

THE INDIAN LAW REPORTS ALLAHABAD SERIES



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<u>Afaq Vs. State of U.P.</u>	Page- 997	<u>Chhedi Ram Pandey (Deceased) & Ors. Vs. Smt. Malti Bajpai (Deceased) & Ors.</u>	Page- 785
<u>Ajay Pratap Singh & Ors. Vs. Board of Revenue, U.P. Allahabad & Ors.</u>	Page- 277	<u>Devendra Shukla @ Mintu & Anr. Vs. State of U.P.</u>	Page- 401
<u>Anis Vs. Vaibhav Goyal & Ors.</u>	Page- 949	<u>Dindyal & Ors. Vs. Board of Revenue & Ors.</u>	Page- 241
<u>Anupam Shukla @ Anupama Tripathi Vs. State of U.P.</u>	Page- 357	<u>Dr. Gyanvati Dixit Vs. State of U.P. & Ors.</u>	Page- 984
<u>Arshad Husain Vs. Shahneela Nishat</u>	Page- 53	<u>Ghanshyam Das Agarwal Vs. Anoop Kumar & Ors.</u>	Page- 761
<u>Arvind Kumar Raji Vs. State of U.P. & Ors.</u>	Page- 598	<u>Girija Prasad Ojha Vs. State of U.P. & Ors.</u>	Page- 754
<u>Ashok Kumar Vs. D.D.C.</u>	Page- 260	<u>Hindi Vidyapeeth Vs. Hindi Sahitya Sammelan & Anr.</u>	Page- 250
<u>Atul Kumar Singh @ Atul Rai Vs. State of U.P.</u>	Page- 305	<u>Jagdish Vs. Sahayak Sanchalak, Chakbandi Adhikari & Ors.</u>	Page- 519
<u>Bhagwan Bux Singh Vs. Board of Revenue, U.P. Allahabad & Ors.</u>	Page- 269	<u>Jageshwar Singh & Ors. Vs. State of U.P.</u>	Page- 793
<u>Bhagwan Deen Vs. State of U.P. & Ors.</u>	Page- 646	<u>Jai Bhagwan Vs. State of U.P. & Ors.</u>	Page- 577
<u>Bharat Singh Vs. State of U.P. & Anr.</u>	Page- 442	<u>Jitendra Kumar Mangla Vs. State of U.P. & Anr.</u>	Page- 18
<u>Bhura & Ors. Vs. State of U.P. & Ors.</u>	Page- 738	<u>Julius Masih @ Sintu Masih @ Ajay Vs. State of U.P. & Anr.</u>	Page- 460
<u>Chandra Prakash Mishra & Ors. Vs. State of U.P. & Ors.</u>	Page- 572	<u>Kailash Singh Vs. State of U.P. & Ors.</u>	Page- 814
<u>Charan Singh Vs. The State of U.P. & Ors.</u>	Page- 748	<u>Kajal Kumari Vs. State of U.P. & Ors.</u>	Page- 968

<u>Khem Chandra Rajvanshi Vs. Satish Chandra & Ors.</u>	Page- 211	<u>Natthan Singh Vs. State of U.P. & Ors.</u>	Page- 74
<u>Krishna Mohan Singh & Ors. Vs. State of U.P. & Anr.</u>	Page- 455	<u>Natthu Singh Vs. State of U.P.</u>	Page- 423
<u>Kumari Manisha Vs. State of U.P. & Ors.</u>	Page- 639	<u>Naveen Chand Jain Vs. Manav Sharma</u>	Page- 58
<u>Lalit Chaprana Vs. State of U.P. & Anr.</u>	Page- 5	<u>Niraj Tyagi & Anr. Vs. State of U.P. & Ors.</u>	Page- 471
<u>Lavkush Vs. State of U.P.</u>	Page- 372	<u>Om Prakash & Anr. Vs. Bn Public School & Ors.</u>	Page- 768
<u>M/S Kingswood Hotel Pvt. Ltd. & Anr. Vs. State of U.P. & Ors.</u>	Page- 721	<u>Piyush Shyamdasani Vs. State of U.P.</u>	Page- 860
<u>M/S NS Papers Limited & Anr. Vs. Union of India & Ors.</u>	Page- 290	<u>Prabhu Narayan Singh & Ors. Vs. State of U.P. & Ors.</u>	Page- 169
<u>M/S Oriental Structural Engineers Pvt. Ltd. Vs. State of U.P. & Anr.</u>	Page- 698	<u>Pradeep Kumar Vs. State of U.P. & Anr.</u>	Page- 583
<u>M/s Sandeep Entp., Varanasi Vs. State of U.P. & Ors.</u>	Page- 713	<u>Pramod Kumar Vs. State of U.P. & Ors.</u>	Page- 601
<u>Mahendra Singh Kanwal Vs. State of U.P. & Ors.</u>	Page- 991	<u>Prateek Agarwal Vs. State of U.P. & Anr.</u>	Page- 819
<u>Manoj Vs. State of U.P.</u>	Page- 565	<u>Prem Kumar & Ors. Vs. Gurudev Singh & Ors.</u>	Page- 111
<u>Matloob Husain Vs. State of U.P.</u>	Page- 808	<u>Prem Kumar & Ors. Vs. Subhash Chand & Ors.</u>	Page- 85
<u>Mohd. Hasnain Vs. State of U.P.</u>	Page- 354	<u>Pushpendra Giri Vs. State of U.P.</u>	Page- 370
<u>Nagar Palika Parishad Vs. The State of U.P. & Ors.</u>	Page- 741	<u>Rahul Tripathi Vs. State of U.P. & Anr.</u>	Page- 840
<u>Nagendra Narayan Mishra Vs. State of U.P. & Ors.</u>	Page- 623	<u>Rajeev Singh Vs. The State of U.P. & Ors.</u>	Page- 649

<u>Rakesh Chandra Jauhari Vs. State of U.P. & Anr.</u>	Page- 223	<u>Shyam Lal Dhadhaniya Vs. State of U.P. & Anr.</u>	Page- 13
<u>Ram Kishor Dixit Vs. State of U.P. & Ors.</u>	Page- 775	<u>Smt. Anchal Goyal Vs. Parag Goyal</u>	Page- 932
<u>Ram Kripal & Ors. Vs. Jagjeevan & Anr.</u>	Page- 64	<u>Smt. Kela & Anr. Vs. Jahangir Singh & Ors.</u>	Page- 230
<u>Ram Sharan Singh Vs. State of U.P. & State of U.P. & Anr.</u>	Page- 525	<u>Smt. Maya Rani Rao Vs. State of U.P. & Ors.</u>	Page- 826
<u>Ramandeep Singh & Ors. Vs. State of U.P. & Anr.</u>	Page- 322	<u>Smt. Munni Devi Vs. Smt. Shashikala Pandey</u>	Page- 217
<u>Ravindra Kumar Verma & Ors. Vs. State of U.P. & Ors.</u>	Page- 653	<u>Smt. Rashmi Sundrani Vs. State of U.P. & Ors.</u>	Page- 174
<u>S M Shah Nawaz Vs. Bachchu Lal</u>	Page- 854	<u>Smt. Rekha & Anr. Vs. State of U.P. & Anr.</u>	Page- 451
<u>Salik Ram & Ors. Vs. Dy. Director of Consolidation, Sravasti & Ors.</u>	Page- 511	<u>Smt. Suman Devi Vs. Sri Avinash Kumar Yadav, Social Welfare Officer, Fatehpur</u>	Page- 33
<u>Sandeep Kumar & Ors. Vs. State of U.P. & Anr.</u>	Page- 437	<u>Smt. Sushila Devi & Ors. Vs. State of U.P. & Ors.</u>	Page- 975
<u>Satish Chandra Vs. State of U.P. & Ors.</u>	Page- 612	<u>Smt. Veerbala Yadav Vs. State of U.P.</u>	Page- 366
<u>Sattar Vs. State of U.P.</u>	Page- 412	<u>State of U.P. & Anr. Vs. M/S Jindal Concrete Udyog</u>	Page- 296
<u>Satyanarayan & Ors. Vs. State of U.P. & Ors.</u>	Page- 283	<u>State of U.P. Vs. Sajid S/O Ibnehasan</u>	Page- 153
<u>Shiv Sharan & Anr. Vs. State of U.P. & Anr.</u>	Page- 801	<u>Sudhanshu Aggarwal Vs. State of U.P. & Ors.</u>	Page- 954
<u>Shivansh Singh Vs. Union of India & Ors.</u>	Page- 964	<u>Sumit Punjabi @ Sumit Arora Vs. State of U.P. & Anr.</u>	Page- 823

[The New India Assurance Co. Ltd. Vs.
Chhedana & Ors.](#) **Page-** 144

[UPSRTC Vs. Bhawani Prasad Manjhi](#)
Page- 126

[Vijay Kalra Vs. Anuj Kumar & Anr.](#)
Page- 203

[Vijay Kumar Yadav Vs. State of U.P. &
Ors.](#) **Page-** 218

[Yogesh Kumar Garg Vs. State of U.P. &
Anr.](#) **Page-** 28

was again presented before the bank on the advice of the applicant on 29.1.2021 but the same was dishonoured by the bank on 30.1.2021 with the endorsement "payment stop by drawer". Thereafter, that cheque was again presented (third time) before the bank on the advice of the applicant on 23.2.2021 but the same was again returned by the bank on 24.2.2021 with the endorsement "payment stopped". Thereafter, opposite party No.2 sent a registered demand notice to the applicant on 4.3.2021 which was delivered to the applicant on 9.3.2021, but despite expiry of 15 days, the cheque amount was not paid then the impugned complaint was filed in which the applicant was summoned by order dated 14.9.2021.

4. This matter was heard on 19.11.2024 and on that date learned counsel for the applicant has submitted that the cheque in question was issued on behalf of the proprietorship concern of the applicant (Mahadev Enterprises) but the applicant was summoned despite the fact that the applicant was not impleaded as accused in the complaint, therefore, the proceeding against the applicant is barred by Section 141(1) N.I. Act as the proprietor of business concern cannot be prosecuted unless he is made party in the complaint and specific averment is made in the complaint that the proprietor was incharge of and responsible for the day to day business of the proprietorship concern. After hearing the above argument, this Court framed a question whether a sole proprietorship concern will come within the definition of "company" in Explanation (a) to Section 141 N.I. Act.

5. Learned counsel for the applicant also submitted that in respect of the cheque in question of Rs.20,50,000/-, the

applicant has already paid Rs.4 Lakh through a cheque No. 000858 dated 12.7.2021. It is further submitted that on bouncing of the cheque of Rs.4 Lakh, which is a part payment of Rs.20,50,000/-, in respect of the cheque in question, another complaint No. 4501 of 2021 has been filed by the applicant, therefore, for one liability applicant is pursuing two cases; first the present impugned complaint and another being Complaint Case No. 4501 of 2021. Therefore, the proceeding deserves to be quashed.

6. One more submission was also advanced by the counsel for the applicant that admittedly as per the complaint, the demand notice was served upon the applicant on 9.3.2021 but the impugned complaint was filed on 22.3.2021 before 15 days from the date of service of the demand notice, therefore, the complaint is pre - mature.

7. Learned counsel for the applicant also fairly submits that in the case of *M.M. Lal vs. State of N.C.T. of Delhi and others; Criminal Leave Petition No. 290 of 2010* decided on 14.9.2012, the Single Bench of the Delhi High Court has observed that the sole proprietorship firm would not fall within the meaning of partnership firm or association of individuals.

8. However, learned counsel for opposite party No.2 has submitted that it is undisputed that the cheque in question as well as the cheque of another complaint has been issued by the applicant, therefore, presumption under Section 139 N.I. Act is attracted and this ground can be raised by the applicant during trial. But the learned counsel for the applicant could not dispute the fact that the impugned complaint has

been filed on 22.3.2021, after the notice sent by him was delivered upon the applicant on 9.3.2021.

9. Learned A.G.A. has also relied upon the judgements of the Apex Court in the cases of **Ashok Transport Agency vs Awadhesh Kumar and another; (1998) 5 SCC 567, Raghu Laxminarayanan vs. Fine Tube; (2007) 5 SCC 103 as well as Alka Khandu Avhad vs. Amar Shyamprasad Mishra and another; (2021) 4 SCC 675** and he vehemently contends that the Explanation (a) to Section 141 N.I. Act clearly prescribed company, firm or other association of individuals, therefore, if any body of individuals is registered that would fall under Section 141 N.I. Act not the proprietorship firm.

10. After hearing the submissions of learned counsel for the parties, it would be pertinent to refer Section 141 N.I. Act which is being quoted as under:-

"Section-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.*

Explanation.-- For the purposes of this section, --

(a) *"company" means any body corporate and includes a firm or other association of individuals; and*

(b) *"director", in relation to a firm, means a partner in the firm."*

11. From the Explanation (a) to Section 141 N.I. Act, it is clear that for the purpose of Section 141 N.I. Act company means any body corporate, including a firm and other association of individuals. Therefore, applying the principle of maxim ejusdem generis other association of individuals will be interpreted as per the meaning of firm which is formed by two or more persons. The proprietorship concerned is always run by a person. Therefore, that cannot be said to be a firm or other association of individuals as mentioned in the Explanation (a) to Section 141 of N.I. Act.

12. Though as per Order XXX Rule 1 C.P.C. a suit can be filed on behalf of or against a partnership firm of two or more persons and the partner of that firm can also be sued but as per Order XXX Rule 10 C.P.C. a person running a business other than in his own name can also sue or be sued in the name of his business or proprietorship concern, but in case of proprietorship concerned, it's proprietor has no separate identity from the proprietorship concerned despite the fact that his proprietorship concerned may be sued. For reference Order XXX Rules 1 to 10 are being quoted as under:-

"Order XXX-

1. Suing of partners in name of firm.—(1) *Any two or more persons claiming or being liable as partners and carrying on business in 641[India] may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the person who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.*

(2) *Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.*

2. Disclosure of partners' names.—(1) *Where a suit is instituted by partners in the name of their firm, the plaintiff or their pleader shall, on demand in writing by or on behalf of any defendant,*

forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) *Where the plaintiff or their pleader fails to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.*

(3) *Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:*

642[Provided that all proceedings shall nevertheless continue in the name of the firm, but the name of the partners disclosed in the manner specified in sub-rule (1) shall be entered in the decree.]

3. Service.—*Where persons are sued as partners in the name of their firm, the summons shall be served either—*

(a) *upon any one or more of the partners, or*

(b) *at the principal place at which the partnership business is carried on within 643[India] upon any person having, at the time of service, the control or management of the partnership business there,*

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without 644[India]:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within 645[India] whom it is sought to make liable.

4. Right of suit on death of partner.—(1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872 (9 of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

5. Notice in what capacity served.—Where a summons is issued to a firm and is served in the manner provided by Rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

6. Appearance of partners.—Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

7. No appearance except by partners.—Where a summons is served in the manner provided by Rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

8. Appearance under protest.—

(1) Any person served with summons as a partner under Rule 3 may enter an appearance under protest, denying that he was a partner at any material time.

(2) On such appearance being made, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the Court for determining whether that person was a partner of the firm and liable as such.

(3) If, on such application, the Court holds that he was a partner at the material time, that shall not preclude the person from filing a defence denying the liability of the firm in respect of the claim against the defendant.

(4) If the Court, however, holds that such person was not a partner of the firm and was not liable as such, that shall not preclude the plaintiff from otherwise serving a summons on the firm and proceeding with the suit; but in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm.]

9. Suits between co-partners.—

This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

10. Suit against person carrying on business in name other than his own.—Any person carrying on business in a name or style other than his own name, or Hindu undivided family carrying on

business under any name, may be sued in such name or style as if it were a firm name, and, insofar as the nature of such case permits, all rules under this Order shall apply accordingly."

13. From the perusal of the Order XXX Rule 10, it is clear that legal fiction is created in favour of the proprietorship concerned of a person for suing the same as it is a firm name, but for the purpose of proceeding under the N.I. Act the proprietorship/business concern of a person has no different identity from its proprietor because proprietorship concerned is not the firm which can be formed by two or more persons.

14. The Apex Court, in paragraph No.6 of the judgement passed in **Ashok Transport Agency (supra)**, observed that partnership is governed by the Indian Partnership Act, 1932. Though partnership is not a juristic person like a company but even then as per Order XXX Rule 1 of C.P.C. partners can be sued in the name of the firm. So far as the proprietorship is concerned, it cannot be sued or to be sued individually but through its proprietor or in the name of proprietor himself. Paragraph No.6 of the **Ashok Transport Agency (supra)** is quoted as under:-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or

against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

15. Above issue again came into consideration before the Apex Court in the case of **Raghu Laxminarayanan (supra)** in which the Apex Court discussed in detail and observed that the company being juristic person is governed by the provision of the Companies Act, 1956 and the partnership is governed by the provision of the Indian Partnership Act, 1932. It is further mentioned in that judgement that association of persons though is not incorporated under the statute but it comes within the definition of company for the purpose of Section 141 N.I. Act. However, the proprietorship concern stands absolutely on a different footing and, therefore, the proprietorship will not come

within the definition of Explanation (a) to Section 141 N.I. Act. Paragraphs No. 8, 9, 12, 13, 14 of **Raghu Laxminarayanan (supra)** are quoted as under:-

"8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act.

12. If Accused 1 was not a company within the meaning of Section 141

of the Negotiable Instruments Act, the question of an employee being proceeded against in terms thereof would not arise. The respondent was aware of the difference between a "partnership firm" and a "business concern" as would be evident from the fact that it described itself as a partnership firm and Accused 1, as a business concern. Significantly, the respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in-charge, Manager and Director of Accused 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a company.

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in Ashok Transport Agency v. Awadhesh Kumar [(1998) 5 SCC 567] wherein this Court stated the law in the following terms : (SCC pp. 569-70, para 6)

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Partnership Act, 1932. Though a partnership is not a juristic person but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the

dealings of the proprietary business. The provisions of Rule 10 of Order 30 which make applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a "company" or a "partnership firm" as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a company incorporated under the Companies Act or a firm within the meaning of the provisions of Section 4 of the Partnership Act."

*16. The above controversy was again came into consideration before the Apex Court in the case of **Alka Khandu Avhad (supra)** in which the Apex Court, while considering the provision of Section 141 N.I. Act, observed that Section 141 N.I. Act is relating to the offence by the companies and it cannot be made applicable to the individuals or*

*proprietorship firm. Paragraph No. 12 of **Alka Khandu Avhad (supra)** is quoted as under:-*

"12. Section 141 of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. The learned counsel appearing on behalf of the original complainant has submitted that "company" means any body corporate and includes, a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within "other association of individuals" and therefore with the aid of Section 141 of the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be "other association of individuals". Therefore, there is no question of invoking Section 141 of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the appellant cannot be convicted with the aid of Section 141 of the NI Act. Therefore, the High Court has committed a grave error in not quashing the complaint against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 read with Section 141 of the NI Act, therefore, can be said to be abuse of process of law and therefore the same is required to be quashed and set aside."

17. From the perusal of the above analysis, it is clear that proprietorship

firm has no individual identity. It is always associated with its proprietor and in case of proprietorship concern, question of vicarious liability does not arise and only proprietor of the proprietorship concern will be liable, whether proprietorship concern is arrayed as accused through it proprietor or proprietor himself is arrayed as a party. In both the cases there will be individual liability of the proprietor and proprietorship concern has no different identity. It is used only for the business purposes; the real identity is its proprietor.

18. In view of the reason mentioned in the forgoing paragraph, it is not necessary to implead the applicant separately as accused. He can be prosecuted by impleading his firm on whose behalf the cheque in question was issued. Therefore, the first submission of the applicant that the impugned proceeding is bad in the eyes of law as **he was not impleaded as party is misconceived, hence, rejected.**

19. So far as the second issue raised by counsel for the applicant that on bouncing of the cheque of part of liability of Rs.4 Lakh, the applicant has filed the complaint No. 4501 of 2021 and for entire amount of Rs.29,50,000/-, the impugned proceeding has been initiated is concerned, the applicant appears to be correct, but this ground can be raised by the applicant **before the trial court and on that ground the present proceeding cannot be quashed.**

20. So far as the third issue raised by the counsel for the applicant that admittedly the demand notice was served upon the applicant on 9.3.2021, but the complaint was filed on 22.3.2021 is

concerned, that appears to be correct because for taking cognizance the complaint should have been filed after expiry of 15 days from the service of demand notice. In the present case admittedly the demand notice was served upon the applicant on 9.3.2021. Therefore, the complaint could have been filed after 24.3.2021 but the complaint was filed on 22.3.2021. Therefore, the complaint is premature.

21. In view of the above, the present application is partly allowed only on the ground that the complaint is premature, **therefore, the proceeding of Complaint Case No. 4501 of 2021 is hereby quashed.**

22. However, opposite party No.2 is at liberty to file fresh complaint in accordance with law.

23. With the aforesaid observation, the application is **disposed of.**

(2024) 12 ILRA 13

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Application U/S 482 No. 10823 of 2024

Shyam Lal Dhadhaniya ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Abhishek Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law- Criminal Procedure Code, 1973 — Section 482 — Indian Penal Code, 1860 - Sections 409, 420, 467, 468, 471, 323, 504 & 506 - Quashing of criminal proceedings — Compromise between parties — Offences under IPC — Some offences compoundable, others not — Dispute private in nature — Continuance of trial found to be futile in view of verified compromise — Entire proceedings quashed—Application allowed. (Paras 14 to 17)

HELD:

While considering the question with regard to the inherent powers of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which, he is allegedly involved, is not compoundable under Section 320 of the Code, the Hon'ble Supreme Court in Para 57 of the judgment in case of Gian Singh (supra) has held that quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence, they are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a Court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the Court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequences may be acquittal or dismissal of indictment. (Para 14)

From the perusal of record, it appears that the real dispute between the parties is relating to property dispute, which is private in nature. The present criminal proceedings arose between the parties is not a formal consequence of the real occurrence. The present criminal prosecution arose incidentally between the parties and is not a natural consequence of the real occurrence. It is apparent that the parties have entered into a

compromise and they further appear to have settled their dispute amicably. The opposite party no.2 who would be a key prosecution witness, if the trial were to proceed, has declared his unequivocal intent to turn hostile at the trial. In these circumstances, it is apparent that the merits and truth apart, the proceedings in trial, if allowed to continue, may largely be a waste of precious time by the learned court below. (Para 15)

The court cannot remain oblivious to the hard reality that the facts of the present case and other similar cases present where, though the allegations made in the FIR do appear to contain the ingredients of a criminal offence, however, in view of settlement having been reached, the chances of conviction are not only bleak but, if such trials are allowed to continue along with all other trials which are piled up, practically in all criminal courts in the St., the continuance of trials in cases such as the instant case may only work to the huge disadvantage of other cases where litigants are crying for justice. (Para 16)

Thus, looking at the prevalent tendencies in the society, a more pragmatic, and less technical approach commends to the court to let some criminal prosecutions such as the present case be dropped, for the sake of more effective, efficient and proper trial in other cases where the litigants appear to be serious about their rights and more consistent in their approach. (Para 17)

Application allowed. (E-14)

List of Cases cited:

1. Narindra Singh & anr. Vs St. of Pun. & anr. reported in (2014) 6 SCC 466
2. Parbatbhai Aahir Vs St. of Guj. reported in (2017) 9 SCC 641
3. St. of M.P. Vs Laxmi Narayan & ors. reported in (2019) 5 SCC 688
4. Sanesh Thakur & ors. Vs St. of U.P. & anr. passed in Application u/s 482 No. 20982 of 2017 decided on 17.03.2023.

5. Gian Singh Vs St. of Punj. & anr. reported in (2012) 10 SCC 303

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the applicant, learned A.G.A. for the State-respondents and perused the record.

2. This application under Section 482 has been filed challenging further proceedings of Case No. 1888 of 2015 (State of U.P. v. Ram Kishan Dhahaniya and others) arising out of Case Crime No. 255 of 2014, under Section 409, 420, 467, 468, 471, 323, 504 & 506 of I.P.C., Police Station Fazalganj, District Kanpur Nagar, pending before Metropolitan Magistrate, Court No. II, Kanpur Nagar including the charge sheet No. 47 of 2015 submitted on 20.05.2015 as well as cognizance and order issuing bailable warrant dated 01.06.2015 passed by Additional Chief Metropolitan Magistrate, Court No. VIII, Kanpur Nagar.

3. Brief facts of the case are that on 05.12.2014, opposite party no. 2 lodged First Information Report against the applicant and six others for offenses punishable under Section 409, 420, 467, 468, 471, 323, 504 & 506 I.P.C. at Police Station Fazalganj, District Kanpur Nagar in Case Crime No. 255 of 2014.

4. After investigation, police submitted the charge sheet No. 47 of 2015 under Section 409, 420, 467, 468, 471, 323, 504 & 506 I.P.C. against Ram Krishna Dhadhaniya, Gopi Kishan, Shyamlal, Amit & Vinit. Thereafter, cognizance was taken by the Additional Metropolitan Magistrate, Kanpur Nagar and the accused persons were summoned including the applicant.

5. On 04.08.2023, a compromise has been taken place between the applicant and opposite party no. 2. The compromise was filed before the court below at Kanpur Nagar where the case is pending. Thereafter, the present application under Section 482 has been filed to quash the proceedings against the applicant on the basis of compromise taken between the parties.

6. This Court by order dated 12.04.2024, has directed for verification of the compromise and for submission of report on the aforesaid compromise by the court below. 8. In compliance of the aforesaid order passed by this Court, Chief Metropolitan Magistrate, Court No. 2, Kanpur Nagar has submitted its report dated 05.07.2024 wherein compromise between the parties has been verified.

7. It is pertinent to mention here that father of the present applicant i.e. Ram Kishna Dhadhaniya, one of the co-accused filed application under Section 482 No. 30532 of 2015 (Ram Kishan Dhadhaniya v. State of U.P. and another) wherein this Court by order dated 09.10.2015 stayed further proceedings of the case against the father applicant i.e. Ram Kishna Dhadhaniya and later on Ram Kishan Dhadhaniya died consequently, the Application U/s 482 No. 30532 of 2015 has been abated. The other co-accused namely Amit, Gopi Kishan and Vinit filed another Application under Section 482 No. 31704 of 2015 (Amit and two others v. State of U.P. and another). In the aforesaid application, further proceedings of Case No. 1888 of 2015 was directed to be stayed by order dated 27.10.2015 and by order dated 02.11.2023 the application has been allowed and the proceedings have been quashed.

8. Since the two other applications under Section 482 regarding the same case and F.I.R. qua the co-accused persons, have already been decided, no purpose would be served in keeping this petition pending after verification of compromise.

9. Learned counsel for the applicants submitted that as the dispute has been settled amicably and compromise entered into the parties has been verified before the court below, the present application under Section 482 Cr.P.C. be allowed and the proceedings of Case No. 1888 of 2015 (State of U.P. v. Ram Kishan Dhahaniya and others) arising out of Case Crime No. 255 of 2014, under Section 409, 420, 467, 468, 471, 323, 504 & 506 of I.P.C., Police Station Fazalganj, District Kanpur Nagar, be quashed.

10. Learned counsel for the applicant had relied upon the judgment of Supreme Court in case of **Narindra Singh and another Vs. State of Punjab and another reported in (2014) 6 SCC 466**, **Parbatbhai Aahir Vs. State of Gujarat reported in (2017) 9 SCC 641**, **State of Madhya Pradesh Vs. Laxmi Narayan and others reported in (2019) 5 SCC 688** and the judgment of this Court in case of **Sanesh Thakur and 3 others Vs. State of U.P. and another** passed in Application u/s 482 No. 20982 of 2017 decided on 17.03.2023.

11. Learned A.G.A. has opposed the prayer made in the application but could not deny the fact that the offence under Sections 323, 504 & 506 of I.P.C. are compoundable and Section 420 I.P.C. is compoundable with the permission of the court in view of the table appended to Section 320 (2) of Cr.P.C. It is further submitted by learned A.G.A. that Sections

409, 467, 468 & 471 I.P.C. are not compoundable, and therefore, present application cannot be decided on the basis of compromise between the parties.

12. In reply, it has been contended by learned Counsel for the applicant that there is no impediment in exercise of powers of the High Court under Section 482 Cr.P.C. in quashing criminal proceedings where the parties have settled their dispute amicably.

13. It is correct that Sections 409, 467, 468 & 471 I.P.C. are not compoundable offences mentioned in either of the tables referred in Section 320 Cr.P.C. In case of **Gian Singh Vs. State of Panjab and another** reported in **(2012) 10 SCC 303**, the Hon'ble Supreme Court has held that Section 320 of the Code articulates the public policy with regard to compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the Court and certain offences can be compounded only with the permission of Court. The offences punishable under the special statutes are not covered by Section 320.

14. While considering the question with regard to the inherent powers of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which, he is allegedly involved, is not compoundable under Section 320 of the Code, the Hon'ble Supreme Court in Para 57 of the judgment in case of **Gian Singh (supra)** has held that quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence, they are different and not interchangeable.

Strictly speaking, the power of compounding of offences given to a Court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the Court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequences may be acquittal or dismissal of indictment.

15. From the perusal of record, it appears that the real dispute between the parties is relating to property dispute, which is private in nature. The present criminal proceedings arose between the parties is not a formal consequence of the real occurrence. The present criminal prosecution arose incidentally between the parties and is not a natural consequence of the real occurrence. It is apparent that the parties have entered into a compromise and they further appear to have settled their dispute amicably. The opposite party no.2 who would be a key prosecution witness, if the trial were to proceed, has declared his unequivocal intent to turn hostile at the trial. In these circumstances, it is apparent that the merits and truth apart, the proceedings in trial, if allowed to continue, may largely be a waste of precious time by the learned court below.

16. The court cannot remain oblivious to the hard reality that the facts of the present case and other similar cases present where, though the allegations made in the

FIR do appear to contain the ingredients of a criminal offence, however, in view of settlement having been reached, the chances of conviction are not only bleak but, if such trials are allowed to continue along with all other trials which are piled up, practically in all criminal courts in the state, the continuance of trials in cases such as the instant case may only work to the huge disadvantage of other cases where litigants are crying for justice.

17. Thus, looking at the prevalent tendencies in the society, a more pragmatic, and less technical approach commends to the court to let some criminal prosecutions such as the present case be dropped, for the sake of more effective, efficient and proper trial in other cases where the litigants appear to be serious about their rights and more consistent in their approach.

18. Considering the facts and circumstances of the case and submissions advanced by learned counsel for the parties, regarding the compromise entered into between the parties and taking all these factors into consideration cumulatively, the compromise between the parties be accepted and further taking into account the legal position as laid down by the Apex Court in case of **Gian Singh Vs. State of Punjab and another (supra)**, **Narindra Singh and others Vs. State of Punjab and another (supra)**, **Parbatbhai Ahir Vs. State of Gujarat (supra)**, **State of Madhya Pradesh Vs. Laxmi Narayan and others (supra)** and **Sanesh Thakur and 3 others Vs. State of U.P. and another (supra)**, the entire proceedings of the entire proceeding of Criminal Case No. 1888 of 2015 (State of U.P. v. Ram Kishan Dhadhaniya and others) arising out of Case Crime No. 255 of 2014, under Section 409, 420, 467, 468, 471, 323, 504 & 506 of

I.P.C., Police Station Fazalganj, District Kanpur Nagar, pending in the court of Additional Chief Metropolitan Magistrate, Court No. VIII, Kanpur Nagar, are hereby quashed.

19. The present Application u/s 482 thus is **allowed**, subject to payment of cost to be deposited by the parties before the High Court Legal Services Committee, Allahabad. Such cost has to be imposed to let the parties (in this case) in particular and the society in general know that the courts cannot remain a mute spectator to unscrupulous and errant behaviour of certain persons. A society that will allow its members to misuse its courts, will ultimately suffer and pay a huge cost. Litigants, both genuine and bogus, will always continue to stand in a common queue. The courts have no mechanism to pre-identify and distinguish between the genuine and the bogus litigants. That differentiation emerges only after the hearing is concluded in any case and hearing requires time. In fact, even if the courts were to take punitive action against a bogus litigant, then, being bound by rules of procedure and fairness, such cases are likely to take more time than a case of two genuine litigants. Cost in the present case is quantified to Rs. 5,000/- (2,500 on each party) to be deposited before the High Court Legal Services Committee, Allahabad, within a period of three weeks from today.

(2024) 12 ILRA 18

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 13.12.2024

BEFORE

**THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Application U/S 482 No. 23721 of 2024
With
Application U/S 482 No. 28869 of 2024

Jitendra Kumar Mangla **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
Bhuvnesh Kumar Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law -Criminal Procedure Code.1973-Section 482-Negotiable Instrument Act, 1881- Section 138-quashing of proceeding s related to complaints filed u/s 138 of N.I.Act for cheque dishonor-Held, the power of attorney holder cannot file a complaint u/s 138 of NI Act in their own name but can represent the payee-adequate averments in the complaint established that the power of attorney holder had sufficient knowledge of the transaction, making the proceedings valid-Hence, the complaint filed by the power of attorney holder in their own name is legally untenable-Proceedings quashed, with liberty to file a fresh complaint in compliance with legal requirements.(Para 1 to 25)

B. Complaint u/s 138 N.I. Act can be filed by the power of attorney holder of payee or holder in due course. However, the Power of Attorney holder cannot depose or verify on oath as complainant unless from the averments, including verification of the affidavit filed in support of the complaint as well as from the supporting document, it must be clear that power of attorney holder has knowledge about the fact mentioned in the complaint regarding the transaction. if the accused disputes the knowledge of the fact of the power of attorney holder or his authority, the same can be considered during the trial but the proceeding cannot be quashed on this ground. The transaction should be within the knowledge of the Power of attorney

holder means and include int the transaction which created liability for which the cheque was issued. (Para 19)

The applications are partly allowed.

List of Cases cited:

1. A.C. Narayana & anr. Vs St. of Mah. & Anr.(2014) 11 SCC 790
2. M/s Arti Indus. Vs St. of U.P., Appl. u/s 482 No. 29906 of 2022
3. Janki Vashdeo Bhojwani Vs IndusInd Bank Ltd. (2005) 2 SCC 217
4. M/s TRL Krosaki Refractories Ltd. Vs M/s SMS Asia Pvt. Ltd.. (2022) 7 SCC 612
5. Vinita S. Rao Vs M/s Essen Corporate Services Pvt. Ltd. & anr.(2015) 1 SCC 527

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

1. Heard Sri Bhuvnesh Kumar Singh, learned counsel for the applicant in Application u/s 482 No. 23721 of 2024; Sri Saurabh Yadav, learned counsel for the applicant and Sri Lalit Kr. Srivastava, learned counsel for opposite party No.2 in Application u/s 482 No. 28869 of 2024 as well as Sri Pankaj Saxena, learned A.G.A. for the State.

2. Application u/s 482 No. 23721 of 2024 has been filed seeking quashing of the entire proceeding of Complaint Case No. 3255 of 2016 (Vineeta Goyal vs. Jitendra Kumar Mangla), under Section 138 N.I. Act, P.S. Hari Parvat, District Agra, including the summoning order dated 1.12.2016.

3. Application u/s 482 No. 28869 of 2024 has been filed seeking following reliefs:-

"1. Quash the summoning order dated 22.10.2018 and order dated 16.07.2024 by means of which N.B.W. has been issued against the applicant as well as the entire proceedings of the case No. 602 of 2018 under section 138 of the Negotiable Instruments Act (Ranveer Singh vs. Jitendra Kumar Mangla) P.S. Hariparvat District Agra pending in the court of Additional Chief Judicial Magistrate, Court No.-5, Agra.

2. Club the proceedings of the two cases belonging to the same transactions i.e. Complaint Case No. 602 of 2018 (Ranveer Singh vs. Jitendra Kumar Mangla) and 912 of 2018 (Ranveer Singh vs. Jitendra Kumar Mangla) and may be tried at one trial."

4. Sri Saurabh Yadav, learned counsel for the applicant in Application u/s 482 No. 28869 of 2024, has submitted that the impugned complaint has been filed by the Power of attorney holder in his name, though the complaint under Section 138 N.I. Act can be filed on behalf of the payee or holder in due course of the cheque, not the power of attorney in his name. His second contention is that from the bare perusal of the complaint, it is clear that there is no averment in the complaint that the power of attorney holder had knowledge of the transaction in question. It is also submitted that the transaction means the transfer of money as well as the handing over of the cheque in lieu of payment of that money. It is also submitted that in this case, the father of the complainant was the power of attorney holder, but he filed the complaint in his name instead of filing the same in the name of the payee or holder in due course.

5. In support of his contention, learned counsel for the applicant has relied upon

the judgement of Apex Court in the Case of *A.C. Narayana and another vs. State of Maharashtra and another*; (2014) 11 SCC 790, paragraphs No. 15, 19, 20, 21, 22, 23, 24, wherein the Apex Court observed that the complaint could be filed by the power of attorney holder on behalf of the payee and not in his name and also that the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

6. Learned counsel for the applicant in has also relied upon the judgment of the coordinate Bench in *M/s Arti Industries vs. State of U.P.; Application u/s 482 No. 29906 of 2022*; paragraphs No. 22, 23, 24 and also the judgement of the Apex Court in *Janki Vashdeo Bhojwani vs. IndusInd Bank Ltd.*; (2005) 2 SCC 217; paragraphs No. 10, 11, 13 & 15.

7. Similarly, Sri Bhuvnesh Kr. Singh, learned counsel for the applicant in Application u/s 482 No. 23721 of 2024, also argued that the power of attorney holder, even if a near relative of the payee, cannot file the complaint unless there is specific averment regarding his personal knowledge about the transaction in question. It is further submitted that merely mentioning in the verification clause that the power of attorney holder has personal knowledge about the fact mentioned in the affidavit of the statement will not be sufficient.

8. Per contra, Sri Pankaj Saxena, learned A.G.A. for the State, has heavily relied upon paragraph No.21 of the judgement in *A.C. Narayan (supra)* and admitted the fact that the power of attorney holder cannot file a complaint in his name. However, the same can be filed in the name

of the payee or holder in due course. Learned A.G.A. further contended that so far as the knowledge of power of attorney holder is concerned, there is no requirement that there must be specific averment in the complaint itself regarding its personal knowledge about the transaction of money as well as handing over of the cheque and it is sufficient if on the basis of supporting document and other surrounding facts it is clear that the power of attorney holder has knowledge about the transaction then the complaint is maintainable on behalf of the power of attorney holder.

9. In support of his contention, learned A.G.A. has relied upon the judgement of the Apex Court in the case of *M/s TRL Krosaki Refractories Ltd. Vs. M/s SMS Asia Private Ltd.* (2022) 7 SCC 612; paragraphs No. 12, 13 & 14 as well as the judgement in *Vinita S. Rao vs. M/s Essen Corporate Services Pvt. Ltd. And another.*; (2015) 1 SCC 527; (paragraphs No. 16 & 19) wherein the Apex Court observed that if the complaint is filed by the husband then sufficient knowledge of transaction can be gathered from the supporting documents and surrounding circumstances including the verification clause of complaint and that would be sufficient for the maintainability of complaint on behalf of the power of attorney holder.

10. The learned A.G.A. also submitted that knowledge of the transaction to the power of attorney holder means the transaction of handing over the cheque and not the transfer of money prior to handing over of the cheque.

11. Learned counsel for opposite party No.2 in Application u/s 482 No. 28869 of 2024 has submitted that being father of the complainant power of attorney holder had

knowledge of the transaction of allotment of flat to his son, when that transaction could not be materialized then the applicant gave the cheque in question to return the money which he took in advance at the time of booking of flat and he had also given notice after bouncing of the cheque on behalf of the payee.

12. After hearing the rival submissions of learned counsel for the parties and on the perusal of the record, following questions arise for consideration:-

(i). *Whether the power of attorney holder of payee or holder in due course can file a complaint under Section 138 N.I. Act in his name?*

(ii) *Whether the power of attorney holder can file a complaint under Section 138 N.I. Act on behalf of the payee or holder in due course, if yes, what is the necessary requirement for filing such a complaint?*

(iii) *Which transaction should be within the knowledge of the Power of attorney holder.*

13. So far as the first question is concerned the Apex Court, in the case of **A.C. Narayan (supra)**, has already observed that the power of attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceeding on behalf of his principal. Paragraph No.31 of **A.C. Narayan (supra)** is quoted as under:-

“31. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where

the payee is a proprietary concern, the complaint can be filed:

(i) *by the proprietor of the proprietary concern, describing himself as the sole proprietor of the “payee”;*

(ii) *the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and*

(iii) *the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.”*

14. Given the above legal position, this Court holds that the power of attorney holder of the payee or holder in due course cannot file a complaint in his name as if he was complainant.

15. So far as the second question is concerned, this issue is no more res integra. Apex Court in the case of **Janki Vashdeo Bhojwani (supra)** considered this issue and observed that the Power of attorney holder can act on behalf of the Principal, therefore, he can file complaint on behalf of his Principal, but cannot depose for the principal on the facts which were in personal knowledge of the principal. Paragraph No.13 of **Janki Vashdeo Bhojwani (supra)** is being quoted as under:-

“13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to “act” on behalf of the principal. In our view the word “acts” employed in Order 3 Rules 1 and 2 CPC confines only to in respect of “acts” done by the power-of-attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered

some “acts” in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.”

16. Apex Court again considered this issue in the case of *A.C. Narayan (supra)* and observed that the power of attorney holder of payee or holder in dues course can file a complaint under Section 138 N.I. Act. It is further observed that the power of attorney holder can also depose and verify on oath before the court to prove the contents of the complaint, subject to the condition that the power of attorney holder either must have witnessed the transaction or possessed due knowledge regarding the transaction and this fact must be explicitly mentioned in the complaint. It is further observed that if power of attorney holder has no knowledge of the transaction then he cannot be examined as a witness. Paragraphs No. 28, 29, 30, 33 of *A.C. Narayan (supra)* are quoted as under.

“28. The power-of-attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary

concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power-of-attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

29. From a conjoint reading of Sections 138, 142 and 145 of the NI Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the NI Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the NI Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of

the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the NI Act.

30. In the light of the discussion, we are of the view that the power-of-attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the NI Act. An exception to the above is when the power-of-attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the power-of-attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous.

33. While holding that there is no serious conflict between the decisions in M.M.T.C. [M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd., (2002) 1 SCC 234 : 2002 SCC (Cri) 121] and Janki Vashdeo Bhojwani [Janki Vashdeo Bhojwani v. IndusInd Bank Ltd., (2005) 2 SCC 217] , we clarify the position and answer the questions in the following manner:

33.1. Filing of complaint petition under Section 138 of the NI Act through power of attorney is perfectly legal and competent.

33.2. The power-of-attorney holder can depose and verify on oath

before the court in order to prove the contents of the complaint. However, the power-of-attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

33.3. It is required by the complainant to make specific assertion as to the knowledge of the power-of-attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

33.4. In the light of Section 145 of the NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.

33.5. The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

17. The judgement of A.C. Narayan (supra) was again considered by the Apex Court in the case of M/s TRL Krosaki Refractories Ltd. (supra). It was observed that the assertion about the knowledge should be said explicitly as stated in A.C. Narayan (supra) cannot be understood to mean that assertion should be in any particular manner and what is required is if the complaint is filed in the name of payee

and if the person who is prosecuting the complaint is different from the payee, the authorization thereof and the contents of the complaint are within his knowledge. If there is a dispute regarding proper authorization or knowledge of transaction to the power of attorney holder, then it would be open for the accused to dispute authorization during the course of trial and quashing of the complaint on such ground is not justified as the proper authorization and knowledge of the fact can only be an issue for trial. Paragraph No. 25 of *M/s TRL Krosaki Refractories Ltd. (supra)* is quoted as under:-

“25. In that view, the position that would emerge is that when a company is the payee of the cheque based on which a complaint is filed under Section 138 of the NI Act, the complainant necessarily should be the company which would be represented by an employee who is authorised. Prima facie, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorised person who has knowledge, would be sufficient. The employment of the terms “specific assertion as to the knowledge of the power-of-attorney holder” and such assertion about knowledge should be “said explicitly” as stated in A.C. Narayanan [A.C. Narayanan v. State of Maharashtra, (2014) 11 SCC 790 : (2014) 4 SCC (Civ) 343] cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the “payee” and if the person who is prosecuting the complaint is different from the payee, the authorisation therefor and that

the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorised employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorised or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial. As noted in Samrat Shipping Co. [Samrat Shipping Co. (P) Ltd. v. Dolly George, (2002) 9 SCC 455 : 2003 SCC (Cri) 1224] , dismissal of a complaint at the threshold by the Magistrate on the question of authorisation, would not be justified. Similarly, we are of the view that in such circumstances entertaining a petition under Section 482 to quash the order taking cognizance by the Magistrate would be unjustified when the issue of proper authorisation and knowledge can only be an issue for trial.”

18. It is further observed by the Apex Court that what can be an explicit averment cannot be determined in a straight jacket but will have to gather from the circumstances and the manner in which it has been averred and conveyed, considering the entire complaint, its verification and other supporting documents, filed along with the complaint. Paragraphs No. 21 of *M/s TRL Krosaki Refractories Ltd. (supra)* are quoted as under:-

“21. A meaningful reading of the above would indicate that the company having authorised the General Manager

(Accounting) and the General Manager (Accounting) having personal knowledge had in fact been clearly averred. What can be treated as an explicit averment, cannot be put in a straitjacket but will have to be gathered from the circumstance and the manner in which it has been averred and conveyed, based on the facts of each case. The manner in which a complaint is drafted may vary from case to case and would also depend on the skills of the person drafting the same which by itself, cannot defeat a substantive right. However, what is necessary to be taken note of is as to whether the contents as available in the pleading would convey the meaning to the effect that the person who has filed the complaint, is stated to be authorised and claims to have knowledge of the same. In addition, the supporting documents which were available on the record by themselves demonstrate the fact that an authorised person, being a witness to the transaction and having knowledge of the case had instituted the complaint on behalf of the “payee” company and therefore, the requirement of Section 142 of the NI Act was satisfied. In Vinita S. Rao v. Essen Corporate Services (P) Ltd. [Vinita S. Rao v. Essen Corporate Services (P) Ltd., (2015) 1 SCC 527 : (2015) 1 SCC (Civ) 558 : (2015) 1 SCC (Cri) 726] , to which one of us (the Hon'ble CJI) was a member of the Bench has accepted the pleading of such a nature to indicate the power to prosecute the complaint and knowledge of the transaction as sufficient to maintain the complaint.”

19. From the legal position discussed above, two questions which were framed above are answered as follows:-

(i). That the power of attorney holder cannot file a complaint in his

name as if he was the complainant and he can prosecute only on behalf of his Principal;

(ii) Complaint u/s 138 N.I. Act can be filed by the power of attorney holder of payee or holder in due course. However, the Power of attorney holder cannot depose or verify on oath as complainant unless from the averments, including the verification of the affidavit filed in support of the complaint as well as from the supporting document, it must be clear that power of attorney holder has knowledge about the fact mentioned in the complaint regarding the transaction. If the accused disputes the knowledge of the fact of the power of attorney holder or his authority, the same can be considered during the trial but the proceeding cannot be quashed on this ground.

(iii) The transaction should be within the knowledge of the Power of attorney holder means and include in the transaction which created liability for which the cheque was issued.

20. Coming back to the facts of Application u/s 482 No. 23721 of 2024, it is clear that in this case, the Power of attorney holder of the complainant has mentioned in paragraph No.1 of the complaint that he is well aware of the facts of the case and in the paragraph No.7 of the complaint the power of attorney holder has mentioned that he is also the witness of the complaint in the present case. Paragraphs No. 1 & 7 of the complaint dated 6.7.2016 are being quoted as under:-

“1. That, Complainant is Proprietor of M/S Shyam Lal Baikuntnath Designs, Awas Vikas Colony, Agra and knows the accused very well since a long time. The present complaint is being filed

by Sri Mukund Goyal S/O Late Om Prakash Goyal as stated above, who has been authorized by Complainant by way of Power of Attorney dated 06/07/2016 to file and pursue the case noted above in the appropriate Court and **very well aware with the facts of case.**

7- That under the circumstances accused is liable to be prosecuted as stated above. **The witnesses of the the complainant are, she herself, Sri Mukono Goyal, officers and staff of banks and post offices concern and Sri Ravi Gupta Adv."**

21. Similarly, in the statement filed on an affidavit under Section 200 Cr.P.C., the power of attorney holder of the complainant again stated in paragraph No.1 that he is well aware of the facts of the case and then again in the verification part, he has mentioned that he has personal knowledge of the fact mentioned in paragraphs No. 1 to 7 of the affidavit. Paragraph No.1 of the statement u/s 200 Cr.P.C., as well as verification of the statement affidavit are quoted as under:-

"1. That, Complainant is Proprietor of M/S Shyam Lal Baikuntnath Designs, Awas Vikas Colony, Agra and knows the accused very well since a long time. The present complaint is being filed by deponent, who has been authorize by Complainant by way of Power of Attorney dated 06/07/2016 to file and pursue the case noted above in the appropriate Court and very well knows the facts of case.

Verification

The contents of Para 1 to Para 7 are true to the personal knowledge of the deponent, nothing has been concealed therein. Verified at Civil Courts Agra on 06/07/2016."

22. From the Power of attorney, it is also clear that the power of attorney holder is the husband of the complainant, who works with her and is well aware of the facts of the case. The power of attorney is being quoted as under:-

" POWER OF ATTORNEY

This Power of attorney is executed on this day 6th day of July 2016 by Mrs. Vineeta Goyal, Proprietor -M/S Shyamlal Baikunth Nath Designs, Awas Vikas Colony, Agra, as the executant is a Business professional and always busy in her Business and domestic work.

In Favour of

Szi Mukund Goyal S/O Late Szi Om Prakash Goyal R/O 5/89, Madia Fatra, Agra, who is husband of executant and works with her and well aware with the facts of the case.

Who shall have all the powers to act and appear on behalf of executant of this power of Attorney before the Courts and do all acts, to engage lawyer, to file case and do all acts that may be necessary for carrying out the proceedings on behalf of executant against Jitendra Kumar Mangla.

The executant has put her signature on this Power of Attorney."

23. From the perusal of the order sheet, it also appears that the applicant accused has not appeared before the court below in the complaint proceeding despite the issuance of coercive measures. Therefore, the complainant could not be examined or cross-examined by the applicant-accused so that more facts regarding knowledge of the power of attorney holder about the transaction could come out on record. In the case of **Vinita S. Rao (supra)**, the Apex Court already considered this issue and observed that if

the husband is the power of attorney holder of his wife, then it could be presumed that he had witnessed all the transactions and possessed due knowledge about them. Paragraphs No. 17 & 18 of **Vinita S. Rao (supra)** is quoted as under:-

“17. Thus, it is clear that the complaint under Section 138 of the NI Act can be filed through the power-of-attorney holder. In this case, Sudhir Gulvady is the power-of-attorney holder of the appellant and he has filed the complaint on her behalf. The learned Magistrate recorded the statement of the power-of-attorney holder under Section 200 of the Code on 5-3-2004 and issued summons. We have perused the said statement. It is signed by the power-of-attorney holder and by the learned Magistrate. A.C. Narayanan [A.C. Narayanan v. State of Maharashtra, (2014) 11 SCC 790 : (2014) 4 SCC (Civ) 343 : AIR 2014 SC 630] states that power-of-attorney holder must have knowledge about the relevant transactions. There can be no dispute about the fact that in this case, the power-of-attorney holder being the husband of the appellant has witnessed all transactions and he possesses due knowledge about them. He is associated with all transactions at all crucial stages. The appellant has placed this fact in the forefront in her complaint. The relevant paragraph of the complaint reads as under:

“3. The complainant is represented by her power-of-attorney holder Mr Sudhir Gulvady, her husband, as the complainant is unable to come to the court due to her not keeping good health and the whole transaction is also within the knowledge of her power-of-attorney holder who is her husband.”

18. The appellant has examined herself on oath. In her evidence, she has stated that the office of the respondents is

in the same building in which her husband's office is situated and her husband being acquainted with Respondent 2, who is the Managing Director of Respondent 1, he was aware that Respondent 2 was functioning as a broker and, hence, she along with her husband had initial discussion with Respondent 2 for transactions in 10,000 shares. Her evidence substantiates her case that her husband had knowledge about the entire transaction. Hence, the submission that the complaint could not have been filed through power-of-attorney holder must fail.”

24. From the above fact, it is clear that for the prima facie issuance of process, there are sufficient averments on record regarding knowledge of the Power of attorney holder about the transaction. Even otherwise, the Apex Court has already observed in the case of **M/s TRL Krosaki Refractories Ltd. (supra)** that if there is some dispute about the knowledge of the transaction on the part of the power of attorney holder, that ground can be taken during trial but cannot be a ground to quash the impugned proceeding.

25. In view of the above, this Court does not find any illegality in the impugned proceeding, challenged in application u/s 482 No. 23721 of 2024. Accordingly, the same is **dismissed**.

26. Coming to the fact of Application u/s 482 No. 28869 of 2024, in this case, as per the complaint, a cheque of Rs. 10 Lakh was given by the applicant in the name of Pankaj Singh who executed power of attorney in favour of opposite party No.2. On presenting that cheque before the bank, same was returned with the endorsement “fund insufficient” on 14.12.2017.

Information of the same was given by the bank to the payee, Pankaj Singh, on 16.12.2017. After that, a registered notice was sent to the applicant by the Advocate of payee Pankaj Singh through registered post on 8.1.2018, which was received by the applicant on 9.1.2018. However, despite the expiry of 15 days from the date of service, the cheque amount was not paid by the applicant. Therefore, the complaint was filed against the applicant on 12.2.2018 by Pankaj Singh through his power of attorney holder Ranveer Singh, also the father of Pankaj Singh. From a perusal of the impugned complaint, it is not in dispute that impugned complaint was filed by the power of attorney holder of payee Ranveer Singh in his own name instead of filing in the name of complainant Pankaj Singh, which is not permissible under the law as observed above. Therefore, this Application deserves to be allowed.

27. Accordingly, the application u/s 482 No. 28869 of 2024 is **allowed**. The impugned proceeding arising out of Case No. 602 of 2018 (*Ranveer Singh vs. Jitendra Kumar Mangla*), under Section 138 N.I. Act, P.S. Hariparvat District Agra is hereby quashed. However, the complainant, Pankaj Singh, is at liberty to file a fresh complaint in accordance with law.

(2024) 12 ILRA 28

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.12.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Criminal Misc. Bail Cancellation Application No.
475 of 2024

Yogesh Kumar Garg ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Siddhartha Srivastava

Counsel for the Opposite Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 420, 467, 468, 471, 406, 504, 506 & 120B - Against grant of bail - Maintainability - Jurisdiction - The Code of Criminal Procedure, 1973 - Section 362 - Applicant/first informant moved bail cancellation application before Sessions Court on ground that conditions imposed by Court of Sessions for grant of bail had not complied with inasmuch as amount of Rs.42 lacs as undertaken by opposite party No. 2 to be deposited not deposited and only Rs.4 lacs deposited during pendency of bail cancellation application - Application rejected - Impugned order. (Para 3, 4)

Held, applicant already approached Court of Sessions seeking cancellation of bail granted u/s 439 (2) Cr.P.C - The Court of Sessions refused to cancel bail already granted - In opinion of Court, applicant having exercised his option to seek cancellation u/s 439 (2) Cr.P.C. before Court of Sessions can't now approach High Court by moving another bail cancellation application u/s 439 (2) Cr.P.C - Thus, order passed by Court of Sessions can be challenged before High Court in application u/s 482 Cr.P.C. (Para 15, 19)

Bail cancellation application dismissed. (E-13)

List of Cases cited:

1. Himanshu Sharma Vs St. of M.P. reported in 2024 (4) SCC 222
2. Gurcharan Singh Vs St. (UT of Delhi) reported in 1978 (1) SCC 118, (Para 16)

3. Puran Vs Rambilas & anr. with Shekhar & anr. Vs St. of Maha. & anr. reported in 2001 (6) SCC 338, (Para 16, 17)

4. Rajesh Kumar & anr. Vs St. of U.P. & ors., (Crl. Misc. Case No. 5572 of 2015), decided on 7.1.2016

5. Surendra Kumar Singh Vs St. of U.P. through Home Secretary Government of U.P. Lucknow & ors., (Case No. 275 of 2016), decided on 26.5.2015

6. Narendra Kumar Amin Vs St. of Guj. reported in 2008 (13) SCC 584

7. Ranjit Singh Vs St. of M.P. reported in 2012 (16) SCC 797, (Para 19)

8. Smt. Rukhsana Vs St. of U.P. & anr., (A482 Cr.P.C. No. 14905 of 2012), (Para 4), decided on 23.04.2013

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

1. This is a Bail Cancellation Application seeking the cancellation of bail granted to the opposite party No. 2, namely, Kuna Kapoor son of Vinod Kapoor by the Sessions Court vide order dated 23.12.2022.

2. The learned Sessions Court, Ghaziabad while granting bail to the opposite party No. 2 imposed a condition that the opposite party would pay a sum of Rs.42 lacs out of the outstanding amount of Rs.4 crores and 37 lacs to the applicant/first informant within two months.

3. The bail cancellation was sought by the applicant herein by moving a bail cancellation application before the Sessions Court, Ghaziabad on the ground that the conditions imposed by the Court of Sessions for grant of bail had not been complied with inasmuch as the amount of

Rs.42 lacs as undertaken by the opposite party No. 2 to be deposited had not been deposited and only a sum of Rs.4 lacs was deposited that too during the pendency of the bail cancellation application.

4. The learned Sessions Court vide order dated 10.9.2024 rejected the bail cancellation application placing reliance upon the various decisions of the Apex Court.

5. The applicant/first informant had approached this Court with the following prayer:-

"It is therefore most humbly and respectfully prayed that this Hon'ble Court may kindly be pleased to cancel the bail granted to opposite party No. 2 by setting aside the order dated 10.9.2024 passed by Shri Nishant Maan, Addl. District Judge/FTC-2, Ghaziabad in Bail Cancellation Application No. 178 of 2023 (Yogesh Kumar Garg versus Kunal Kapur) in connection with FIR No. 472 of 2022, under Sections 420, 467, 468, 471, 406, 504, 506 & 120B IPC, PS-Kotwali, District Ghaziabad."

6. This Court vide order dated 11.12.2024 had made a specific query from the learned counsel for the applicant to the effect as to whether after rejection of the bail cancellation application by the Sessions Court, a bail cancellation application would lie before this Court under Section 439 (2) Cr.P.C. or the applicant herein may pursue remedies against the order dated 10.9.2024 rejecting the bail cancellation application before the appropriate forum, the learned counsel for the applicant sought time to address on the said aspect.

7. I have heard Shri Siddharth Srivastava, learned counsel for the applicant/first informant in support of the bail cancellation application as also Shri S. K. Rai, learned AGA-I for the State-respondent and have perused the records.

8. Shri Siddharth Srivastava, learned counsel for the applicant has invited the attention of this Court to the provisions of Section 439 (2) Cr.P.C. to submit that the power to cancel bail already granted has been conferred to the Court of Sessions as also to the High Court. In the case at hand, the Sessions Court has refused to cancel the bail granted by it to the opposite party No. 2 and as such, the bail cancellation application can be considered by this Court in exercise of the powers conferred under Section 439 (2) Cr.P.C. He accordingly contends that the instant bail cancellation application before the Court is maintainable. Reliance is placed upon the decision of the Apex Court in the case of *Himanshu Sharma versus State of Madhya Pradesh* reported in **2024 (4) SCC 222** for the proposition that bail granted to an accused can only be cancelled if the Court is satisfied that after being released on bail the accused has flouted the conditions of bail order. Reliance is also placed upon a decision of the High Court of Hyderabad for the State of Telengana and Andhra Pradesh reported in **2014 SCC Online Hyd. 1643 (2014) 3 ALT (Crl.) 112** for the proposition that an application under Section 439 (2) Cr.P.C. would be maintainable before this Court despite rejection of an application under Section 439 (2) Cr.P.C. before the Court of Sessions.

9. Per contra, Shri S. K. Rai, learned AGA-I vehemently opposing the instant bail cancellation application submits that

the same is not maintainable and the remedy available to the applicant herein is to assail the order dated 10.9.2024 passed by the Court of Sessions in a 482 Cr.P.C. application. Reliance is placed upon the decision of the Apex Court in the case of *Puran versus Rambilas and another with Shekhar and another versus State of Maharashtra and another* reported in **2001 (6) SCC 338** as also two decision of the co-ordinate Bench of this Court in *Crl. Misc. Case No. 5572 of 2015 (Rajesh Kumar and another versus State of U.P. and others)* decided on 7.1.2016 and in the *Case No. 275 of 2016 (Surendra Kumar Singh versus State of U.P. through Home Secretary Government of U.P. Lucknow and others)* U/s □ 482/378/407 Cr.P.C. decided on 26.5.2015.

10. I have given my anxious thoughts to the submissions made by learned counsels for the parties and have gone through the rulings cited at the Bar.

11. The scope of power under Section 439 (2) Cr.P.C. conferred upon a High Court has been considered by the Apex Court in the case of *Gurcharan Singh versus State (UT of Delhi)* reported in **1978 (1) SCC 118**. Their Lordships have succinctly explained the provisions regarding cancellation of bail under the Cr.P.C. culled out the differences from the Code of Criminal Procedure, 1898 (old Code) and elucidated the position of law viz-a-viz powers of the Courts granting the cancelling the Bail. The Apex Court in Para 16 of *Gurcharan Singh (supra)* observed as under:-

"16. Section 439 of the new Code confers special powers on the High Court or Court of Session regarding bail. This was also the position under Section 498

CrPC of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly, under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High

Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

12. The Apex Court in ***Puran versus Rambilas*** reported in **2001 (6) SCC 338** has held that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervising circumstances warranting such cancellation. In ***Narendra Kumar Amin versus State of Gujrat*** reported in **2008 (13) SCC 584**, the Apex Court while reiterating the principle laid down in ***Puran versus Rambilas (supra)*** drew a distinction between the two in respect of relief available in view or appeal. In the said case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439 (2) Cr.P.C. In appeal, it was contended before the Apex Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Apex Court observed that when irrelevant materials have been taken into consideration by the Court granting order of bail, the same makes the order vulnerable and subject to scrutiny by the Appellate Court and that no review would lie under Section 362 of the Code. In essence, the Apex Court opined that if the order of grant of bail is perverse,

the same can be set at naught only by the superior Court and has left no room for a review by the same Court.

13. Yet again, the Apex Court in ***Ranjit Singh versus State of M.P. reported in 2012 (16) SCC 797*** reverberating the aforesaid principle observed as under:-

"19. ? There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court."

14. From the above, it is culled out that the concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and consequently an order granting bail can only be set aside on the grounds of being illegal or contrary to law by the Court superior to the Court which granted the bail and not by the same Court.

15. In the case at hand, the applicant/first informant herein had already approached the Court of Sessions, Ghaziabad seeking cancellation of the bail granted by it under Section 439 (2) of the Cr.P.C. The Court of Sessions vide order dated 10.9.2024 refused to cancel the bail already granted. In the opinion of the Court, the applicant having exercised his option to seek cancellation under Section 439 (2) of Cr.P.C. before the Court of

Sessions cannot now approach this Court by moving another Bail Cancellation Application under Section 439 (2) Cr.P.C.□ A challenge would have to be made to the orders rejecting the Bail Cancellation Application and the same cannot be achieved in the present proceedings. Had the applicant/first informant approached this Court at the first instance seeking the cancellation of the bail granted to the opposite party No. 2 by the Court of Sessions by its order dated 23.12.2022 invoking the provisions of Section 439 (2) of Cr.P.C., the application would be maintainable of Section 439 (2) of Cr.P.C., the application would be maintainable.

16. It is an accepted principles of law that when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, functus officio and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order granting bail and order in the absence of any express provision in the Cr.P.C., for the same. Section 362 of the Cr.P.C. operates as a Bar to any such alteration or review of the cases disposed of by the Court, the only exception of bail correction of clerical or arithmetical error by the Court.

17. A co-ordinate Bench of this Court in the case of ***Smt. Rukhsana versus State of U.P. and another (application under Section 482 Cr.P.C. No. 14905 of 2012)*** was pleased to hold as under:-

"4. When an order has been passed under Section 439, Cr. P.C. cancelling the bail order recorded under

Section 437 the accused would have two courses open. It is always this right to move for bail afresh before the proper forum but his right to challenge the validity of the order of cancellation of bail cannot be taken away simply for the reason that he has a right to pray for bail again. This challenge could not be made in a petition under Section 397, Cr. P.C. as an order recording bail or its cancellation is but an interlocutory order and the validity of the order, therefore, could only be challenged in a proceeding under Section 482, Cr. P.C. invoking the inherent powers of the Court to prevent abuse of process of any Court or to secure the ends of justice. The objection of the complainant in this behalf is thus not tenable and this Court can look to the validity of the cancellation of bail in exercise of its powers under Section 482, Cr. P.C. It must also be indicated that cancellation of bail is normally to be made only on the proof of misuse of privilege of bail either by abscondence or by interference with investigation or by threats to witnesses."

18. The Hon'ble Apex Court in the case of *Puran and Shekhar and another (supra)* was pleased to hold as under:-

"16. When Section 439(2) grants to the High Court the power to cancel bail, it necessarily follows that such powers can be exercised also in respect of Orders passed by the Court of Sessions. Of course cancellation of bail has to be on principles set out hereinabove and only in appropriate cases.

17. Further, even if it is an interlocutory order, the High Court's inherent jurisdiction under Section 482 is not affected by the provisions of Section 397 (3) of the Code of Criminal

Procedure. That the High Court may refuse to exercise its jurisdiction under Section 482 on the basis of self-imposed restriction is a different aspect. It cannot be denied that for securing the ends of justice, the High Court can interfere with the order which causes miscarriage of justice or is palpably illegal or is unjustified. [Re. Madhu Limaye v. State of Maharashtra (1977) 4 SCC 551 and Krishnan and Another v. Krishnaveni and Another (1997) 4 SCC 241]."

19. the validity of the order passed under Section 439 (2) Cr.P.C. The order dated 10.9.2024 passed by the Court of Sessions, Ghaziabad rejecting the Bail Cancellation Application, at the instance of the applicant/First Informant can be questioned before the Court in an application under Section 482 Cr.P.C. The instant Bail Cancellation Application is held to be not maintainable and is **dismissed**, leaving it open for the applicant to assail the order dated 10.9.2024 passed by the Sessions Court, Ghaziabad in appropriate proceedings. There shall be no order as to costs. .

(2024) 12 ILRA 33
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Contempt Application (Civil) No. 6731 of 2024

Smt. Suman Devi **...Applicant**
Versus
Sri Avinash Kumar Yadav, Social Welfare Officer, Fatehpur **...Opposite Party**

Counsel for the Applicant:
 Sri Bhawesh Pratap Singh

Counsel for the Opposite Party:**Civil Law – Constitution of India, 1950 - Article 215 - Contempt of Courts Act, 1971 - Sections 2, 2(b) & 12 - Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 - Rule 29:-**

Contempt Application – willful disobedience of order passed in writ petition – applicant-petitioner who was employed as Assistant Teacher in an Institution which governed by the Department of Social Welfare, UP & managed by an elected Committee of Management – petitioner was to retire on 10.04.2022, therefore, under Rule 29 of Rules, 1981, she claimed benefit of extended employment end of session i.e. till 31.03.2023 – her claim for session benefit was referred before the DSWO, Fatehpur who, in turn, referred to the Director, Department of Social Welfare – who further referred the matter to the Principal Secretary, Department of Social Welfare – when her claim was pending she filed writ petition – during pendency of writ petition – Principal Secretary, Department of Social Welfare, UP allowed session benefit in her favour – consequently, writ petition was disposed of with direction that the petitioner shall be paid her salary for the extended period of her service, if there was no legal impediment – Special Secretary, DoSW rejected her claim of salary, on the ground of no work no pay – contempt proceeding – issue notices – personal appearance – court held guilty of willful disobedience of orders – court finds that, the act of the Special Secretary in trying to pass the buck and his role in preventing payment of salary to the applicant in terms of the order passed by this court shows that the apology tendered by the Special Secretary is not sincere and has been given only to avoid punishment in proceedings – held, any act or order of any executive authority or other person which nullifies or frustrates the orders or directions of a court would amount to contempt of court – thus, Special Secretary, DoSW, UP is hereby sentenced to detention in the Court till the rising of court and with a fine of Rs. 2000/- – directions issued – Contempt Application, disposed of, accordingly. (Para – 13, 18, 25, 27, 28, 29, 30)

Contempt Application Disposed of. (E-11)**List of Cases cited:**

1. Angad Yadav & ors. Vs State of U.P. & ors., Neutral Citation No. - 2017:AHC:159745,
 2. CELIR LLP Vs Ms. Sumati Prasad Bafna & ors. - Contempt Petition (C) Nos. 158 and 159 of 2024 – order dated 13.12.2024,
 3. Smt. Suman Devi Vs St. of U.P & ors. - Writ A No.19650 of 2022 - order dated 4.3.2024,
 4. Ram Kishan v. Tarun Bajaj & ors. reported in (2014) 16 SCC 204,
 5. Murray & Co. Vs Ashok Kr. Newatia & anr. reported in (2000) 2 SCC 367,
 6. Pushpaben & anr. Vs Narandas Badiani & anr. - reported in (1979) 2 SCC 394,
 7. Bihar State Government Secondary School Teachers Association Vs Ashok Kumar Sinha & ors. (2014) 7 SCC 416,
 8. In Re : - Sanjiv Datta & ors. (1995) 3 SCC 619,
- (Delivered by Hon'ble Salil Kumar Rai, J.)

1. The present contempt application has been filed claiming that the order dated 4.3.2024 passed by this Court in Writ - A No. 19650 of 2022 (Smt. Suman Devi vs. State of U.P. & 4 Ors.) has been willfully disobeyed by the State officers. In the writ petition, the State of Uttar Pradesh through Principal Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow, the Director, Department of Social Welfare, Uttar Pradesh, Lucknow, the District Social Welfare Officer, Fatehpur, the District Basic Education Officer, District Fatehpur and the Committee of Management of Dr. B.R. Ambedkar Shiksha Sadan, Abu Nagar, Fatehpur (hereinafter referred to as, 'Institution') were impleaded as respondents.

2. The relevant facts of the case are that the Institution is governed by the Department of Social Welfare and is managed by an elected Committee of Management. The service conditions of its Teachers are governed by the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as, 'Rules, 1981'). The petitioner was employed, on a regular basis, as Assistant Teacher in the Institution. The retirement age of the Assistant Teachers under the Rules, 1981 is 62 years and it is claimed that under Rule 29 of the Rules, 1981, a Teacher who retires during an academic session shall continue to work till the end of the academic session and such period of service is deemed as extended period of employment. By virtue of the Government Order dated 17.8.2015, the benefit of Rule 29 of the Rules, 1981 has been extended to the Institutions governed by the Department of Social Welfare. The Government Order specifies that the academic session starts from 1st of April and ends on 31st of March. The date of birth of the petitioner is 11.4.1960. The petitioner was to retire on 10.4.2022, therefore, under Rule 29, she claimed benefit of extended employment till 31.3.2023. The claim of the applicant for session benefit, i.e., extended employment, was referred by the Manager of the Committee of Management of the Institution as well as by the District Basic Education Officer to the District Social Welfare Officer, Fatehpur who, in turn, vide his recommendation letter dated 16.2.2022 referred the matter to the Director, Department of Social Welfare. A copy of the letter dated 16.2.2022 was also sent to the Principal as well as the Manager of the Committee of Management of the Institution. The letter dated 16.2.2022 prohibited the Manager and the Principal of

the Institution from taking any work from the applicant after 30.4.2022 without the approval of the State Government. The Director, Department of Social Welfare, Government of Uttar Pradesh, Lucknow referred the matter of the applicant to the Principal Secretary, Department of Social Welfare vide his letter dated 27.4.2022. However, the claim of the applicant remained pending and no orders were passed giving her benefit of extended employment / session benefit, therefore, the applicant filed Writ - A No. 19650 of 2022 claiming the aforesaid benefit. While the writ petition was pending, an order dated 18.1.2023 was passed by the Principal Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow allowing session benefit / extended employment to the applicant till 31.3.2023. A consequential letter dated 21.1.2023 was issued by the Manager of the Committee of Management of the Institution asking the petitioner to join in the Institution and in response to the letter dated 21.1.2023, the petitioner joined as Assistant Teacher on the same date. Writ - A No. 19650 of 2022 was heard by this Court on 4.3.2024 by which date, the relief claimed by the applicant to be given session benefit had become infructuous as the said benefit had already been extended to the applicant and she had been allowed to join as Assistant Teacher in the Institution from 21.1.2023. However, the applicant was given salary only from the date she joined in the Institution, i.e., from 21.1.2023 and was not given salary for the period starting from 1.5.2022 to 21.1.2023. It appears from a reading of the order dated 4.3.2024 that during the hearing of Writ - A No. 19650 of 2022 on 4.3.2024, the counsel for the applicant raised the aforesaid issue and sought salary for the applicant for the period between 1.5.2022 and 21.1.2023.

This Court vide its order dated 4.3.2024 allowed the oral prayer of the applicant and disposed of the writ petition with the direction that the petitioner shall be paid her salary for the period 1.4.2022 to 21.1.2023 expeditiously, if there was no legal impediment. The order of this Court is being reproduced below : -

“1. Heard Sri Bhavesh Pratap Singh, learned counsel for petitioner and Ms. Shruti Malviya, learned Brief Holder for State-Respondents.

2. Petitioner has attained age of superannuation after completion of 62 years on 11.04.2022, which falls in mid academic session as there is no dispute that academic session commenced from 01st April of relevant year.

3. Petitioner was not granted benefit of Rule 29 of U.P. Basic Education (Teachers) Service Rules, 1981, i.e., to extend her services till the end of session, i.e., upto 31st March, 2023. Therefore, petitioner approached this Court by way of filing present writ petition on 17.11.2022 seeking aforesaid benefit.

4. During pendency of this writ petition petitioner was granted benefit of extended academic session by order dated 21.01.2023 till 31st March, 2023 and said order has been placed on record by way of filing a supplementary affidavit on 12.04.2023.

*5. Though prayers of this writ petition are not effective amended, however, an argument has been raised by learned counsel for petitioner that petitioner is entitled for her monthly salary from 01.04.2022 to 21.01.2023 and this period cannot be considered as “no work no pay”. In order to substantiate his argument, learned counsel has placed reliance on a Coordinate Bench judgment of this Court in **Angad Yadav and others***

vs. State of U.P. and others, Neutral Citation No. - 2017:AHC:159745 and submits that similar controversy was decided in favour of petitioners therein.

6. Learned counsel also submits that an appeal filed against aforesaid judgment by Basic Shiksha Parishad being Special Appeal No. 505 of 2018, was dismissed in default on 11.12.2018 and as per information status remained same till date.

7. Learned Brief Holder appearing for State-Respondents submits that matter is still under consideration before Director, Directorate Social Welfare, U.P. However, she fairly submits that above referred judgment has substantiate the claim of petitioner.

*8. In aforesaid circumstances, since similar controversy has already been decided by Coordinate Bench of this Court in **Angad Yadav (supra)** in favour of petitioner, which has been affirmed by Division Bench since appeal thereof is dismissed in default and has not been restored till date, therefore, there is no reason not to allow the oral prayer made by petitioner since she was not allowed to continue the job of teaching for above referred relevant period and benefit of extended session was provided belatedly in the month of March, 2023.*

9. The writ petition is accordingly disposed of with direction that salary for the period from 01.04.2022 to 21.01.2023 shall also be paid to petitioner expeditiously, if there is no legal impediment.”

3. Despite the aforesaid order dated 4.3.20024, the applicant was not paid her salary for the period 1.5.2022 to 21.1.2023, therefore, the present contempt application was filed by the petitioner in October, 2024 impeaching the then District Social Welfare

Officer, District Fatehpur as opposite party in the case. Notices were issued to the opposite party by this Court vide its order dated 24.10.2024 fixing 25.11.2024. On 25.11.2024, Sri Avinash Kumar Yadav, the then District Social Welfare Officer filed his affidavit dated 21.11.2024 disclosing that Sri Rajnish Chandra, the Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow had passed an order dated 4.11.2024 directing that because the petitioner had not worked as Assistant Teacher in the Institution from 1.5.2022 to 20.1.2023, therefore, on the principle of 'no work no pay', she was not entitled to salary for the aforesaid period. It was also disclosed that as a result of the aforesaid order dated 4.11.2024, Sri Prasoon Rai, the then District Backward Class Welfare Officer, Fatehpur who was also temporarily holding the charge of District Social Welfare Officer (Development), Fatehpur had passed an order dated 9.11.2024 denying salary to the applicant for the period 1.5.2022 to 21.1.2023. The orders dated 4.11.2024 passed by the Special Secretary and 9.11.2024 passed by the District Social Welfare Officer (Development) were also annexed with the aforesaid affidavit. A reading of the order dated 4.11.2024 shows that the order has been passed by the Special Secretary on the recommendations of the Director, Department of Social Welfare who had recommended that the petitioner was not entitled to salary for the period between 1.5.2022 to 21.1.2023. A reading of the order dated 4.11.2024 also shows that in his recommendations, the Director had also referred to the order passed by this Court in Writ - A No. 19650 of 2022 and the said order had been taken note of by the Special Secretary in his order dated 4.11.2024. Interestingly, in the affidavit dated 21.11.2024, it was stated

that the order dated 4.3.2024 passed by this Court had been complied by the State Government in letter and spirit. The aforesaid claim was made in reference to the passing of the orders dated 4.11.2024 and 9.11.2024. It is relevant to note that the orders dated 4.11.2024 and 9.11.2024 were passed after this Court issued notices in the present contempt case.

4. This Court while hearing the case on 25.11.2024 observed that the orders dated 4.11.2024 and 9.11.2024 override the order dated 4.3.2024 passed by this Court. The Court further observed as follows : -

"A reading of the order dated 04.03.2024 shows that the issue regarding the entitlement of the applicant for salary for the period between April, 2022 and 20.01.2023, i.e., the period she was not allowed to work as Assistant Teacher because session benefit was wrongly denied to her was considered by this Court and the claim of the State respondents based on the principle of no work no pay was rejected by this Court. Evidently, the orders dated 04.11.2024 and 09.11.2024 passed by the Special Secretary as well as the District Social Welfare Officer overriding the orders passed by this Court are contumacious. The Special Secretary, Uttar Pradesh Social Welfare Department and the District Social Welfare Officer (Development), Fatehpur have committed contempt of this Court for which they are liable to be tried.

The Special Secretary, Social Welfare Section - II, Government of Uttar Pradesh, Lucknow and the District Social Welfare Officer (Development), Fatehpur shall be personally present in the Court on the next date fixed for framing of charges."

5. The case was listed on 3.12.2024 and on the said date, the Special Secretary, the present District Social Welfare Officer (Development) and Sri Prasoon Rai who had passed the order dated 9.11.2024 filed their affidavits. At this stage, it would also be relevant to record that in his affidavit, Sri Prasoon Rai stated that he was posted as District Backward Class Welfare Officer, Fatehpur and it was Ms. Shalini who was posted as District Social Welfare Officer (Development), Fatehpur on 9.11.2024. It has been stated in the affidavit that Ms. Shalini was on medical leave between 12.9.2024 to 12.11.2024, therefore, during the aforesaid period, Sri Prasoon Rai held the additional charge of District Social Welfare Officer (Development), Fatehpur. In their affidavits filed on 3.12.2024, Ms. Shalini, i.e., the District Social Welfare Officer (Development), Fatehpur, Sri Prasoon Rai, i.e., the District Backward Class Welfare Officer, Fatehpur and Sri Rajnish Chandra, the Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow pleaded that the delay in payment of salary to the applicant for the period 1.5.2022 to 21.1.2023 was because the management of the Institution had not sent the pay roll / attendance sheet of the applicant / petitioner which was necessary to pay the salary of the applicant for the aforesaid period. Paragraph Nos. 6 to 11 of the affidavits of the Special Secretary and the District Social Welfare Officer (Development), Fatehpur containing their stand are reproduced below :-

“6. That is further submitted that the payment of salary is made to the teachers on the basis of the Pay Role/Attendance duly provided by the Manager of the Institution. It is again submitted that the Manager of the

Institution has approved and provided the Pay-Roll/Attendance of the petitioner from 21.01.2023 to 31.03.2023 for which period the payment has already been made.

7. That it is stated that the Appointing Authority/ Manager of the Institution in question has not provided the Pay-Roll/Attendance Certificate of the petitioner for the period of 01.05.2022 to 20.01.2023, it is therefore, the payment of salary has not been made to the petitioner for that period.

8. That it is respectfully submitted that since the Manager of the institution is the appointing authority of the applicant, therefore, the pay-roll / attendance certificate for the period of 01.05.2022 to 20.01.2023 can only be verified and provided by the Manager, hence in this regard, the District Social Welfare Officer (Development) Fatehpur vide letter dated 25.11.2024 directed to the Manager of the institution to provide the pay-roll / attendance certificate for the period of 01.05.2022 to 20.01.2023 of the applicant, so that further proceeding regarding the payment of arrears of salary for the said period be initiated in the light of the direction issued by this Hon'ble Court, otherwise legal action shall be taken against the Manager of the institution. Copy of the letter dated 25.11.2024 is being filed herewith and marked as ANNEXURE NO. 1 to this affidavit.

9. That it is respectfully submitted that the deponent trying his/her level best to comply with the writ court order regarding the payment of salary for the period of 01.05.2022 to 20.01.2023 to the applicant but due to the reason aforesaid, the arrears of salary for the period 01.05.2022 to 20.01.2023 could not be made in favour of the applicant. The inconvenience caused to this Hon'ble Court

is highly regretted on the part of the deponent.

10. That it is respectfully submitted that since the matter is still active consideration of the Manager of the institution in question regarding to provide the pay-roll / attendance certificate for the period of 01.05.2022 to 20.01.2023 of the applicant and the District Social Welfare Officer (Development) Fatehpur also wrote a letter to the Manager of the institution on 25.11.2024 and after obtaining the said required document, the further proceeding shall be initiated in the matter in accordance with law.

11. That in the aforesaid manner, there is no willful or deliberate delay in the matter on the part of the deponent. The delay caused in the matter due to aforesaid reason. The inconvenience caused to this Hon'ble Court is highly regretted on the part of the deponent."

The Court through its order dated 3.12.2024 rejected the explanation of the Special Secretary and the District Social Welfare Officer noting that the pay roll / attendance of the petitioner was not required for compliance of the order passed by this Court as by order dated 16.10.2022, the District Social Welfare Officer, Fatehpur had prohibited the Principal and Manager of the Institution from taking any teaching work from the petitioner without the approval of the State Government, therefore, the petitioner could not have worked in the Institution between 1.5.2022 to 20.1.2023 as she had not been granted the session benefit till 18.1.2023. The subsequent discussion would show that the explanation of the Special Secretary and the District Social Welfare Officer for having failed to comply with the orders of this Court was false and an attempt to mislead the Court. This Court vide its order

dated 3.12.2024 directed the District Social Welfare Officer (Development) to ensure full compliance of the order passed by this Court by the next date fixed and further, proceeded to frame charges against Sri Rajnish Chandra, the Special Secretary, Department of Social Welfare, Government of Uttar Pradesh and Sri Prasoon Rai, the District Backward Class Welfare Officer who had passed the order dated 9.11.2024. The relevant portion of the order dated 3.12.2024 is reproduced below : -

*"The averments in the affidavits filed by the Special Secretary and the present District Social Welfare Officer (Development) do not explain their failure to comply with the order passed by this Court. **Through their orders dated 9.11.2024 and 4.11.2024, the previous District Social Welfare Officer (Development) and the Special Secretary, Department of Welfare, Government of U.P, Lucknow substituted and nullified the order passed by the Writ Court i.e., the order dated 4.3.2024 passed by this Court in Writ A No.19650 of 2022.** At this stage, it would be relevant to note that in his order dated 16.10.2022, the then District Social Welfare Officer, Fatehpur had directed the Principal and the Manager of the Institution not to take any teaching work from the applicant without the approval of the State Government. Apparently, the applicant could not have been present and could not have worked in the institution between 1.5.2022 to 20.1.2023 because she had not been granted the session benefit and further the Principal and the Management of the Institution had been prohibited from taking any work from the applicant.*

The Rights of the applicant for back wages was also in issue before this Court in Writ Petition No. 19650 of 2022

and this Court vide its order dated 4.3.2024 held that the principle of 'no work no pay' was not applicable in the present case as the applicant was not allowed to continue the job of teaching for the period between April 2022 to 20.01.2023 and a categorical direction was issued by this Court that the petitioner shall be paid the salary for the aforesaid period. It be noted that on 4.3.2024, no mandamus or any order was required to allow the petitioner to join because session benefit had already been granted to the applicant by that date by the government itself and the applicant was permitted to work on the post of Assistant Teacher from 21.1.2023. The applicant was granted session benefit by the State Government itself during the pendency of the writ petition, therefore, the only issue involved in the petition on 4.3.2024 was regarding the rights of the applicant for payment of salary for the period she was not allowed to continue to work as Assistant Teacher.

The aforesaid facts clearly lead to the conclusion that the opposite party nos. 2 & 3 i.e., the present Special Secretary, Department of Social Welfare, Government of U.P., Lucknow and the previous District Social Welfare Officer (Development), District Fatehpur have willfully disobeyed the orders passed by the Writ Court through their orders dated 4.11.2024 and 9.11.2024.

So far as the present District Social Welfare Officer (Development), Fatehpur is concerned, at present there is nothing on record showing any willful disobedience by her of the orders passed by this Court especially in the circumstance that assurance has been given by Shri P.K.Giri, the Additional Advocate General that back wages payable to the applicant under the orders of the Writ Court shall be

paid within two days from today i.e., by 5.12.2024.

However, the Special Secretary and the previous District Social Welfare Officer (Development) are liable to be tried for Contempt of Court. The said Officers are accordingly charged as follows:

1. *"You, Shri Rajneesh Chandra presently posted as Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow are hereby charged for having violated and willfully disobeyed the order dated 4.3.2024 passed by this Court in Writ A No.19650 of 2022 (Smt.Suman Devi versus State of U.P and 4 others) by overriding it and consequently nullifying it through your order dated 4.11.2024 by directing that the applicant shall not be paid the salary for the period between 1st May, 2022 to 20.1.2023. You, therefore, show cause within one week from today as to why you should not be tried and punished under Section 12 of Contempt of Courts Act, 1971 for deliberate and willful disobedience of the order dated 4.3.2024 passed by this Court in Writ A No.19650 of 2022."*

2. *"You, Shri Prasoon Rai who was posted as District Social Welfare Officer (Development), Fatehpur till 12.11.2024 are hereby charged for having violated and willfully disobeyed the order dated 4.3.2024 passed by this Court in Writ A No.19650 of 2022 (Smt.Suman Devi versus State of U.P and 4 others) by overriding it and consequently nullifying it through your order dated 9.11.2024 by directing that the applicant shall not be paid the salary for the period between 1st May, 2022 to 20.1.2023. You, therefore, show cause within one week from today as to why you should not be tried and punished under Section 12 of Contempt of Courts Act, 1971 for deliberate and willful disobedience of the order dated 4.3.2024*

passed by this Court in Writ A No.19650 of 2022."

Both of the aforesaid Officers shall file their objection/reply/defense to the aforesaid charge by 10.12.2024.

Put up again on 11.12.2024 on which date, the contemnors Shri Rajneesh Chandra, presently posted as Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow and Shri Prasoon Rai, previously District Social Welfare Officer (Development), Fatehpur and at present District Backward Class Welfare Officer, Fatehpur shall be personally present in the Court.

Even though charges have been framed in presence of the aforesaid contemnors, the Registrar (Compliance) shall send a copy of this order to Shri Rajneesh Chandra, presently Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow and Shri Prasoon Rai, presently District Backward Class Welfare Officer, Fatehpur and previously District Social Welfare Officer (Development), Fatehpur within 48 hours for necessary compliance.

It is clarified that by the next date fixed, the present District Social Welfare Officer (Development), Fatehpur shall also be personally present in the Court and file her compliance affidavit disclosing full compliance of the order of the Writ Court."

7. When the case was taken up on 11.12.2024, Sri Rajnish Chandra, the Special Secretary, Sri Prasoon Rai, the present District Backward Class Welfare Officer who had passed the order dated 9.11.2024 and also the present District Social Welfare Officer were again present in the Court and filed their affidavits disclosing full compliance of the order passed by this Court and that the amount due to the applicant as arrears of salary for

the period between 1.5.2022 and 20.1.2023 had been credited in the account of the petitioner / applicant. The officers referred above also tendered their apologies for having not complied with the order passed by this Court. Sri Rajnish Chandra, the Special Secretary, in his affidavit / reply to the charges framed against him, apart from tendering his apology, has also narrated certain administrative steps allegedly taken by him to ensure that such acts do not happen in future and has stated that the matter of the petitioner / applicant was unnecessarily referred to the State Government and further, the order dated 4.11.2024 had been passed on the recommendations of the Director, Department of Social Welfare, Government of Uttar Pradesh. It has been stated in the affidavit of the Special Secretary that adverse entries had been awarded to the present District Social Welfare Officer (Development) because of the delay in payment of arrears of salary to the applicant and for having unnecessarily referred the matter to the Director, Department of Social Welfare, Government of Uttar Pradesh. It has been pleaded that there is no willful disobedience by the Special Secretary of the order passed by this Court, therefore, the said officer be discharged from contempt. In his affidavit / reply, Sri Prasoon Rai has taken the additional defense that the order dated 9.11.2024 was passed by him as a consequence of the order dated 4.11.02024 passed by the Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow.

8. It was pleaded by the Standing Counsel that the order dated 4.11.2024 was passed by the Special Secretary considering the fact that the recommendation for not paying the salary to the applicant /

petitioner for the period she had not worked was made by the Director, Department of Social Welfare, Government of Uttar Pradesh. It was also pleaded that the direction of this Court in its order dated 4.3.2024 was to pay salary to the petitioner / applicant from 1.5.2022 to 21.1.2023 only if there was no legal impediment in doing so and the orders dated 4.11.2024 and 9.11.2024 were passed on a misreading of the order dated 4.3.2024. It was pleaded that there was no intention on the part of the charged officers to disobey the orders passed by this Court, therefore, the apologies tendered by the concerned officers be accepted and the charged officers be discharged from contempt.

9. I have considered the plea of the contemnors and the submission of the Additional Advocate General on their behalf.

10. Civil contempt is defined in Section 2(b) of the Contempt of Courts Act, 1971 to mean wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.

11. It was held by the Supreme Court in its judgment dated 13.12.2024 passed in Contempt Petition (C) Nos. 158 and 159 of 2024 (**CELIR LLP vs. Ms. Sumati Prasad Bafna & Ors.**) that acts that attempt to mislead the Court, obstruct its functioning or frustrate its decisions distort the process of justice and would amount to contempt. It was observed by the Court that even in the absence of specific mandates, the deliberate conduct of parties aimed at frustrating court proceedings or circumventing its eventual decision may amount to contempt because such actions strike at the heart of the

judicial process, undermining its authority and obstructing its ability to deliver justice effectively. It was further observed that any contumacious conduct of the parties to bypass or nullify the decision of the court or render it ineffective or to frustrate the proceedings of the court, or to enure any undue advantage therefrom would amount to contempt. It was further observed by the Supreme Court that challenges to the authority of Court through wilful disobedience or otherwise undermine the rule of law and create the risk of anarchy. It was observed that the courts should not hesitate in wielding the weapon of contempt for the proper administration of justice and to ensure due compliance with the order passed by it in order to maintain and uphold the dignity of courts and majesty of law. The observations of the Supreme Court elucidating the law of contempt are reproduced below : -

“182. In order to decide whether the appellants are guilty of civil contempt, it would be apposite to refer to Section 2(b) of the Act, 1971, which reads as under: -

*“2. **Definitions.**— In this Act, unless the context otherwise requires,—*

xxx xxx xxx

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;”

183. ...

184. ...

185. Hence, the expression or word “wilful” means act or omission which is done voluntarily or intentionally and with the specific intent to do something which the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or to

disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose.

186. ...

187. ...

188. In **Ram Kishan v. Tarun Bajaj & Ors.** reported in (2014) 16 SCC 204 it was held that the contempt jurisdiction conferred on to the law courts power to punish an offender not only for his wilful disobedience but also for contumacious conduct or obstruction to the majesty of law. It further observed that **such power has been conferred for the simple reason that the respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined.** The relevant observations read as under: -

“11. The contempt jurisdiction conferred on to the law courts power to punish an offender for his wilful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither be fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to

impose sentence for contempt on the authorities in exercise of the contempt jurisdiction on mere probabilities. [...]”

(Emphasis supplied)

189. In **Murray & Co. v. Ashok Kr. Newatia & Anr.** reported in (2000) 2 SCC 367 this Court held that **the purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted, as any indulgence which can even remotely be termed to affect the majesty of law would result in the society losing its confidence and faith in the judiciary and the law courts forfeiting the trust and confidence of the people in general.** The relevant observations read as under: -

“9 [...] The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted. The respect and authority commanded by courts of law are the greatest guarantee to an ordinary citizen and the entire democratic fabric of the society will crumble down if the respect for the judiciary is undermined. **It is true that the judiciary will be judged by the people for what the judiciary does,** but in the event of any indulgence which can even remotely be termed to affect the majesty of law, the society is bound to lose confidence and faith in the judiciary and the law courts thus, would forfeit the trust and confidence of the people in general.”

(Emphasis supplied)

190. In **Pushpaben & Anr. v. Narandas Badiani & Anr.** reported in (1979) 2 SCC 394, it was held that contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to

impede its course or tends to shake public confidence in the judicial institutions. It further held that this jurisdiction is to be exercised not for the protection of the dignity of an individual judge but to protect the administration of justice from being maligned and ensure that the authority of the courts is neither imperilled nor is the administration of justice by it interfered with in any manner. The relevant observations read as under: -

“42. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the majesty of law or dignity of the courts. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law. It is an unusual type of jurisdiction combining “the jury, the judge and the hangman” and it is so because the court is not adjudicating upon any claim between litigating parties. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. In the general interest of the community it is imperative that the authority of courts should not be imperilled and there should be no unjustifiable interference in the administration of justice. It is a matter between the court and the contemner and third parties cannot intervene. It is exercised in a summary manner in aid of the administration of justice, the majesty of law and the dignity of the courts. No such act can be permitted which may have the tendency to shake the public confidence in the fairness and

impartiality of the administration of justice.”

(Emphasis supplied)

191. ...

192. ...

193. ...

194. In **Patel Rajnikant (supra)**

this Court upon examining Section 2(b) of the Act, 1971 held that to hold a person guilty of having committed contempt, there must be a judgment, order, direction etc. by a court, there must be disobedience of such judgment, order, direction etc and that such disobedience must be wilful. The relevant provisions read as under: -

“58. The provisions of the Contempt of Courts Act, 1971 have also been invoked. Section 2 of the Act is a definition clause. Clause (a) enacts that contempt of court means “civil contempt or criminal contempt”. Clause (b) defines “civil contempt” thus:

“2. (b) ‘civil contempt’ means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;”

Reading of the above clause makes it clear that the following conditions must be satisfied before a person can be held to have committed a civil contempt:

(i) there must be a judgment, decree, direction, order, writ or other process of a court (or an undertaking given to a court);

(ii) there must be disobedience to such judgment, decree, direction, order, writ or other process of a court (or breach of undertaking given to a court); and

(iii) such disobedience of judgment, decree, direction, order, writ or other process of a court (or breach of undertaking) must be wilful.”

195. However, the subsequent observations made by this Court in **Patel**

Rajnikant (supra) are significant. It observed that the court should not hesitate in wielding the potent weapon of contempt, it is for the proper administration of justice and to ensure due compliance with the orders passed by it in order to uphold and maintain the dignity of courts and majesty of law. The relevant observations read as under: -

“70. From the above decisions, it is clear that punishing a person for contempt of court is indeed a drastic step and normally such action should not be taken. At the same time, however, it is not only the power but the duty of the court to uphold and maintain the dignity of courts and majesty of law which may call for such extreme step. If for proper administration of justice and to ensure due compliance with the orders passed by a court, it is required to take strict view under the Act, it should not hesitate in wielding the potent weapon of contempt.”

(Emphasis supplied)

196. What can be discerned from the above exposition of law is that any act of disobedience, defiance, or any attempt to malign the authority of the court would amount to contempt because they undermine the respect and trust that the public reposes in judicial institutions. The judicial process relies on the confidence of society, and any act that disrupts or disrespects this process threatens to erode the foundation of justice and order.

197. Contempt jurisdiction exists to preserve the majesty and sanctity of the law. Courts are the guardians of justice, and their decisions must command respect and compliance to ensure the proper functioning of society. When individuals or entities challenge the authority of courts through wilful disobedience or obstructive behaviour, they undermine the rule of law and create the risk of anarchy. Contempt

serves as a mechanism to protect the integrity of the courts, ensuring that they remain a symbol of fairness, impartiality, and accountability.

198. When judicial orders are openly flouted or court proceedings are disrespected, it sends a signal that the rule of law is ineffective, leading to a loss of trust in the system. Judicial decisions must remain unimpaired, free from external pressures, manipulation, or circumvention. Acts that attempt to mislead the court, obstruct its functioning or frustrate its decisions distort the process of justice and would amount to contempt.

199.

200. Any contumacious conduct of the parties to bypass or nullify the decision of the court or render it ineffective, or to frustrate the proceedings of the court, or to enure any undue advantage therefrom would amount to contempt. Attempts to sidestep the court’s jurisdiction or manipulate the course of litigation through dishonest or obstructive conduct or malign or distort the decision of the courts would inevitably tantamount to contempt sans any prohibitory order or direction to such effect.

201. Thus, the mere conduct of parties aimed at frustrating the court proceedings or circumventing its decisions, even without an explicit prohibitory order, constitutes contempt. Such actions interfere with the administration of justice, undermine the respect and authority of the judiciary, and threaten the rule of law.”

(emphasis supplied)

12. Earlier, in Bihar State Government Secondary School Teachers Association vs. Ashok Kumar Sinha & Ors. (2014) 7 SCC 416, the Supreme Court, after acknowledging the power of the Government to frame service rules for

its employees held that if such Rules were framed with the sole intention to frustrate the effect of a judgment then such act would amount to contempt of court.

13. From the aforesaid judgments of the Supreme Court, it is evident that ***any act or order of any executive authority or other person which nullifies or frustrates the orders or directions of a court would amount to contempt of court.***

14. The orders dated 4.11.2024 and 9.11.2024 passed by the Special Secretary and the In-charge District Social Welfare Officer (Development) nullify the rights of the applicant / petitioner as recognized by this Court in its order dated 4.3.2024. The orders dated 4.11.2024 and 9.11.2024 of the charged government officers are in direct conflict with the directions issued in the order dated 4.3.2024 and frustrate the order of this Court. By passing the orders dated 4.11.2024 and 9.11.2024, the charged officers have clearly disobeyed the order dated 4.3.2024 passed by this Court.

15. The order dated 4.3.2024 passed by this Court was clear and there is no ambiguity in the aforesaid order. The order does not require any clarification. There are no two possible interpretations of the order dated 4.3.2024. The plea of the charged officers and the Additional Advocate General is that the orders dated 4.11.2024 and 9.11.2024 were passed under the impression that the direction issued by this Court vide its order dated 4.3.2024 was operative only if there was no legal impediment in paying the arrears of salary and the principle of 'no work no pay' is a legal impediment in paying arrears of salary to the applicant and the said rider by this Court in its order dated 4.3.2024 gave an impression to the officers that they had

the discretion to consider whether arrears of salary should be paid to the applicant.

16. The plea is farcical and cannot be accepted. The direction in the order dated 4.3.2024 to pay salary to the applicant for the period between 1.4.2022 to 21.1.2023 if there was no legal impediment only meant that the State respondents shall pay the salary unless the order was reversed or stayed in any appeal or review / recall filed by the State respondents for the said purpose. The rider in the order regarding absence of legal impediment did not confer a power on the Executive to review or reconsider the rights of the applicant which had been decided by this Court. The Executive has no power to either judge the correctness of an order passed by a Court or to review it. Under the Constitutional framework of which separation of powers and Rule of law are essential features, the only reason for complying with an order of a Court is that it is an order of the Court.

17. It has also been pleaded by and on behalf of the Special Secretary that there was no willful disobedience of the order passed by this Court in as much as the Special Secretary had passed the order dated 4.11.2024 on the recommendations of the Director, Department of Social Welfare, Government of Uttar Pradesh and the matter was not required to be referred to the State Government. The aforesaid plea of the Special Secretary is also not acceptable. The Special Secretary was not bound by the recommendations of the Director. In case, the Special Secretary was not required to take any decision or the records of the case were not required to be sent to the Special Secretary, the Special Secretary could have returned the file of the petitioner / applicant to the Director or whosoever was empowered to make

payment to the applicant in compliance of the order passed by this Court. The Special Secretary being the Head of the Department had every authority to reject the recommendations of the Director. The Director has not been summoned in contempt as mere recommendations to a superior officer would not constitute a cause of action for registering contempt proceedings either under Article 215 of the Constitution of India or under the Contempt of Courts Act, 1971. The order dated 4.11.2024 passed by the Special Secretary binds his subordinates and compels them to act accordingly. Nothing compelled the Special Secretary to accept the recommendations of the Director. The Special Secretary by accepting the recommendations of the Director and by passing an order prohibiting payment of salary to the applicant for the period between 1.5.2022 to 20.1.2023, had frustrated and nullified the order of this Court and had thereby willfully disobeyed it.

18. Similarly, Sri Prasoon Rai, the officer who at the relevant time was the In-charge District Social Welfare Officer (Development), Fatehpur had passed the order dated 9.11.2024 also willfully disobeyed the order of this Court and committed contempt by complying with the orders of the Special Secretary. Contempt proceedings are quasi-criminal in nature and the plea that an act was done on the command of the master is not an acceptable defense in contempt proceedings. All officers of the State who by their orders or any other act or conduct, disobey the orders of this Court or obstruct its implementation are liable to be prosecuted and punished in contempt. The orders dated 4.11.2024 and 9.11.2024 have been passed with the knowledge of the order dated 4.3.2024. The

orders dated 4.11.2024 and 9.11.2024 deny a right to the applicant which was recognized and awarded by this Court vide its order dated 4.3.2024. It requires no further elaboration to conclude that by passing the orders dated 4.11.2024 and 9.11.2024, the aforesaid State officers have willfully and intentionally disobeyed the order dated 4.3.2024 passed by this Court.

19. Lastly, the officers have tendered their apologies which they plead is unconditional and the Additional Advocate General pleads that the apologies purge the charged officers of the offense of contempt, therefore, the officers be discharged from the proceedings.

20. It has been held in various decisions of the Courts that apology cannot be taken as a weapon of defense and there should be evidence of real contriteness on the part of the contemnor. The apology should be offered at the earliest opportunity and in good grace. It be noted that a conduct which amounts to contempt of court if done by a layman who does not know the implications of his act may be excused if an apology is tendered but senior officers in the government are supposed to know the implications of their act. Officers of the State who do not know or understand the grave implications of their orders especially orders which affect the rights of the citizens as decided by the Courts, do not deserve to hold a responsible office in the Government. Senior officers in the government are expected to be more responsible and have a special obligation to respect the authority of the Court and ensure compliance of its orders.

21. In *In Re : - Sanjiv Datta & Ors.* (1995) 3 SCC 619, the Supreme Court while dealing with certain contumacious

statements made by the contemnors observed in Paragraph Nos. 9, 10 and 11 as follows : -

“9. We have considered the above apology tendered by the contemner. We find that the statements made in the affidavit when they were so made were to the knowledge of the contemner, a malicious attempt to cast aspersions on and attribute motives to the Court. They were not made in ignorance of their consequences nor were they innocent. A responsible officer of the Government like the contemner ought to have known, and we have no doubt that he did know the serious implications of the said statements. If he did not know of their grave implications he does not deserve to hold the office he does. If such statements were made by a layman we might have probably ignored them and also accepted the apology. Coming as they do from a public functionary, the Court will fail in its duty if it does not bring home to him his special obligations to respect the authority of the Court. If such trends as are displayed in these proceedings by the contemner are allowed to go scot-free, there is a danger of the erosion of the deference to and confidence in the judicial system. Coming as it does from the executive branch of the State, it has all the potentiality of mischief and if not curbed firmly, may in course of time assume proportion grave enough to sabotage the rule of law from within. As it transpires, the draft of the affidavit which was settled by Smt. Kumaramangalam was not the one which was filed and the affidavit was filed without even Shri Vasdev, Advocate-on-Record having a sufficient opportunity to peruse the same. That makes the action of the contemner doubly suspect with regard to his intentions in filing the affidavit with

the offending statements. He did not even take care to have the opinion of his advocates on the said statements. Probably, he did not want their opinion. This conduct of his speaks for itself and aggravates his offence. It is for this reason that we are not inclined to accept his apology.

*10. The responsibility to maintain the rule of law lies on all individuals and institutions. Much more so on the three organs of the State. Our Constitution has separated and demarcated the functions of the Legislature, the Executive and the judiciary. Each has to perform the functions entrusted to it and respect the functioning of the others. None is free from errors, and the judiciary does not claim infallibility. It is truly said that a judge who has not committed a mistake is yet to be born. Our legal system in fact acknowledges the fallibility of the courts and provides for both internal and external checks to correct the errors. The law, the jurisprudence and the precedents, the open public hearings, reasoned judgments, appeals, revisions, references and reviews constitute the internal checks while objective critiques, debates and discussions of judgments outside the courts, and legislative correctives provide the external checks. Together, they go a long way to ensure judicial accountability. The law thus provides procedure to correct judicial errors. **Abuses, attribution of motives, vituperative terrorism and defiance are no methods to correct the errors of the courts.** In the discharge of their functions the courts have to be allowed to operate freely and fearlessly but for which impartial adjudication will be an impossibility. Ours is a constitutional government based on the rule of law. **The Constitution entrusts the task of interpreting and administering the law to the judiciary whose view on the subject is made legally final and binding***

on all till it is changed by a higher court or by a permissible legislative measure. Those living and functioning under the Constitution have to accept and submit to this obligation of respecting the constitutional authority of the courts. Under a constitutional government, such final authority has to vest in some institution. Otherwise, there will be a chaos. **The court's verdict has to be respected not necessarily by the authority of is reason but always by reason of its authority.** Any conduct designed to or suggestive of challenging this crucial balance of power devised by the Constitution is an attempt to subvert the rule of law and an invitation to anarchy.

11. The contemner, for reasons which can only be attributed to his misconception of his role and over-zealousness to assert himself and his side of the matter intentionally overstepped his limits and conveniently ignored the above legal position, and abrogated to himself, in substance the role of a judge in his own cause. He has thus in effect not only challenged the jurisdiction of the Court to discharge its functions but also its authority to do so."

(emphasis supplied)

22. In **Bal Kishan Giri (supra)**, it was observed by the Supreme Court as follows :

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"12. This Court in *M.B Sanghi v. High Court of Punjab and Haryana*, while examining a similar case observed: (SCC p.602, para 2)

"2. ... The foundation of [judicial] system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It

is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society."

13. In *Asharam M. Jain v. A.T Gupta*, while dealing with the issue, this Court observed as under: (SCC p. 127, para 3)

"3. ... The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of Judges. It is not that Judges need be protected; Judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."

14. In *Jennison v. Baker All ER p. 1006d*, it was observed: (QB p. 66 H)

"... 'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.'"

15. The appellant has tendered an absolute and unconditional apology which has not been accepted by the High Court. The apology means a regretful acknowledgment or an excuse for failure. An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given. **Apology should be unquestionable in sincerity. It should be tempered with a sense of genuine remorse and repentance, and not a calculated strategy to avoid punishment.**

16. Sub-section (1) of Section 12 of the Act and the Explanation attached thereto enables the court to remit the punishment awarded for committing the

contempt of court on an apology being made to the satisfaction of the court. However, an apology should not be rejected merely on the ground that it is qualified or tendered at a belated stage if the accused makes it bona fide. A conduct which abuses and makes a mockery of the judicial process of the court is to be dealt with iron hands and no person can tinker with it to prevent, prejudice, obstruct or interfere with the administration of justice. There can be cases where the wisdom of rendering an apology dawns upon only at a later stage. Undoubtedly, an apology cannot be a defence, a justification, or an appropriate punishment for an act which tantamounts to contempt of court. An apology can be accepted in case where the conduct for which the apology is given is such that it can be "ignored without compromising the dignity of the court", or it is intended to be the evidence of real contrition. It should be sincere. Apology cannot be accepted in case it is hollow; there is no remorse; no regret; no repentance, or if it is only a device to escape the rigour of the law. Such an apology can merely be termed as "paper apology".

17. In *L.D Jaikwal v. State Of U.P.*, this Court noted that it cannot subscribe to the "slap-say sorry-and forget" school of thought in administration of contempt jurisprudence. Saying "sorry" does not make the slapper poorer. [See also *T.N Godavarman Thirumulpad (102) v. Ashok Khot.*] So an apology should not be "paper apology" and expression of sorrow should come from the heart and not from the pen; for it is one thing to "say" sorry, it is another to "feel" sorry.

18. An apology for criminal contempt of court must be offered at the earliest since a belated apology hardly

*shows the "contrition which is the essence of the purging of contempt". Of course, an apology must be offered and that too clearly and at the earliest opportunity. However, even if the apology is not belated but the court finds it to be without real contrition and remorse, and finds that it was merely tendered as a weapon of defence, the court may refuse to accept it. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment, it ceases to be an apology and becomes an act of a cringing coward. (Vide *Debabrata Bandopadhyay v. State of W.B.*, *Mulk Raj v. State Of Punjab*, *Hailakandi Bar Assn. v. State of Assam*, *C. Elumalai v. A.G.L. Irudayaraj and Ranveer Yadav v. State Of Bihar.*)*

19. This Court has clearly laid down that an apology tendered is not to be accepted as a matter of course and the court is not bound to accept the same. The court is competent to reject the apology and impose the punishment recording reasons for the same. The use of insulting language (sic and later on tendering an apology) does not absolve the contemnor on any count whatsoever. If the words are calculated and clearly intended to cause any insult, an apology, if tendered and lack penitence, regret or contrition, does not deserve to be accepted. (Vide *Baradakanta Mishra v. Registrar of Orissa High Court*, *Bar Council of Maharashtra v. M.V. Dabholkar*, *Asharam M. Jain v. A.T. Gupta*, *Mohd. Zahir Khan v. Vijai Singh*, *Ministry of Information & Broadcasting*, In re, *Patel Rajnikant Dhulabhai v. Patel Chandrakant Dhulabhai and Vishram Singh Raghubanshi v. State Of U.P.*)

20. That the power to punish for contempt is a rare species of judicial power which by the very nature calls for exercise with great care and caution. Such power ought to be exercised only where "silence

is no longer an option.” (See S. Mulgaokar, In re, H.G. Rangangoud v. State Trading Corpn. of India Ltd., Maninderjit Singh Bitta v. Union of India, T.C. Gupta v. Hari Om Prakash and Arun Kumar Yadav v. State Of U.P.) Power of courts to punish for contempt is to secure public respect and confidence in judicial process. Thus, it is a necessary incident to every court of justice.”

23. The conduct of the Special Secretary and the explanations given by him do not show that his apology is sincere. The Special Secretary pleads that the order was passed on the recommendations of the Director. As noted earlier, the Special Secretary was not bound by the recommendations of the Director. Subsequently, in his affidavit dated 3.12.2024, the Special Secretary also pleads that the salary of the applicant can be paid only after the pay-roll / attendance of the petitioner/ applicant is certified by the Manager of the Committee of Management of the Institution for the period 1.5.2022 to 21.1.2023. It has been further pleaded that the salary of the applicant for the period 1.5.2022 to 20.1.2023 was not made because the Manager of the Institution had not provided the pay-roll / attendance certificate of the petitioner/ applicant for the period between 1.5.2022 to 20.1.2023. The same averment has also been made by the present District Social Welfare Officer (Development), Fatehpur in her affidavit. The explanation is apparently false and made only to mislead this Court. The attendance register would be required if the payment of arrears was dependant on the petitioner having worked in the Institution. It is apparent, as noted earlier, that the petitioner / applicant could not have worked in the Institution between 1.5.2022 to 21.1.2023 and there

was no way by which the Manager of the Institution could have provided the attendance certificate / pay-roll of the applicant. The requirement of attendance certificate from the Manager may have been required only to enforce the principle of ‘no work no pay’ and thereby deny the arrears of salary to the applicant / petitioner in accordance with the orders dated 4.11.2024 and 9.11.2024 and contrary to order dated 4.3.2024 passed by this Court. A bare reading of the order dated 4.3.2024 passed by this Court would show that the Court directed payment of salary to the applicant for the period from 1.4.2022 to 21.1.2023 after considering that she had been wrongly not allowed to work during the aforesaid period. Further, it is to be noted that the Special Secretary and the District Backward Class Welfare Officer have been charged for contempt of court not because of any delay in payment of arrears of salary to the applicant but because of the conduct of the contemnors in overriding and thereby nullifying and frustrating the order dated 4.3.2024 passed by this Court.

24. At this stage, it is relevant to note that the orders dated 4.11.2024 and 9.11.2024 which persuaded this Court to frame charges against the contemnors were passed after notices in the present contempt case were issued on 24.10.2024. The conduct of the Special Secretary shows that he has no respect for the authority of the court or fear of law. The order dated 4.11.2024 reflects arrogance of the contemnor. Apparently, the apology tendered by the Special Secretary is not genuine and has been made only to avoid punishment in contempt.

25. It is also noted that in his affidavit dated 10.12.2024, the Special Secretary has

filed different orders passed by him and the Director, Social Welfare, Government of Uttar Pradesh disclosing that disciplinary proceedings were instituted against the present District Social Welfare Officer (Development) for non-payment of arrears of salary to the applicant and adverse entry has been given to her for her failure to pay salary to the applicant in terms of the order dated 4.3.2024. It is difficult to comprehend as to how the present District Social Welfare Officer could have been held responsible for non-payment of salary to the applicant / petitioner when the senior officers in the department were recommending non-payment of arrears and orders had been passed by the previous District Social Welfare Officer (Development) and also the Special Secretary holding that the applicant was not entitled for payment of salary for the period between 1.5.2022 and 21.1.2023. The act of the Special Secretary in trying to pass the buck and his role in preventing payment of salary to the applicant in terms of the order dated 4.3.2024 passed by this Court shows that the apology tendered by the Special Secretary is not sincere and has been given only to avoid punishments in the proceedings.

26. In light of the aforesaid conclusions and the observations of the Supreme Court in *CELIR LLP (supra)*, it is the duty of this Court to take a strict view of the matter so far as the Special Secretary is concerned and wield the weapon of contempt to uphold and maintain the dignity of this court and also the majesty of law.

27. However, after considering the hierarchical structure of the bureaucracy and the fact that any non-compliance of an order passed by a senior officer may result

in disciplinary proceedings against the junior officers and also the fact that the order dated 9.11.2024 passed by Sri Prasoon Rai, the then In-charge, District Social Welfare Officer (Development), Fatehpur and presently the District Backward Class Welfare Officer, Fatehpur was consequential to the order dated 4.11.2024, the apology of Sri Prasoon Rai is accepted and he is to be discharged from the proceedings.

28. In view of the aforesaid, the Special Secretary and the then In-charge District Social Welfare Officer (Development), Fatehpur and presently District Backward Class Welfare Officer are held guilty of willful disobedience of the order dated 4.3.2024 passed by this Court in Writ – A No. 19650 of 2022. The apology tendered by the Special Secretary does not persuade this Court to discharge him from contempt as the said apology is not genuine and sincere. For reasons noted earlier, Sri Prasoon Rai, the present District Backward Class Welfare Officer, Fatehpur is to be discharged.

29. In view of the aforesaid, the Court proceeds to pass the following order : -

1. Sri Rajnish Chandra, the present Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow is hereby sentenced to detention in the Court itself and shall remain in detention till the rising of the Court at 01:00 p.m. and with a fine of Rs.2000/- (Rs. Two Thousand) payable by 4.1.2025 to the Registrar General of this Court. On failure of the aforesaid contemnor to pay the fine as noted above, the contemnor shall undergo one month imprisonment for which a warrant shall be issued by the Chief Judicial Magistrate, Allahabad.

2. Sri Prasoon Rai, the present District Backward Class Welfare Officer, Fatehpur is discharged.

30. The Court officer shall take into custody Sri Rajnish Chandra, the present Special Secretary, Department of Social Welfare, Government of Uttar Pradesh, Lucknow, who is present in the Court today, and shall keep Sri Rajnish Chandra in his custody in the Court till the rising of the Court at 01:00 p.m.

31. As the order dated 4.3.2024 passed by the Writ Court has been fully complied, no further orders are required to be passed. The contempt application is *disposed of* accordingly.

(2024) 12 ILRA 53
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 111 of 2019

Arshad Husain ...Appellant
Versus
Shahneela Nishat ...Respondent

Counsel for the Appellant:
Shafiq Mirza, Ali Akhtar Zaidi

Counsel for the Respondent:
Mohd. Mustafizul Haq

Civil Law – Family Court Act, 1984 - Section 19 - Criminal Procedure Code, 1973 – Sections 125 & 127 - Muslim Personal Law (Shariat) Application Act, 1937 – Section 2:- Appeal - challenging the judgment of family court - whereby a declaration case filed by the husband for

declaration of matrimonial status was dismissed – husband claiming that he had given triple talaq to his wife - the Family Court found no evidence that the *Talaq* was pronounced during the non-menstrual period or that reconciliation efforts were made, relying on judgment of Apex court in case of *Shayara Bano v. Union of India* (which declared instant *Triple Talaq* unconstitutional) dismissed the declaration case – first appeal – court finds that, during pendency of the instant appeal, both parties entered into a mutual agreement (Mubara'at), agreeing to withdraw all pending cases and dissolve their marriage by mutual consent - court verified the mutuality and voluntariness of the agreement – Held, under Shariyat Law, a marriage can be dissolved by mutual agreement between the husband and wife – but, it does not affect the liability of husband to maintain here wife or children as per the agreement – hence, in the light of the facts that they agreed to dissolve the marriage, subject to payment of Rs. 30 Lacks by the husband to the wife, no useful purpose would be served by remitting the matter back to the family court for further proceeding - accordingly, the appeal is disposed of in terms of the Mubara'at agreement, the marriage was declared dissolved, - impugned judgment is set aside – direction issued for issue a decree of divorce. (Para – 8, 9, 11, 12)

First Appeal Allowed. (E-11)

List of Cases cited:

1. Shayara Bano Vs Union of India, reported in (2017) 9 SCC 1,
2. Zohara Khatoon Vs Mohd. Ibrahim, (1981) 2 SCC 509,
3. Asbi .K.N Vs Hashim M.U. - 2021 SCC Online Ker 3945,
4. Shabnam Parveen Ahmad Vs Mohammed Saliva Shaikh, 2024 SCC OnLine Kar 39.

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Ali Akhtar Zaidi, learned Counsel representing the appellant/husband and Shri Mohd. Mustafizul Haq, learned Counsel representing the respondent/wife.

(2) This appeal under Section 19 of the Family Courts Act, 1984 has been filed by the husband/appellant, seeking to quash the judgment and order dated 04.07.2019 passed by the learned Principal Judge, Family Court, Lucknow, whereby Declaration Case No. 214 of 2019 filed by the husband/appellant for declaration of matrimonial status of the parties has been dismissed at the admission stage.

(3) Facts of the case are that the marriage between the appellant and the respondent was solemnized on 12.01.2002 in accordance with Islamic Rites and Rituals. It was the case of the appellant that after marriage, the behaviour of his wife was not good as his wife was having affair with a police officer, on account of which his wife visited her parental house frequently. With the connivance of the said police officer, his wife had lodged frivolous complaint against him and her behaviour became cruel. Ultimately, on 02.07.2018, she went to parental home and since then, she is living there only. Despite efforts made by him for reconciliation, settlement between them was not arrived and ultimately he gave *triple talaq* to his wife in accordance with muslim law. In this background, the appellant had instituted the declaration case, bearing No. 214 of 2019, seeking to declare the matrimonial status of the parties, before the Family Court, Lucknow.

(4) The learned Family Court, Lucknow, heard the aforesaid declaration case at admission stage and has returned a finding

that though the husband claimed to have given *triple talaq* in the month of March, April and May, but there was neither any endorsement to the fact that first, second and third talaq were given by the husband during the non-menstrual period of the wife nor there was any endorsement to the fact that any effort for reconciliation preceded Talaq. By recording these findings and placing reliance upon the judgment of the Apex Court rendered in **Shayara Bano v. Union of India : (2017) 9 SCC 1**, the learned Family Court has dismissed the declaration case vide judgment and order dated 04.07.2019 at the admission stage, which is assailed in the present appeal.

(5) During the hearing of the present appeal, learned Counsels for the parties have drawn attention to Annexure SSA-1 of the second supplementary affidavit, which is a *Mubara'at* (mutual agreement) dated 15.06.2024 entered into between the parties. This mutual agreement was also filed in the proceedings under Section 125 of the Cr.P.C. initiated by the respondent (wife), bearing Case No. 358 of 2018. The agreement provides that both parties will withdraw all pending cases between them, and the marriage shall be dissolved by mutual consent, subject to the payment of Rs.30,00,000/- (Rupees Thirty Lakhs) by the husband to the wife in three installments. Learned Counsel for the appellant submits that both the parties are living separately and the husband has already paid the entire sum of Rs.30,00,000/- in three installments and requests that the present appeal be disposed of in terms of the mutual agreement, thereby dissolve the marriage between the parties by consent.

(6) Mohd. Mustafizul Haq, learned Counsel representing the respondent/wife does not dispute the aforesaid mutual

agreement dated 15.06.2024 and states that Rs.30,00,000/- has been paid to the wife by the husband/appellant in three installments and the respondent has no objection to declare the marriage of the parties dissolve in terms of the mutual agreement dated 15.06.2024.

(7) Muslim Personal Law (Shariat) Application Act, 1937, governs marriage and divorce for Muslims in India. Section 2 of the Act explicitly recognizes various forms of divorce, including *Mubara'at*, *Khula*, *Talaq*, and *Faskh*.

(8) Under Shariyat Law, a marriage can be dissolved by mutual agreement between the husband and wife. This mutual dissolution may take the form of *khula* or *mubara'at*. *Mubara'at*, a form of mutual consent, is a valid and recognized method for dissolution of marriage. It allows both spouses to agree to terminate their marital relationship without requiring judicial intervention, as long as their intentions are clear and unambiguous. The process begins when one spouse proposes the dissolution, and the other spouse agrees. Once both parties affirm their intention to end the marriage, the divorce takes effect, but it does not affect the liability of husband to maintain her wife or children as per the agreement. We have also gone through the law laid down by the Supreme Court in the case of **Zohara Khatoon v. Mohd. Ibrahim, (1981) 2 SCC 509**, and reaffirmed by subsequent judgments, the irrevocability of *mubara'at* takes effect once the intention of both parties to dissolve the marriage is established, in para 22 of the judgment, the Supreme Court has made following observations:—

“22.In these circumstances we are, therefore, satisfied that the

interpretation put by the High Court on the second limb of clause (b) is not correct. This seems to be borne out from the provisions of Mahomedan law itself. It would appear that under the Mahomedan law there are three distinct modes in which a Muslim marriage can be dissolved and the relationship of the husband and the wife terminated so as to result in an irrevocable divorce:

(1) *Where the husband unilaterally gives a divorce according to any of the forms approved by the Mahomedan law viz. talak ahsan, which consists of a single pronouncement of divorce during tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat; or talak ahsan which consists of three pronouncements made during the successive tuhrs, no intercourse taking place between three tuhrs;.....*

(2) *By an agreement between the husband and the wife whereby a wife obtains divorce by relinquishing either her entire or part of the dower. This mode of divorce is called “khula” or mubarat. This form of divorce is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where, however, both parties agree and desire a separation resulting in a divorce, it is called mubarat. The gist of these modes is that it comes into existence with the consent of both the parties particularly the husband because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to by the husband. In such a case*

the wife can repudiate herself in the exercise of the power and the divorce would be deemed to have been pronounced by the husband. This mode of divorce is called "tawfeez" (vide: Mulla's Principles of Mahomedan Law, § 314, p, 300).

....." (emphasis added)

(9) When parties approach a court seeking formal recognition of their divorce through *mubara'at*, the court's primary role is to verify the mutuality and voluntariness of the agreement. Upon satisfaction, the court is obligated to endorse the dissolution and declare the marital status of the parties as divorced. The High Court of Kerala at Ernakulam in the case of **Asbi .K.N versus Hashim M.U. reported in 2021 SCC OnLine Ker 3945** in paragraphs 4 and 5 of the said judgment is reproduced herein below:-

"4.The Division Bench of this Court in X v.Y (2021 (2) KHC 709) has held that the Family Court in exercise of the jurisdiction under Explanation (d) of S.7 of the Act is competent to endorse an extrajudicial divorce to declare the marital status of a person. It was made clear in the said judgment that in the matter of unilateral dissolution of marriage invoking khula and talaq, the scope of enquiry before the Family Court is limited and in such proceedings, the Court shall record the khula or talaq to declare the marital status of the parties after due notice to other party. In the matter of mubaraat, the Family Court shall declare the marital status without further enquiry on being satisfied that the dissolution was effected on mutual consent. It was observed that such matter shall be disposed treating it as uncontested matter without any delay by passing a formal order declaring the marital status. It was further held that if

any person wants to contest the effectiveness of khula or talaq, it is open for such person to contest the same in appropriate manner known under the law.

5.The unilateral extrajudicial divorce under Muslim Personal law is complete when either of the spouse pronounce/declare talaq, talaq-e-tafweez or khula, as the case may be, in accordance with Muslim Personal Law. So also extrajudicial divorce by mubaarat mode is complete as and when both spouses enter into mutual agreement. The seal of the Court is not necessary to the validity of any of these modes of extra judicial divorce. The endorsement of extrajudicial divorce and consequential declaration of the status of the parties by the Family Court invoking S.7(d) of the Act is contemplated only to have a public record of the extrajudicial divorce. Hence, detailed enquiry is neither essential nor desirable in a proceeding initiated by either of the parties to endorse an extrajudicial divorce and to declare the marital status. The Family Court has to simply ascertain whether a valid pronouncement/declaration of talaq or khula was made and it was preceded by effective attempt of conciliation. In the case of khula, it has to be further ascertained whether there was an offer by the wife to return the "dower". It could be ascertained by perusal of the recitals in talaq nama/khula nama or its communication (if it is in writing) or by recording the statement of the parties. No further enquiry as in the case of an adversarial litigation like chief examination and cross-examination of the parties are not at all contemplated in such a proceedings. If the Court is prima facie satisfied that there was valid pronouncement of talaq/khula/talaq-e-tafweez, it shall endorse the same and declare the status of the parties. In the case of mubaarat, if the Court is prima

facie satisfied that mubaarat agreement has been executed and signed by both parties, it shall endorse the same and declare the status of the parties. The Court shall pass formal order declaring the marital status without any delay. If any of the parties want to challenge the extrajudicial divorce by talaq, khula, mubaarat or talaq-e-tafweez mode, he/she is free to challenge the same in accordance with law in appropriate forum. The declaration granted by the Family Court u/s 7(d) endorsing the extrajudicial divorce shall be subject to the final outcome of such proceedings, if any. We consider it desirable to formulate the following guidelines to be followed by the Family Court in a petition filed u/s 7(d) of the Act to endorse an extrajudicial divorce under Muslim Personal Law and to declare the marital status of the parties to the marriage.

(i) On receipt of the petition, the Family Court shall issue notice to the respondent.

(ii) After service of summons or appearance of the respondent, as the case may be, the Family Court shall formally record the statement of both parties. The parties shall also be directed to produce talaq nama/khula nama (if pronouncement/declaration is in writing)/mubaarat agreement.

(iii) The Family Court shall thereafter on perusal of the recitals in talaq nama/khula nama/ communication of talaq, khula or talaq-e-tafweez (if available) and the statement of the parties, ascertain whether there was valid pronouncement of talaq/khula/talaq-e-tafweez. In the case of mubaarat, the Family Court shall ascertain whether the parties have executed and signed mubaarat agreement.

(iv) On prima facie satisfaction that there was valid pronouncement of talaq, khula, talaq-e-tafweez, as the case may be, or valid execution of mubaarat agreement, the Family Court shall proceed to pass order endorsing the extrajudicial divorce and declaring the status of the parties without any further enquiry.

(v) The enquiry to be conducted by the Family Court shall be summary in nature treating it as an uncontested matter.

(vi) The Family Court shall dispose of the petition within one month of the appearance of the respondent. The period can be extended for valid reasons.

(vii) If any of the parties is unable to appear at the Court personally, the Family Court shall conduct enquiry using video conferencing facility.”

(10) The Karnataka High Court in Shabnam Parveen Ahmad v. Mohammed Saliya Shaikh, 2024 SCC OnLine Kar 39 in paragraph no. 9 of the said judgment held as under:—

“9. Having considered the contentions advanced and in view of the decisions which are relied on by the learned counsel appearing for the appellants we are of the opinion that the finding of the Family Court that the Family Court is not empowered to consider the application for Divorce by mutual consent when the parties are Muslims cannot said to be the correct proposition. In view of the fact that the parties have entered into Mubarat agreement and have decided to dissolve the marriage entered into between them by the said agreement, we are of the opinion that the prayer sought for by the parties i.e., for a declaration as to the dissolution of marriage ought to have been granted by the Family Court.”

(11) In the present case, the facts are undisputed that the parties are living separately and have entered into a Mubara'at agreement dated 15.06.2024, wherein they mutually agreed to dissolve the marriage, subject to the payment of Rs.30,00,000/- by the husband to the wife. It is also undisputed that the sum of Rs.30,00,000/- has been paid in full by the husband, and both the appellant and respondent have consented to the dissolution of the marriage. In light of these facts, this Court finds that no useful purpose would be served by remitting the matter back to the Family Court for further proceedings.

(12) Accordingly, the present appeal is **disposed of** in terms of the mutual agreement (*mubara'at*) dated 15.06.2024. The decree of divorce in terms of mutual agreement/consent dated 15.06.2024 is granted by declaring dissolution of the marriage between the parties. Let a decree be prepared accordingly.

(13) The judgment and order dated 04.07.2019 passed by the learned Principal Judge, Family Court, Lucknow, in Case No. 214 of 2019 is hereby set aside.

(14) The suit for the declaration of matrimonial status is decreed.

(15) The matrimonial status of the parties is declared as "divorced" under Muslim Personal Law and in accordance with their mutual agreement dated 15.06.2024.

(2024) 12 ILRA 58
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal No. 136 of 2024

Naveen Chand Jain ...Appellant
Versus
Manav Sharma ...Respondent

Counsel for the Appellant:
 Anjali Sinha, Rahul Sahai

Counsel for the Respondent:
 Nipun Singh

A. Civil Law – Civil Procedure Code, 1908 – Order VII - Rule 11 – Rejection of plaint – Cause of action – Relevance of its determination – Property was sold by the defendant making his status as stranger – Effect – Held, cause of action to claim injunction against a stranger is certainly recognized under the law and, therefore, the view taken by the trial court that after the defendant had sold the property, the plaintiff did not disclose a cause of action against him, is certainly erroneous – There exists no circumstance warranting rejection of plaint by invoking Order 7 Rule 11 (d) CPC at this stage and there can be adjudication of all the aspects after framing proper issues and holding full-fledged trial. (Para 15 and 23)

B. Civil Law – Specific Relief Act, 1963 – Section 41(h) – Injunction, grant of – Principle of equally efficacious remedy and its exception – Held, injunction cannot be granted when equally efficacious relief can be obtained by any other usual mode of proceeding, however, the exception carved out to the said provision is that it would not apply when there is a case of breach of trust. (Para 20)

First appeal allowed. (E-1)

List of Cases cited:

1. Balram Singh Vs Kelo Devi; 2022 SCC Online SC 1283

2. Church of Christ Charitable Trust & Educational Charitable Society Vs Ponniamman Educational Trust; (2012) 8 SCC 706

3. ABC Laminart (P) Ltd. Vs A.P. Agencies (1989) 2 SCC 163

4. Popat and Kotecha Property Vs St. Bank of India Staff Association; 2005 (61) ALR 457

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Supplementary affidavit filed today is taken on record.

2. Heard Sri Rahul Sahai, learned counsel for the plaintiff-appellant and Sri Anoop Trivedi, learned Senior Counsel, assisted by Sri Nipun Singh, learned counsel for the defendant-respondent.

3. Since the appeal arises out of rejection of plaint under Order 7 Rule 11 CPC, only plaint averments and some documents forming part of plaint are relevant for deciding the matter and, hence, with the consent of learned counsel for the parties, without summoning the record of trial court, the instant appeal is being finally decided as necessary material has been appended alongwith the stay application as well as supplementary affidavit filed today.

4. The plaintiff-appellant is aggrieved by the impugned order dated 10.11.2023, whereby learned Civil Judge (Senior Division)/ F.T.C., Muzaffar Nagar has rejected the plaint of Original Suit No.439 of 2018 (Naveen Chand Jain Vs. Manav Sharma) under Order 7 Rule 11 CPC. The said order amounts to "decree" under Section 2(2) CPC. Hence, this appeal under Section 96 CPC.

5. Brief facts giving rise to the instant appeal are that the plaintiff-

appellant filed the aforesaid suit claiming a decree for permanent prohibitory injunction restraining the defendant-respondent himself or through his agency from causing interference in running of petrol pump over the property in dispute and dispossessing him without following due process of law. The property in dispute was described as marked by alphabets 'A', 'B', 'F' 'E' in the plaint map.

6. The basis of the claim of the plaintiff-appellant was a lease granted by the defendant-respondent in favour of Hindustan Petroleum Corporation Limited (HPCL) and an agreement of dealership executed by the said Corporation in favour of the plaintiff-appellant on 29.09.2015. Certain averments regarding existence of initial agreement of the decade of 1960 and its renewal from time to time were also made in the plaint and the cause of action giving rise to the suit was alleged that whereas the appellant was running the petrol pump, the defendant was causing interference therein. Few averments regarding payment of a sum of Rs.60,00,000/- by the plaintiff to the defendant based upon some oral understanding to sell the property, were also made in the plaint.

7. The trial court has rejected the plaint recording few reasons, one of which is that since the defendant has sold the property by a registered sale deed, paper No.60-C/1 to 60-C/10 (annexed alongwith the supplementary affidavit filed today), he ceases to be owner of the property and, hence, there remains no cause of action against the defendant. Second reason is based upon Section 41(h) of the Specific Relief Act, 1963 that relief of specific performance of the agreement being an equally efficacious remedy, the same

having not been availed, the suit is barred and, hence, the plaint is liable to be rejected under Order 7 Rule 11 (d) CPC. Third reason is that the defendant was not a party to the agreement between the plaintiff-appellant and the HPCL and it is apparent from the plaint averments that there is no relationship between the plaintiff and the defendant.

8. Following points for determination arise for consideration in this appeal as per Order 41 Rule 31 CPC:-

"(a) Whether the plaint disclosed a cause of action ?

(b) Whether rejection of plaint by invoking Section 41(h) of the Specific Relief Act, 1963 and on account of defendant having lost title to the property is justified ?"

9. Assailing the order impugned, Sri Rahul Sahai submits that the plaint averments clearly establish a triable case, inasmuch as not only a sum of Rs.60,00,000/- was paid by the appellant to the respondent, continuous running of petrol pump for the last about 60 years was alleged and, therefore, injunction against unlawful interference was rightly claimed. As regards the sale of the property, it is contended that the suit was filed in the year 2018, whereas the property was sold by the defendant in the year 2020 and when the defendant did not remain owner of the property, this circumstance cannot go against the plaintiff-appellant, rather the plaintiff was entitled to claim injunction against the defendant, who has now become a stranger to the property.

10. Per contra, Sri Anoop Trivedi, learned Senior Counsel submits that as only an oral agreement for sale was alleged in

the plaint and on the basis thereof, no decree for specific performance can be granted, once the plaintiff cannot get any relief based upon alleged oral understanding or alleged oral agreement, he cannot claim injunction. Further submission is that the plaint contained inconsistent pleas and whereas at some places some privity of contract between the plaintiff and Ved Prakash (non- party) was alleged and at some other places, lapse of agreement and, even thereafter, continuity in alleged tenancy rights was pleaded. As far as the relationship between the plaintiff and defendant is concerned, since no cause of action arose to claim the relief against the defendant, the trial court was justified in rejecting the plaint both under Order 7 Rule 11 (a) and Rule and 11 (d) CPC. In support of his submissions, he has placed reliance upon judgment of Supreme Court in **Balram Singh Vs. Kelo Devi: 2022 SCC Online SC 1283**.

11. Having heard the learned counsel for the parties, while dealing with **first** point of determination, the Court has to read the entire plaint so as to understand as to whether bare statement contained in the plaint gives rise to cause of action for filing the suit. The entire plaint raises different pleas, one based upon agreement between the defendant and HPCL, the other is based upon relationship between such HPCL and the plaintiff arising out of contract/ agreement regarding running of petrol pump, third, between the plaintiff and non-party Ved Prakash in respect of expiry of lease granted qua part of the property for a period of 15years, fourth, some oral understanding of sale of the property between parties to suit and transfer of a sum of Rs.60,00,000/- through R.T.G.S. by the plaintiff in the account of the defendant and fifth, continued tenancy even after non-

execution of the fresh agreement of tenancy between the plaintiff and Ved Prakash.

12. These questions certainly require adjudication during the course of trial and at least, at this stage, there is no dispute between the parties that the appellant is in possession over the property in dispute and is running a petrol pump. The cause of action alleged in paragraph no.27 of the plaint is that the defendant was, despite transferring the property of service station, is causing interference in running of the petrol pump by somehow impressing the authorities of the HPCL and threatening to get the supply of fuel stopped and also to dispossess the appellant.

13. The Supreme Court, in **Church of Christ Charitable Trust & Educational Charitable Society [Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706]**, has observed and held as under:

“13. While scrutinising the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. **The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words “cause of action”.** A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.”

14. In **ABC Laminart (P) Ltd. v. A.P. Agencies [(1989) 2 SCC 163]**, the Supreme

Court explained the meaning of “cause of action” as follows:

“12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.”

15. In view of the contents of plaint in the present case, even if the property was sold by the defendant prior to institution of the suit or even *lis pendens*, vide paper No.60-C, in both the cases his status would become as that of stranger to the property, although, earlier, he might have been owner either of the entire property or a part thereof. Cause of action to claim injunction against a stranger is certainly recognized under the law and, therefore, the view taken by the trial court that after the defendant had sold the property, the plaint did not disclose a cause of action against him, is certainly erroneous.

16. First point for determination is, accordingly, decided in favour of the

appellant holding that the plaint disclosed a cause of action and, hence, the rejection of plaint by invoking Order 7 Rule 11 (a) CPC was not justified.

17. As regards **second** point for determination, the Court has to examine whether the bar contained under Section 41 (h) of the Specific Relief Act, 1963 can be invoked at this stage of proceedings. There is no dispute about the fact that there is no written agreement for sale executed between the parties and the statement of plaint is that there was some oral understanding for selling the property in between the plaintiff and defendant in connection where to, a sum of Rs.60,00,000/- was transferred by the plaintiff in the bank account of the defendant. Whether any amount was paid or not paid is a question of trial and, at this stage, no observation can be made in that regard.

18. As far as claim for injunction based upon an oral agreement is concerned, reliance placed by Sri Trivedi on the judgment of **Balram (supra)** needs to be examined in the facts of the present case. The case of **Balram (supra)** had arisen out of a suit for injunction based upon only an unregistered agreement to sell dated 23.03.1996. The Supreme Court held that since the plaintiff might not succeed in getting the relief of specific performance of such agreement to sell as the same was unregistered, he had filed a suit simplicitor for permanent injunction only. The Supreme Court also observed that it may be true that in a given case, an unregistered document can be used and/or considered for collateral purpose, however, at the same time, the plaintiff cannot get the relief indirectly which he otherwise cannot get in a suit for substantive relief.

19. The said judgment, with great respect, would not apply in the facts of the present case for certain reasons. First, that there is no written unregistered agreement for sale between the parties. Secondly, the relief of injunction claimed in the instant case is not solely dependent upon the oral understanding for sale, rather it is based upon many other averments like transfer of a sum of Rs.60,00,000/- in the account of the defendant by the plaintiff through R.T.G.S. mode, loss of title vested in the defendant after the property was sold, privity of contract between the plaintiff and HPCL that had granted an agreement for running a petrol pump, which has not been discontinued by any action of the Petrol Corporation, 6 decades old possession etc. Under such circumstances, even if the bar under Section 41(h) is examined, it may be a case where the plaintiff's case may fall under the **exceptional clause** contained in sub-section (h). For a ready reference, Section 41(h) of the Specific Relief Act, 1963 is quoted as under:-

"41. (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding **except in case of breach of trust**"

20. A bare perusal of the aforequoted provision shows that injunction cannot be granted when equally efficacious relief can be obtained by any other usual mode of proceeding, however, the exception carved out to the said provision is that it would not apply when there is a case of breach of trust.

21. The Supreme Court in **Popat and Kotecha Property Vs. State Bank of India Staff Association: 2005 (61) ALR 457**, in paragraph no.13 of the report, has held as under:-

“13. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.”

22. In the facts of the present, transfer of a sum of Rs.60,00,000/- by the plaintiff to the defendant is a question to be tried in the suit. Further, long continuance of petrol pump over the land which was earlier owned by the defendant is a matter which may give rise to element of acquiescence on the part of the defendant as regards running of the petrol pump on the land owned by him, whether in lieu of exchange of money or otherwise in the nature of permissive possession etc. When the plaint averments speak transfer of property by the defendant, his status becomes that of a stranger and, under such circumstances, equally efficacious remedy concept does not directly apply, inasmuch as the cause of action is not directly correlated to the grievance of the appellant to sell the property to the appellant nor is there any challenge to the sale made by the defendant to any third party. The entire plaint case is

based upon unwarranted interference by the defendant-respondent in the plaintiff-appellant's right to run the petrol pump.

23. In the facts of the case, there exists no circumstance warranting rejection of plaint by invoking Order 7 Rule 11 (d) CPC at this stage and there can be adjudication of all the aspects after framing proper issues and holding full fledged trial. Even impleadment of third party or amendment of plaint based upon given facts or subsequent developments may be an aspect and, therefore, rejection of plaint at this stage by invoking Order 7 Rule 11 (d) CPC is not justified. **Second** point for determination is also decided accordingly.

24. In view of the above discussion, this Court is satisfied that the plaint could not be rejected under Order 7 Rule 11 CPC and, hence, the impugned order is not sustainable.

25. The appeal is **allowed**.

26. The impugned judgment and order dated 10.11.2023 passed by the learned Civil Judge (Senior Division)/ F.T.C., Muzaffar Nagar in Original Suit No.439 of 2018 (Naveen Chand Jain Vs. Manav Sharma) is **set aside**.

27. The suit stands revived to its original number and same status that existed on the date when the plaint was rejected.

28. The trial court is directed to proceed with the suit and it shall decide the same expeditiously by the **end of year 2025**.

29. It is made clear that the instant appeal has been decided only examining the rejection of plaint under Order 7 Rule

11 CPC and the trial court shall be at all its competence to decide all questions of fact and law involved in the matter after holding full-fledged trial.

(2024) 12 ILRA 64

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 20.12.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 240 of 2002

Ram Kripal & Ors. ...Appellant
Versus
Jagjeevan & Anr. ...Respondents

Counsel for the Appellant:
U.S. Sahai

Counsel for the Respondents:
D.C. Mukharji, Dr. Ramsurat Pande, Surya Bhan Singh, Vinod Mishra

Civil Law – Civil Procedure Code, 1908 - Section 100 - Rule 4A - Order 22- Rule 4, 5, 6, 11 - Order-41 - Rule-31 - UP Zamindari Abolition & Land Reforms Act, 1950 - Section 210 – Indian Succession Act, 1925 - Section 63 - Indian Evidence Act, 1872 – Section 68 - Second appeal - seeks to set aside the judgment and decree, passed in Civil Appeal - the lower appellate court allowed the appeal, overturning the trial court's decision and cancelling the sale deed in question, directing the trial court to inform the concerned Sub Registrar - The defendant-appellants argued that the suit for cancellation of the sale deed was based on general allegations, which were denied in the written St.ment, and the trial court rightly dismissed the suit - However, the lower appellate court accepted the appeal, claiming that plaintiff an illiterate Pardanashin village lady, had her thumb impression obtained on the sale deed through fraud and misrepresentation – court finds that, since the plaintiff, who had filed the appeal, died after the hearing was concluded,

therefore, the proceedings did not abate and on the other hand, considered the application of respondent no. 1 and allowed without, following the prescribed procedure – held, the lower appellate court directed to addressed the issue of legal representation of the deceased plaintiff-appellant – hence, the matter is remitted to the lower appellate court to decide the issue as to whether the respondent no. 1 is legal representative of the plaintiff or not afresh in accordance with law within a period of three months without granting unnecessary adjournment to either parties – direction issued to list the second appeal after receipt of the order passed by the lower court – appeal is pending. (Para – 13, 14, 18, 19, 24, 25)

Second Appeal Pending. (E-11)

List of Cases cited:

1. Krishna Devi Vs Siksha Devi; MANU/UP/2018/2020, [(2020) 3 AWC 2230 All],
2. Ali Husain (Dead) Through Legal Representatives Vs Rabiya & ors.; (2019) 9 SCC 353,
3. Kewal Krishan Vs Rajesh Kumar & ors.; 2022 (156) RD 171,
4. Smt. Dularia Devi Vs Janardan Singh & ors.; 1990 RD (SC) 193,
5. Jokhu Vs Deputy Director Consolidation, Pratapgarh & ors.; 2018 (36) LCD 453,
6. Laxmi Narain & anr. Vs Smt. Hubraja @ Barki; 1989 (7) LCD 284.
7. Jaladi Suguna (deceased) through LRs Vs Satya Sai Central Trust & ors.; (2008) 8 SCC 521,
8. Mahanth Satyanand @ Ramjee Singh Vs Shyam Lal Chauhan & ors.; (2018) 18 SCC 485.

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

1. Heard, Shri U.S. Sahai, learned counsel for the appellants and Dr. R.S. Pande, learned Senior Advocate assisted by

Shri Vinod Mishra, learned counsel for the respondents.

2. This second appeal under Section 100 of Civil Procedure Code (here-in-after referred as CPC) has been filed for setting aside the judgment and decree dated 30.05.2002 passed in Civil Appeal No.4/2001; Smt. Gaya Dei Vs. Ram Kripal and Others by 6th Additional District and Sessions Judge, Sultanpur, by means of which the appeal has been allowed and the judgment and decree passed by the court below i.e. the trial court has been set aside and the sale deed in question has been cancelled with a direction to the trial court to communicate the cancellation of sale deed to the concerned Sub-Registrar.

3. The appeal has been admitted on the following substantial questions of law:-

"1. Whether the judgement and decree rendered by the lower Appellate Court stands vitiated for non compliance of the mandatory provisions contained under Order XXXI, Rule 31 C.P.C.

2. Whether even after the clear admissions made by Smt. Gaya Dei that she has not filed any suit for cancellation and she being totally ignorant about the case, the lower Appellate Court could allow the appeal and decree the plaintiffs' suit.

3. Whether the Lower Appellate Court could reverse the findings recorded by the trial court without considering the reasons adopted by the trial court and the evidence relied upon by the trial court.

4. Whether during pendency of the appeal before the Lower Appellate Court, in the matter of substitution consequent on the death of Smt. Gaya Dei, alleged Will set up by the respondents Jagjeevan, being disputed, the Lower Appellate Court could substitute the

Jagjeevan without entering into evidence and without the Will having been proved."

4. Learned counsel for the defendant-appellants submitted that the suit for cancellation of sale deed by Gaya Dei in favour of Pudda was filed with general allegations in the plaint, which were denied in the written statement filed by the defendant-appellant nos.1 to 3. The trial court, after considering the pleadings, evidence and material on record and recording the finding that the execution and thumb impression on the sale deed has been admitted by the Gaya Dei and no allegation has been levelled against the transferee and no evidence of any benefit to her confident Ram Lakhan Singh has been adduced, rightly dismissed the suit. He further submitted that the lower appellate court has allowed the civil appeal filed by the plaintiff-respondent without following the provisions of Order-41, Rule-31 CPC. He further submitted that the lower appellate court, without considering that the predecessor-in-interest of the plaintiff-respondent Gaya Dei had executed two sale deeds including the sale deed in question and contested a case of mutation with Smt. Maha Dei and the murder case, therefore, it can not be said that she was not aware with the worldly affairs and entitled for any benefit of Pardanashin lady, held that the thumb impression had been obtained on sale deed in her ignorance and misleading her. The lower appellate court also failed to consider that the plaintiff Gaya Dei admitted in her evidence that she has not filed any suit for cancellation of sale deed and she does not know about the suit and she has come to court twice only. Thus, admittedly, the suit was not filed by her but was got filed by some other person. He further submitted that the financial condition and capability to purchase the

land in dispute by Pudda has not been questioned but the lower appellate court considered the same and also considering the evidence of other witnesses recorded findings on the basis of presumption without any basis and failed to consider the cross-examination of PW-1 Gaya Dei, in which she admitted two sale deeds and sale deed about eleven years back, thus, the sale deed of appellant has been admittedly executed by her.

5. On the basis of above, learned counsel for the defendant-appellants submitted that the impugned judgment and decree passed by the lower appellate court is not sustainable in the eyes of law and it is liable to be set-aside restoring the judgment and decree passed by the trial court. He relied on **Krishna Devi Vs. Siksha Devi; MANU/UP/2018/2020, [(2020) 3 AWC 2230 All]** and **Ali Husain (Dead) Through Legal Representatives Vs. Rabiya and Others; (2019) 9 SCC 353**.

6. Per contra, learned counsel for the plaintiff-respondent vehemently opposed the submissions of learned counsel for the defendant-appellants. He submitted that the lower appellate court had failed to consider the evidence adduced by the defendant-appellants rightly and in accordance with law, therefore, the same has rightly been considered by the lower appellate court in accordance with law and after considering the same in detail and recording the findings thereon allowed the appeal. Thus, the provisions of Order-41, Rule-31 CPC have been followed and since all the issues have been considered by the lower appellate court, therefore, it can not be said to have been vitiated merely because the points for determination have not been formulated. The appeal has been filed on

misconceived and baseless grounds. The substantial questions of law formulated in this appeal does not arise in this appeal, therefore, the appeal is liable to be dismissed with cost. He relied on **Kewal Krishan Vs. Rajesh Kumar and Others; 2022 (156) RD 171, Smt. Dularia Devi Vs. Janardan Singh and Others; 1990 RD (SC) 193, Jokhu Vs. Deputy Director Consolidation, Pratapgarh and Others; 2018 (36) LCD 453 and Laxmi Narain and Another Vs. Smt. Hubraja @ Barki; 1989 (7) LCD 284**.

7. I have considered the submissions of learned counsel for the parties, and perused the records.

8. The suit for cancellation for sale deed was filed by the Gaya Dei alleging therein that she is illiterate Pardanashin village lady, who became widow after few days of her marriage and her whole life passed with the help of neighbours and on her confidants. She was owner and in possession of Gata No.811 as Bhumidhar in continuation of her mother-in-law. Ram Lakhan Singh is residing near her old house and their family used to go each others. He also used to help her in agriculture as per need. She had to contest a case with Ram Dei after death of her mother-in-law, in which also he had helped and got the evidence of his close man Pudda son of Manbhod adduced. The old house of the plaintiff was at an aloof place, therefore, the said Ram Lakhan had helped her in getting a land in his neighbourhood and constructing a new house on the same, on account of which she had more confidence on him. Ram Lakhan Singh asked to the plaintiff that her new house is required to be recorded in the records and for the said purpose he took her to Musafirkhana and got her thumb impression on many papers

and she put the thumb impression with a view that it was required. The said Ram Lakhan had not informed for any execution of sale deed. When the plaintiff demanded a copy of the documents of her agricultural fields on 16.07.1989 from the Lekhpal then she came to know that the name of predecessor-in-interest of the defendant-appellants Pudda has been recorded on the land in question bearing Gata No.811. Then, after inspection from the Tehsil Musafirkhana, she got the copies and came to know that Pudda has got a registered sale deed executed from her, whereas she has not executed the sale deed. Thereafter, after coming to know about the ex-party mutation in favour of the Pudda, she filed an appeal under Section 210 of U.P. Zamindari Abolition and Land Reforms Act, which is pending. The suit for cancellation of sale deed was filed on the grounds that she has not got any money in consideration of sale. She was also not in need of any money on account of which she would had to sell her land. She has not given any party (bhog) and went on pilgrimage, for which she would have to borrow. The sale deed in question is an out come of fraud. Pudda was doing her agriculture and she had full confidence on him. The said Ram Lakhan Singh had put Pudda with her to look after the agriculture of the plaintiff. The plaintiff has no legal heir. The witnesses of the sale deed and Pudda are the confidants to each other.

9. The suit was contested by the defendant-appellants denying most of the averments made in the plaint. It has further been alleged that the plaintiff is a clever lady and knows worldly affairs. However, it was not disputed that the house of the plaintiff was at an aloof place and after murder of Ram Deen, she had lived with Ram Lakhan Singh for same time, from

where Tribhuvan had forcibly taken her away. It was further alleged that the plaintiff has made a concocted story of going to Musafirkhana for recording the name for the new house. Pudda used to live at the house of the plaintiff, for which he was being paid wages. The pattidar of the plaintiff Tribhuvan and others were angry with the sale deed executed by her, therefore after death of Pudda they had also murdered the father of the respondent no.4 Ram Dev, on account of which in the criminal prosecution against them, they have been convicted with life imprisonment. The mother of the defendant-appellant no.4 had moved an application and adopted the written statement filed by the defendant-appellants no.1 to 3.

10. After exchange of pleadings, following six issues were framed by the trial court.

"1. क्या वादिनी का दावा कथनानुसार प्रश्नगत बैनामा मंसूख होने योग्य है?

2. (क) क्या वाद मूल्यांकन कम है ?

(ख) क्या अदा किया गया न्याय शुल्क अपर्याप्त है ?

3. क्या दावा काल बाधित है ?

4. क्या वाद 34/41 विनिर्दिष्ट अनुतोष अधिनियम से बाधित है ?

5. क्या दावा 33। जमींदारी विनाश अधिनियम से बाधित है?

6. क्या वादिनी किसी अनुतोष को पाने की अधिकारिणी है ?"

11. After framing of issues, the documentary as well as oral evidence was adduced by the parties. Gaya Dei; the plaintiff appeared as PW-1, Brij Lal as PW-2 on behalf of the plaintiff. Devta Deen the defendant-appellant no.2 appeared as DW-1, Ram Das as DW-2, Shanker Bux Singh

as DW-3, Mohd. Zaki son of Mohd. Shafi as DW-4, Ram Lakhan Singh as DW-5 and Shiv Prasad Yadav as DW-6 on behalf of the defendant-appellants. Thereafter, after hearing learned counsel for the parties and considering the pleadings, evidence and material on record, the trial court dismissed the suit. Being aggrieved, the civil appeal was filed by the plaintiff. Before the lower appellate court, the respondent no.2 Hub Lal claiming himself to be the maternal grand father of the defendant-appellant no.4 moved an application for appointment of his guardian on the ground that his mother Janki is mad, therefore, she is not in a position to protect the interest of the minor. However, the lower appellate court held that the mother of the defendant-appellant no.4 Smt. Janki is prudently protecting the interest of the minor and she has rightly adopted the written-statement of the other defendant-appellants no 1 to 3. During pendency of appeal the plaintiff Gaya Dei died, therefore the respondent no.1 was authorised to pursue the proceedings of appeal on the basis of a will of Gaya Dei produced by him. Thereafter the lower appellate court proceeded to consider and decide the appeal considering each and every issue framed by the trial court and allowed the appeal with cost setting aside the judgment and decree passed by the trial court and cancelled the sale deed in question with a direction to the trial court to inform to the concerned Sub-Registrar about it. Hence this second appeal has been filed by the defendant-appellants, which has been admitted on the aforesaid substantial questions of law.

12. The fourth substantial question of law is in regard to procedural lapse on the part of the lower appellate court in deciding the question of legal representative of the plaintiff-appellant before it. The disposal of

the said issue makes respondent no.1 legal representative of Gaya Dei because there is no other successor of the deceased plaintiff-appellant before the lower appellate court, therefore, this court deems it appropriate to consider it first because the proceedings can be continued only after determination of the issue of legal representative as in absence of legal representative the proceedings can be continued after following procedure prescribed in Rule 4A of CPC.

13. The judgment was reserved on 13.09.2001 by the lower appellate court, which was to be delivered on 19.09.2001. Gaya Dei the plaintiff-appellant before lower appellate court, who had filed the suit for cancellation of sale deed died on 16.09.2001, therefore, the application was filed on 17.09.2001 informing the same with a request for abatement. An objection to the same was filed that since the case is fixed for judgment, therefore, there is no question of abatement of appeal under Order-22, Rule-6. The application was filed by respondent no.1 Jagjivan Mishra claiming himself to be the legal representative of the Gaya Dei on the basis of a registered will executed by her on 20.08.1998 in his favour. An application was also filed by one Shesh Narain Dwivedi for his substitution. However, the same was not pressed, therefore, it was dismissed. An objection, to the application filed by the respondent no.1, was filed on the ground that Gaya Dei had not executed any will and the will presented by respondent no.1 is forged and fabricated. An application was filed by the defendant-appellant Ram Kripal etc. for their substitution on the basis of sale deed, claiming that they are the legal representatives of the deceased Gaya Dei and since the will deed has been executed

after execution of sale deed, therefore, it has no effect and the judgment could not be pronounced within 14 days, therefore, they should be substituted. An objection was filed by the respondent no.1 stating therein that the will deed was correct and registered and he has right to prosecute the further proceedings.

14. The learned lower appellate court, after considering the applications and the objections, found that since the hearing was concluded on 13.09.2000 and the judgment was to be delivered on 19.09.2001, therefore, the question of abatement of appeal under Order-22, Rule-6 does not arise. The lower appellate court held that the pronouncement of judgment is not part of hearing. Thereafter, the lower appellate court proceeded to consider the application filed by the respondent no.1 for substitution on the basis of will executed by deceased plaintiff Gaya Dei on 20.08.1998 of her movable and immovable property and considering the evidence on record, the learned lower appellate court recorded a finding that there is evidence on record that Gaya Dei was living with Tribhuvan prior to her death and the defendant-appellants have admitted in their objection that the respondent no.1 Jagjivan is brother-in-law of Tribhuvan and after considering certain case laws held that since the defendant-appellants are already on record, therefore, it would be justified to declare the respondent no.1 authorised for pursuing the appeal further and accordingly authorised him by means of the order dated 24.10.2001 and fixed the case for hearing as more than 14 days had passed after hearing of the case. Thus, the lower appellate court appears to be of the view that both are legal representative of the deceased Gaya Dei, whereas the court should have decided as to whether the

respondent no.1 would be legal representative of the deceased Gaya Dei or not to pursue the proceedings. The lower appellate court without deciding it conclusively after hearing allowed the appeal and set aside the judgement and decree passed by the trial court and allowed the suit and cancelled the sale deed.

15. Order-22, Rule-5 of CPC provides the determination of question as to legal representative, which is extracted here-in-below:-

"5. Determination of question as to legal representative.—Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

[Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.]"

16. Proviso to the aforesaid rule provides that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question, therefore if a question arises before the court as to who is legal representative of plaintiff or defendant, it is to be decided by the court. If this question arises before an appellate

court, it may direct the subordinate court to try the question and return with evidence recorded, if any, therefore, if for trying the question of legal representative any evidence is required to be recorded, if can be recorded and thereafter considering the same, the question of legal representative can be determined.

17. In the present case, the question as to whether the respondent no.1 is the legal representative of the deceased Gaya Dei or not was before the lower appellate court because he was claiming on the basis of a registered will executed in his favour by Gaya Dei and an objection was filed to the same by the defendant-appellants disputing the will deed and alleging that the will deed is forged and fabricated and it could not have been executed by Gaya Dei after execution of sale deed, therefore, the respondent can not be a legal representative of Gaya Dei. Therefore, it was incumbent upon the lower appellate court to consider the said issue of legal representative of Gaya Dei as per the procedure prescribed under Order-22, Rule-5 of CPC. But the learned lower appellate court without following the procedure as prescribed under law authorised the respondent no.1 to pursue the proceedings of appeal, that too without his substitution, whereas in case the question of legal representative was determined, he should have been made a party in appeal in view of Rule-3 of Order-22.

18. The learned lower appellate court on the one hand held that since the plaintiff, who had filed the appeal, died after the hearing was concluded, therefore, the proceedings did not abate and on the other hand, considered the application of respondent no.1 and allowed without, following the prescribed procedure and

authorized him to pursue the proceedings without his substitution/ impleadment, whereas if there was no abatement under Order-22, Rule-6 CPC, there was no question of authorizing the respondent no.1 to pursue the appeal. Rule-6 of Order-22 CPC is extracted here-in-below:-

"6. No abatement by reason of death after hearing.—*Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.*"

19. In view of above, this Court is of the view that the lower appellate court has not only not followed the procedure prescribed under law but also allowed the application of the respondent no.1 recording contradictory findings, which could not have been done because a dispute was raised in regard to the validity of the will deed on the basis of which, the respondent no.1 had set up his claim for being legal representative of the deceased plaintiff-appellant Gaya Dei before the lower court, which could not have been decided without following the due procedure of law and provisions of section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act.

20. The Hon'ble Supreme Court, in the case of **Jaladi Suguna (deceased) through LRs Vs. Satya Sai Central Trust and Others; (2008) 8 SCC 521**, has held that provisions of Rules 4 and 5 of Order 22 are mandatory and where a question arises as

to whether who should be the legal representative and if there is a dispute as to who is the legal representative, a decision should be rendered on such dispute and only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. However, it will be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. It has further been held that though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record. The deceased in the said case was defendant-respondent and in the present case the plaintiff-appellant before the lower appellate court had died, therefore, the provisions of Rule-3 read with Rule-11 of Order-22 CPC would be attracted. The relevant paragraphs 14, 15 and 16 are extracted here-in-below:-

"14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent-plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (the tenant) was only a pro forma respondent. When the first

respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore, it was necessary to bring the legal representative(s) of the deceased Suguna on record to proceed with the appeal.

15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased.

16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as

parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record."

21. The Hon'ble Supreme Court, in the case of **Mahanth Satyanand @ Ramjee Singh Vs. Shyam Lal Chauhan And Others; (2018) 18 SCC 485**, has held that the issue of bringing on record the legal representative in a pending appeal has to be dealt with in a manner prescribed under the provisions of Order 22 Rule 5. The Court, before proceeding to decide with the substantive issues involved in the case, first and foremost, shall decide who is the legal representative of the deceased. It has further been held that the statute has clearly mandated that if the question of deciding the legal representative of a legatee arises before an appellate Court, it may direct the subordinate Court to make enquiries by leading evidence, if any, through the

process of trial and record its finding as to who is the legal representative and after considering the finding recorded by the trial Court, the appellate Court can decide and bring on record the legal representative of the deceased. It has also been held that procedural laws are meant to advance justice and a procedure contemplated under the code which is mandatory in nature shall not be skipped or ignored by the Courts. The relevant paragraphs 10 and 11 are extracted here-in-below:-

"10. Apparently, the issue of bringing on record the legal representative in a pending appeal has to be dealt with in a manner prescribed under the provisions of Order 22 Rule 5. From the context of the settled legal position, it is clear that when a question arises before the court in a pending matter as to who will come on record as the legal heir of the deceased, the court shall, before proceeding to decide with the substantive issues involved in the case, first and foremost, shall decide who is the legal representative of the deceased. It is also well settled that when a party dies at the stage of second appeal and there are rival contenders claiming to be the legal representatives of the deceased, as in the present case, there is a burden cast upon the court to first decide as to who is the legal representative of the deceased. Without doing so, the court cannot proceed with the disposal of the case on hand. At the same time, the court cannot make all the contenders as parties. The aspect of deciding legal representative cannot also be postponed with a view to decide the same at the time of final disposal of the appeal on merits. It is significant that the statute has clearly mandated that if the question of deciding the legal representative of a legatee arises before an appellate court, it may direct the

subordinate court to make enquiries by leading evidence, if any, through the process of trial and record its finding as to who is the legal representative. After considering the finding recorded by the trial court, the appellate court can decide and bring on record the legal representative of the deceased.

11. It is indisputable that the procedural laws are meant to advance justice. A procedure contemplated under the code which is mandatory in nature shall not be skipped or ignored by the courts. Whereas, in the instant case, the High Court's approach has diluted the purport of Order 22 Rule 5 CPC and is contrary to the law laid down by this Court in Jaladi Suguna [Jaladi Suguna v. Satya Sai Central Trust, (2008) 8 SCC 521]. Such an approach of the High Court cannot be sustained."

22. In view of above, since the question as to whether the respondent no.1 is legal representative of the plaintiff-appellant Gaya Dei before the lower appellate court or not, in regard to which the dispute was raised by the defendant-appellants, was not decided determining the question in accordance with law, therefore, it requires to be decided in accordance with law.

23. It is also noticed by this Court that though an objection has been raised by the defendant-appellants that the respondent no.1 is the brother-in-law of Tribhuvan and the lower appellate court has also considered the same but in the will deed placed on record as Paper No.15-Ga/1, it has been stated that after death of the husband of Gaya Dei, she was being looked after by the son of the daughter of her maternal uncle, who is like her son and even at this stage of old age also Jagjivan

Mishra is serving her in each possible manner, therefore, the relationship of respondent no.1 with the deceased Gaya Dei does not seem to be clear. An application was also moved by Jagjivan Mishra but in the present case he has been impleaded as Jagjivan. Though parentage is same but it has not been objected, although Vakalatnama has been signed by Jagjivan Mishra.

24. In view of above, this Court is of the view that the lower appellate court has decided the issue as to whether the respondent no.1 is legal representative of the plaintiff-appellant Smt. Gaya Dei before the lower appellate court or not without following the due procedure of law and recording contradictory and perverse findings, therefore, this Court is of the view that the same should be decided first by the lower appellate court before considering the other substantial questions of law and decide this appeal finally because it may have impact on the entitlement of the respondent no.1 not only after disposal of this appeal but in the further proceedings also as the matter is old and appeal is pending since a long time. This court deems it appropriate to direct to the lower appellate court to determine the question as to whether the respondent no.1 is the legal representative of the deceased Gaya Dei or not in accordance with law and the observations made here-in-above in this order after considering the respective pleadings and affording opportunity to the parties to lead evidence on the same. The fourth substantial question of law stands decided accordingly.

25. The matter is remitted to the lower appellate court to decide the aforesaid issue as to whether the respondent no.1 is legal representative of the plaintiff Gaya Dei or

not afresh in accordance with law and observations made here-in-above in this order expeditiously and within a period of three months without granting unnecessary adjournment to either of the parties and fixing at least one date in a week and, if possible, on day to day basis and send the order so passed alongwith the evidence adduced by the parties, if any. The determination of the issue earlier made by the lower appellate court shall be subject to fresh determination made by the lower appellate court under this order and abide by the same.

26. The case shall be listed immediately after receipt of the order passed by the lower appellate court with the record or in the week commencing 21.04.2025, whichever is earlier for further hearing.

27. The lower court record shall be remitted forthwith to the concerned appellate court so that it may reach before the date fixed before the lower appellate court for appearance in this order. The parties shall appear before the lower appellate court on 15.01.2025.

(2024) 12 ILRA 74
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal No. 388 of 2015
 With
 First Appeal No. 357 of 2016
 With
 First Appeal No. 1104 of 2003
 With
 First Appeal No. 1138 of 2003

Natthan Singh

Versus

...Appellant

State of U.P. & Ors.

...Respondents

Counsel for the Appellant:

Madan Mohan, Rakesh Pande, Shailesh K. Upadhyay, Shailesh Upadhyay

Counsel for the Respondents:

Ashok Mehta, Prabhat Tripathi, S.C., Subodh Kumar

A. Acquisition Law – Land Acquisition Act, 1894 – Section 6 – Award – Determination of compensation – Doctrine of merger – Applicability – High Court passed an order dated 10.01.2002 in Ran Singh's case enhancing the compensation, against which S.L.P. of acquiring body (CPWD and UOI) was dismissed *in limine* with certain observation regarding impleadment – C.P.W.D./U.O.I. were not parties to the lis culminating into the order dated 10.01.2002 – Effect – Held, the adjudication made by this Court in Ran Singh's case would not amount to merger or confirmation of this Court's judgment dated 10.01.2002 in the Supreme Court's orders, at least affecting or prejudicing any right of acquiring body. (Para 9, 23 and 24)

B. Acquisition Law – Land Acquisition Act, 1894 – Sections 9 & 25 – Award – No claim was raised in pursuance to the notice issued u/s 9 – No dispute regarding service of notice has been raised – Effect – Entitlement of over amount to the award – Bar of Section 25 – Applicability – Held, S. 25, as existed on the date of issuance of notifications, would operate as a statutory obstruction standing against the claimants to claim any higher compensation over and above Rs. 1.90/- per Sq. Yd. as determined by the S.L.A.O. under the initial award. (Para 26 and 32)

First Appeal of tenure holders dismissed and of St. allowed. (E-1)

List of Cases cited:

1. Uttar Pradesh Awasth Vikas Vs Gyan Devi (deceased); 1995 (2) SCC 326

2. St. of U.P. & anr. Vs Virendra Bahadur Katheria & ors.; 2024 (3) SLJ 1

3. Ram Kumar Vs St. of U.P. & ors.; AIR 2022 SC 4705

4. Dadoo Yogendranath Singh & ors. Vs The Collector, Seoni; 1977 (2) SCC 1

5. Gobardhan Mahto Vs St. of Bihar; 1979 (4) SCC 330

6. Dilawarsab Babusab Mullasab & ors. Vs Special Land Acquisition Officer; 1975 (1) SCC 158

7. St. of Maharashtra Vs Shanta Bai & anr.; AIR 1980 Bombay 36

8. Ashok Kumar & anr. Vs St. of Haryana; (2016) 4 SCC 544

9. Narendra Kumar & ors. Vs St. of U.P. & ors.; 2017 (9) SCC 426

10. Krishi Utpadan Mandi Samiti Vs Kanhaiya Lal & ors.; 2002 (7) SCC 756

(Delivered by Hon'ble Kshitij Shailendra, J.)

APPEALS ARISING OUT OF LAND ACQUISITION REFERENCES

1. Heard Shri Shailesh Upadhyay, learned counsel appearing for the claimants/tenure holders in all matters and Shri Subodh Kumar alongwith Shri Udit Chandra, learned counsel appearing for C.P.W.D. as well as U.O.I. at length.

2. Since common questions of fact and law are involved in all the matters, the same are being decided by common judgment. Distinguishing features of individual cases, if any, would reflect at appropriate places in this judgment or in the judgment/order passed in such matters separately.

For the convenience sake, First Appeal No. 388 of 2015 is being treated as the leading appeal.

3. The instant appeal is directed against the judgment and order dated 30.03.1991 passed by learned Additional District Judge, Ghaziabad in Land Acquisition Reference No. 29 of 1987. The land in dispute situates in village Raispur, Tehsil and District Ghaziabad. The description of area and all gatas number does not seem to be relevant as the issue involved in all these matters revolves around few orders passed by this Court earlier in other matters and few orders passed by Hon'ble Supreme Court. As a matter of fact, these appeals are to be decided in the light of effect of those decided proceedings.

BRIEF FACTS AND PROCEEDINGS

4. The land of tenure holders, namely, Ran Singh, Ganga Ram, Nathhan Singh, Khoob Singh, Ram Kishan etc. was acquired by the State of U.P. for the purposes of development by the Central Public Works Department (hereinafter referred to as "C.P.W.D."). Notification under Section 4 of the Land Acquisition Act, 1894 was issued on 28.12.1963 that was published on 04.01.1964. It was followed by notification under Section 6 of the Act published on 24.07.1965. A corrigendum was issued on 10.10.1972 regarding certain plots that were skipped in the earlier notifications and, consequently, the left-out plots were also included in the acquired land. State Government took possession over the acquired land on 09.03.1973. An award was published by the Special Land Acquisition Officer (hereinafter referred to as "S.L.A.O.") on 22.09.1986 awarding compensation at the rate of Rs. 1.90/- per Sq. Yd.

5. Five land owners filed Land Acquisition References (hereinafter referred to as "L.A.Rs.") seeking enhancement of compensation. These L.A.Rs. were clubbed together with following details and were jointly decided by the reference court by judgment dated 30.03.1991 enhancing compensation from Rs.1.90/- per Sq. Yd. to Rs. 8/- per Sq. Yd.:-

(i) L.A.R. No. 25 of 1987 (Ran Singh and others vs. State of U.P.)

(ii) L.A.R. No. 26 of 1987 (Ganga Ram and others vs. State of U.P.)

(iii) L.A.R. No. 27 of 1987 (Ram Kishan vs. State of U.P.)

(iv) L.A.R. No. 29 of 1987 (Natthan and others vs. State of U.P.)

(v) L.A.R. No. 30 of 1987 (Khoob Singh and another vs. State of U.P.)

6. Three (3) land owners, out of five (5), filed following First Appeals before this Court:-

(i) First Appeal No. 809 of 1993 (Ran Singh vs. State of U.P.)

(ii) First Appeal (Defective) No. 322 of 1992 (Natthan and others vs. State of U.P.) (subsequently registered as regular First Appeal No. 388 of 2015, i.e. the instant leading appeal).

(iii) First Appeal (Defective) No. 248 of 1992 (Ganga Ram and others vs. State of U.P.) (subsequently registered as regular First Appeal No. 357 of 2016)

7. State of U.P. also filed five (5) First Appeals against Reference Court's order dated 30.03.1991 with following details:-

(i) First Appeal (Defective) No. 612 of 1991 (State of U.P. vs. Ran Singh) (subsequently renumbered as First Appeal No. 1140 of 2003)

(ii) First Appeal (Defective) No. 614 of 1991 (State of U.P. vs. Ram Kishan) (subsequently renumbered as First Appeal No. 1119 of 2003)

(iii) First Appeal (Defective) No. 609 of 1991 (State of U.P. vs. Khoob Singh) (subsequently renumbered as First Appeal No. 1143 of 2003)

(iv) First Appeal (Defective) No. 613 of 1991 (State of U.P. vs. Natthan) (renumbered as First Appeal No. 1104 of 2003)

(v) First Appeal (Defective) No. 611 of 1991 (State of U.P. vs. Ganga Ram) (renumbered as First Appeal No. 1138 of 2003)

8. First Appeal No. 809 of 1993 (Ran Singh vs. State of U.P.) (herein-after referred to as "Ran Singh's case") was allowed by this Court by judgment dated 10.01.2002 enhancing compensation from Rs.8/- per Sq. Yd to Rs. 84/- per Sq. Yd. In the meantime, some affected land holders filed

applications under Section 28-A of Land Acquisition Act, 1894 that were allowed by the S.L.A.O. and an award was declared on 16.08.1992. Being aggrieved, Union of India preferred Writ Petition Nos. 31447 of 1992, 31448 of 1992, 31449 of 1992, 31450 of 1992 that were allowed by a Division Bench of this Court by a common order dated 27.03.2003, the award dated 16.08.1992 was quashed with further observation that "applications under Section 28-A shall be kept pending by the Collector/Land Acquisition Officer and shall be decided in accordance with law after the decisions in pending first appeals", i.e. above-referred first appeals filed by the State of U.P.

9. Challenging the aforesaid order dated 10.01.2002 passed in Ran Singh's case enhancing compensation from Rs.8/- per Sq. Yd to Rs. 84/- per Sq. Yd, the State of U.P. filed Special Leave Petition No. 5022 of 2004 (*S.L.P. No. at some places is described as 3022 but the case is same*) before the Supreme Court that was rejected on the ground of delay on 19.07.2004. The State of U.P. filed Review Application No. 227 of 2005, which was also rejected on 15.02.2005 after condoning the delay. Thereafter, C.P.W.D. filed a review application alongwith impleadment application before this Court seeking review of the order dated 10.01.2002 passed in Ran Singh's case. The said applications were rejected by this Court on 12.08.2009 as barred by time and after making certain other observations. Challenging the order dated 12.08.2009, C.P.W.D. filed S.L.P. Nos. 16202-16203 of 2010, which were dismissed by the Supreme Court on 18.07.2011 with observation that the question whether the acquiring body was a necessary party or not, was not gone into S.L.Ps..

10. Taking aid of observations made in order dated 18.07.2011, C.P.W.D. and U.O.I. filed impleadment applications in the pending appeals and the same were allowed. Consequently, in the appeals filed by the State of U.P., C.P.W.D. and U.O.I. were impleaded as appellants whereas in the appeals filed by the tenure holders, they were impleaded as respondents. The orders allowing impleadment applications were never challenged and, therefore, these appeals were heard by and against the said impleaded parties. The Court may observe here that in orders dated 01.11.2017 passed in First Appeal

Nos. 1104-2003 and 1138-2003 it has already been observed that State had chosen not to press these appeals and the appeals shall remain only at the instance of C.P.W.D./Union of India.

11. When the appeals came up for joint consideration on merits, this Court, after taking into consideration the above-referred orders passed by this Court and the Supreme Court in Ran Singh's case, dismissed the First Appeal No. 1119 of 2003 (State of U.P. vs. Ram Kishan) by order dated 06.11.2012 observing finality attached to the determination of market value of the property and non-filing of any cross-objections or cross appeals against the award of the Reference Court.

12. Thereafter, successors of late Ram Kishan, i.e., respondents in First Appeal No. 1119 of 2003, filed delay condonation application, leave to press an abatement application accompanied by review application with the contention that the appeal could not be decided on merits as factum of death of Ram Kishan was not brought to the notice of the Court and, hence, the appeal had stood abated by operation of law. This Court, by order dated 02.02.2016, allowed the review application, recalled the order dated 06.11.2012 and another order dated 26.08.2015 earlier dismissing the application seeking leave to press an abatement application, restored the said application to its original number, allowed the abatement application and dismissed the appeal as abated. This Court, however, made it clear that order dismissing the appeal as abated would be read in relation to the First Appeal No. 1119 of 2003 (State vs. Ram Kishan) only and insofar as other four connected appeals are concerned, the order dated 06.11.2012 would remain operative. It is needless to mention that on 06.11.2012 when First Appeal No. 1119 of 2003 (State vs. Ram Kishan) was dismissed on merits, connected First Appeal Nos. 1140 of 2003 (State vs. Ran Singh) 1143 of 2003 (State vs. Khaob Singh) were also dismissed for the reasons given in the order deciding First Appeal No. 1119 of 2003.

POINTS FOR DETERMINATION

13. Having heard learned counsel for the parties, following points for determination arise for consideration in these appeals:-

1. "Whether in view of the judgment/order of this Court dated 10.01.2002 passed in First Appeal No. 809 of 1993 (Ran Singh's case) having travelled upto the Supreme Court, C.P.W.D. and/or U.O.I, have been left with any say in the matter and can determination of compensation as Rs.84/- per Sq. Yd. be set aside/reduced by this Court ignoring doctrine of merger?"

2. Whether the tenure holders having not raised a claim pursuant to notice issued under section 9 of the Land Acquisition Act, 1894, as it then existed, they are, at all, entitled for any amount over and above the one awarded by the S.L.A.O. in view of bar contained in section 25?

ARGUMENTS ON BEHALF OF TENURE HOLDERS

14. Shri Shailesh Upadhyay, learned counsel appearing for the tenure-holders, vehemently argued that once this Court enhanced compensation from Rs.8/- per Sq. Yd. to Rs. 84/- per Sq.Yd. and the said judgment was carried upto the Supreme Court by the State of U.P. and also by C.P.W.D. and U.O.I. and the Supreme Court dismissed the S.L.Ps. as well as review application granting no relief to either State of U.P. or C.P.W.D. or U.O.I., no contrary view can be taken by this Court against the determination of compensation at the rate of Rs.84/- per Sq. Yd. and, hence, all the appeals filed by C.P.W.D. and U.O.I. are liable to be dismissed and those filed by the tenure-holders are entitled to be allowed determining compensation at the rate of Rs. 84/- per Sq.Yd. It was also argued that when the Reference Court decided five L.A.Rs. by judgment dated 30.03.1991, the Special Land Acquisition Officer, Joint Organization, Ghaziabad wrote a letter dated 13.05.1991 to the concerned Engineer of C.P.W.D., Hinden, Ghaziabad asking him to furnish his opinion regarding filing of appeal against the order of Reference Court and associated aspects like expenses qua the same. Responding to the said letter, the concerned Engineer of C.P.W.D. sent a communication dated 27.06.1991 to the S.L.A.O stating that since the Department was not a party to the proceedings and was informed at the very last stage, it was not possible for the Department to prefer appeal, until and unless the Department was arrayed as a party. The Engineer asked the S.L.A.O to file an

appeal at his own end. Submission is that once C.P.W.D. expressed its reluctance to challenge the decision of the Reference Court and asked State to prefer appeal and, once, the State preferred appeals and lost from this Court and, then, upto the Supreme Court, C.P.W.D. cannot make any submission against the determination which has attained finality. It has further been argued that even if C.P.W.D. has made submissions in this case, since all the tenure holders are identically placed and their land was also acquired under same notifications, they are entitled for the same rate of compensation as has been determined in Ran Singh's case.

ARGUMENTS ON BEHALF OF C.P.W.D. AND U.O.I.

15. Per contra, Shri Subodh Kumar alongwith Shri Udit Chandra, learned counsel for C.P.W.D. and U.O.I., vehemently opposed each and every submission advanced on behalf of tenure holders. Their arguments are as under:-

(i) C.P.W.D. and U.O.I. not being parties to the proceedings, determination made on the contest made by the State of U.P. would not affect their rights and contentions and, in view of decision of the Supreme Court in **Uttar Pradesh Awas Vikas vs. Gyan Devi (deceased), 1995 (2) SCC 326**, they have their own legal right to contest and press the matter.

(ii) S.L.P. No. 5022 of 2004 preferred by the State of U.P. against the judgment and order dated 10.01.2002 passed in Ran Singh's case was dismissed only on the ground of delay by order dated 19.07.2004, which order would not amount to merger of the order of this Court, at least adversely affecting the rights of C.P.W.D. and U.O.I.

(iii) Order dated 15.02.2005 rejecting the Review Application No. 227 of 2005 filed by the State even after condoning the delay would not result in closure of rights of C.P.W.D. and U.O.I. to lay their challenge to the determination made at the rate of Rs.84/- per Sq. Yd.

(iv) Though, C.P.W.D.'s/U.O.I.'s review application in Ran Singh's case, was dismissed on 12.08.2009 by this Court on the ground of delay and S.L.Ps. No. 16202-16203 of 2010 filed their-against, were dismissed by the Supreme Court on 18.07.2011, since the Supreme Court clearly

observed that the question of acquiring body being a necessary party had not been gone into in the said S.L.Ps. and, subsequently, the C.P.W.D. and U.O.I. have been impleaded in these proceedings, they have their own say in the matter and, hence, their rights cannot be curtailed merely on the basis of determination made in Ran Singh's case. Further in none of the S.L.Ps., leave was granted by Supreme Court, therefore, doctrine of merger would not apply in the instant case.

(v) Judgment dated 10.01.2002 passed in Ran Singh's case runs on absolutely wrong premise recording entirely different facts having no concern with the present lis. This Court began judgment in Ran Singh's case with the statement that "the Ghaziabad Development Authority framed a scheme for development of the City within the municipal limits and for that purposes the land of the appellants and of other persons was acquired", whereas the instant case has no concern with Ghaziabad Development Authority nor did the said Authority ever frame any scheme; rather it was the State of U.P. that acquired land for the project, namely, 'Central Public Works Department for constructions of quarters of Government Employees'.

(vi) In Ran Singh's case, this Court described notification under Section 6 of the Act having been issued on 22.09.1986, whereas, in the instant case notification under Section 6 is 21 years old and is dated 20.07.1965.

(vii) In Ran Singh's case, acquisition was referred to in relation to development of two colonies within the municipal limits of Ghaziabad whereas, in other cases, the construction of houses for employees of C.P.W.D. was to be made over 31 acres of Mauza Sahari, Pargana Loni, District Meerut, 353 acres of Mauza Harson, Pargana Dasna, district Meerut and 371 acres of Mauza Raispur, Pargana Dasna, District Meerut.

(viii) In Ran Singh's case, basis of the order was location of land of Sewak Ram and Anoop Singh situated in village Jatwara Kalan, District Ghaziabad for development of some colonies, though notification under Section 4 regarding land of Jatwara Kalan was issued on 18.06.1962, Section 6 notification was dated 27.10.1964, possession was taken on 22.12.1964 and the award was declared on 26.06.1967. However, the issues involved in the present case arise out of acquisition made by the State of U.P. pursuant to the notifications of other

dates in relation to other land having a different identity and location, possession whereof was taken on different dates and award was also made on a different date.

(ix) Judgment dated 10.01.2002 is based upon the judgment of Anoop Singh and others, who had filed First Appeal No. 288 of 1985 against the decision of Reference Court dated 31.05.1984 in L.A.Rs No. 376 of 1982 and the said appeal was decided by this Court on 05.02.1993 awarding compensation at the rate of Rs.84/- per Sq. Yd. Anoop Singh's case arose from acquisition made by the Improvement Trust, Ghaziabad that had framed scheme for planned development in relation to village Jatwara Kalan and the discussion made in the judgment of the Reference Court as well as this Court was entirely on different parameters, particularly, when the Court had found user of the land acquired for commercial purposes, which is not the case here.

(x) In Anoop Singh's case, the land acquired was found to be in close vicinity of Basant Cinema, Chaudhary Market, Power House, Shops, Halwara Residential Colony, Chaudhary Hammer Factory and other commercial properties having higher value, which is not the case here.

(xi) Any adjudication based on suppression or non-disclosure of relevant material documents and facts would amount to nullity and, therefore, the decision in Ran Singh's case would not prejudice rights and contention of C.P.W.D./U.O.I., i.e. acquiring body.

(xii) C.P.W.D. has already deposited compensation in favour of Additional District Judge, Vth Ghaziabad and the same was disbursed to the land owners of First Appeal No. 809 of 1993 (Ran Singh and others vs. State of U.P. and others) and no parity can be claimed in alive matters.

16. Shri Subodh Kumar, learned counsel has raised another argument with quite vehemence, based upon Section 25 read with Section 9 of the Land Acquisition Act, 1894, as applicable at the time of issuance of notifications. He submits that Section 25 provides that when the applicant has made a claim for compensation pursuant to any notice under Section 9 of the Act, the award shall not exceed the amount so claimed nor would it be less than the amount awarded by the Collector under Section 11 of the Act, however, in case the applicant has refused

or omitted to make such claim, the amount awarded by the Court shall, in no case, exceed the amount awarded by the Collector. The contention, therefore, is that since none of the claimants in these appeals ever made a claim for enhanced compensation after S.L.A.O. had declared the award and in pursuance of notice under Section 9, amount of compensation in relation to such non-objectors would not exceed Rs.1.90/- per Sq. Yd. He further submitted that notice under Section 9 of the Act was issued to all affected tenure-holders on 20.01.1973 fixing 05.02.1973 as the date for hearing their objections but none of the claimants responded to the notice and the award itself shows that the objections of the tenure-holders other than the claimants involved in these appeals were filed and considered. Shri Subodh Kumar, in support of his argument based upon applicability of Section 25 of the Act, placed reliance upon certain authorities, reference whereof would come in the later part of this judgment. The Court may also observe here that when the appeal was heard by a Co-ordinate Bench of this Court on 22.05.2017, this Court passed an order granting adjournment to the claimants' counsel to prepare the matter in the light of provisions contained in unamended Section 9 read with Section 25 of the Land Acquisition Act.

17. As regards arguments of Shri Subodh Kumar in relation to Section 25 of the Act, Shri Shailesh Upadhyay, learned counsel for tenure holders vehemently argued that the tenure holders had filed objections before the S.L.A.O and he specifically referred to Objection No. 4 mentioned in the award. In this regard, Shri Subodh Kumar submitted that one of the objectors to the Objection No. 4 was Ram Kishan Pradhan, who did not object in relation to the amount of compensation, rather, he stated that there was a public rasta in certain Khasras, which should also be acquired. As regards other objections, though it is mentioned that 56 objections were filed, Shri Subodh Kumar submits that they were not in pursuance of the notice issued to the tenure holders under Section 9 of the Act, rather, the award specifically mentions that these objections were filed under Section 5-A of the Act pursuant to the notification issued under Section 4(1) of the Act.

ANALYSIS OF RIVAL CONTENTIONS AND DISCUSSION ON POINTS FOR DETERMINATION

FIRST POINT:

“Whether in view of the judgment/order of this Court dated 10.01.2002 passed in First Appeal No. 809 of 1993 (Ran Singh’s case) having travelled upto the Supreme Court, C.P.W.D. and/or U.O.I, have been left with any say in the matter and can determination of compensation as Rs.84/- per Sq. Yd. be set aside/reduced by this Court ignoring doctrine of merger?”

18. First of all, the Court may observe that Ran Singh’s case was decided on 10.01.2002 against which State filed Special Leave Petition No. 5022 of 2004 that was rejected on the ground of delay on 19.07.2004 and review also met the same fate. In view of above, it is apparent that it was the State of U.P that has lost the matter before the Supreme Court in terms of dismissal of its S.L.P. on the ground of delay without granting leave to file appeal and, hence, the present matter is not being heard and decided inter se State and tenure holders. Though, it is true that C.P.W.D./U.O.I. had also approached the Supreme Court after their review application in Ran Singh’s case was rejected by this Court, the Supreme Court, while dismissing the S.L.Ps. No. 16202-16203 of 2010, clearly observed that the question whether acquiring body is a necessary party or not, has not been gone into by the Supreme Court in the said S.L.Ps. Apparently, dismissal of these S.L.Ps. was also in view of order dated 19.07.2004 passed in State’s S.L.P., i.e. on the ground of delay. Question of grant of leave, therefore, did not arise in case of C.P.W.D./U.O.I. too. For a ready reference, all the orders passed by the Supreme Court are quoted hereunder: -

Special Leave Petition No. 5022 of 2004 (U.P. State vs Ran Singh and others), order dated 19.07.2004:

“The special leave petition is dismissed on the ground of delay.”

Review Petition No. 227 of 2005 (U.P. State vs. Ran Singh and others), order dated 15.02.2005:

“Delay condoned.

We have carefully gone through the review petition and the annexures thereto. We do not find any merit in the same. Hence, the review petition is dismissed.”

Petition(s) for Special Leave to Appeal (Civil) No. 16202-16203 of 2010 (Union of India and another vs. Ran Singh and others) Order dated 18.07.2011:-

“Delay condoned.

The Special Leave Petitions are dismissed in view of order dated 19.07.2004 passed in SLP (C) No. 3022/2004. The question whether the acquiring body is a necessary party or not is not gone into in the present SLPs.”

(It appears that S.L.P. No. 3022/2004 is a typographical error. Correct number appears to be 5022 of 2004.)

19. It is, therefore, clear that the Supreme Court did not examine the effect of non-impleadment of C.P.W.D./U.O.I. as a party in the proceedings decided upto the Supreme Court and all the matters, whether of State or of C.P.W.D./U.O.I. were not entertained on the ground of delay except that rejection of Review Petition No. 227 of 2005 filed by the State is after condoning delay in filing review but that would not, with due respect, amount to an order granting leave to file appeal against final order dated 10.01.2002 passed in Ran Singh’s case. Ultimately, the impleadment applications filed by C.P.W.D./U.O.I. in the pending proceedings were allowed, orders to which effect have never been assailed. Hence, right of hearing in toto has been given to C.P.W.D./U.O.I.

20. On the question of merger, reliance was placed by Shri Subodh Kumar on Supreme Court’s judgment in **State of U.P. and another vs. Virendra Bahadur Katheria and others, 2024 (3) SLJ 1**, where doctrine of merger, in a case where special leave petition was dismissed in *limine*, was dealt with in the light of various judicial precedents and it was held that such a dismissal would not amount to merger. Relevant paragraphs of **Virendra Bahadur Katheria (supra)** are reproduced hereunder:-

.....(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The

superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

[Emphasis supplied]”

21. On the question of decision for want of disclosure of relevant material documents, Shri Subodh Kumar placed reliance upon the judgment of Supreme Court in **Ram Kumar vs. State of U.P. and others**, AIR 2022 SC 4705, paragraph 21 whereof reads as under:-

“21. This Court, in the case of **S.P. Chengalvaraya Naidu (Dead) By LRs. Vs. Jagannath (Dead) by LRs and others (1994) 1 SCC 1**, has held that non-disclosure of the relevant and material documents with a view to obtain an undue advantage would amount to fraud. It has been held that the judgment or decree obtained by fraud is to be treated as a nullity. We find that respondent No.9 has not only suppressed a material fact but has also tried to mislead the High Court. On this ground also, the present appeal deserves to be allowed.”

22. As far as distinguishing features in between the case of Ran Singh and those involved in the present appeals are concerned, a bare perusal of the judgment dated 10.01.2002 passed in Ran Singh’s case would reflect that the said judgment runs on entirely different facts having no concern with the present lis. This Court began judgment in Ran Singh’s case with the statement that “the Ghaziabad Development Authority framed a scheme for development of the City within the municipal limits and for that purposes the land of the appellants and of other persons was acquired” whereas the instant case has no concern with Ghaziabad Development Authority nor did the said Authority ever frame any scheme, rather it was the State of U.P. that acquired land for the project, namely, ‘Central Public Works Department for constructions of quarters of Government Employees’. In Ran Singh’s case, this Court described notification under Section 6 of the Act having been issued on 22.09.1986, whereas, in the instant case notification under Section 6 was issued 21 years ago, i.e. on 20.07.1965. In Ran Singh’s case, acquisition was referred to in relation to the development of two colonies within the municipal limits of Ghaziabad, whereas, in other cases the construction of houses for employees of C.P.W.D. was to be made over 31 acres of Mauza Sahari, Pargana Loni, District Meerut, 353 acres of Mauza Harson, Pargana Dasna, district Meerut and 371 acres of Mauza Raispur, Pargana Dasna, District Meerut. In Ran Singh’s case, basis of the order was location of land of Sewak Ram and Anoop Singh situated in village Jatwara Kalan, District Ghaziabad for development of some colonies, though notification under Section 4 regarding land of Jatwara Kalan was issued on 18.06.1962, Section 6 notification was dated 27.10.1964, possession was taken on 22.12.1964 and the award was declared on

26.06.1967, whereas the issues involved in the present case arise out of acquisition made by the State of U.P. pursuant to the notifications of altogether different dates in relation to land having a different identity and location, possession whereof was taken on different dates and award was also made on a different date. Judgment in Ran Singh's case is based upon the judgment of Anoop Singh and others, who had filed First Appeal No. 288 of 1985 against the decision of Reference Court dated 31.05.1984 in L.A.Rs No. 376 of 1982 and the said appeal was decided by this Court on 05.02.1993 awarding compensation at the rate of Rs.84/- per Sq. Yd. Anoop Singh's case arose from acquisition made by the Improvement Trust, Ghaziabad that had framed scheme for planned development in relation to village Jatwara Kalan and the discussion made in the judgment of the Reference Court as well as this Court was entirely on different parameters. In Anoop Singh's case, the land acquired was found to be in close vicinity of Basant Cinema, Chaudhary Market, Power House, Shops, Halwara Residential Colony, Chaudhary Hammer Factory and other commercial properties having higher value, which is not the case here.

23. This Court is conscious of the fact that it is not deciding a review application against the order dated 10.01.2002 but, at the same time, since C.P.W.D./U.O.I. were not parties to the lis culminating into the order dated 10.01.2002, the contentions raised by them, pursuant to their impleadment in the light of order of Supreme Court in S.L.Ps. filed by C.P.W.D./U.O.I., cannot be shut down or given a go by and effect of order dated 10.01.2002 on matters not decided by then or thereafter has to be seen, particularly inter se C.P.W.D./U.O.I. and tenure holders looking at all aspects involved. This is also for the reason that doctrine of merger would not apply in this case and the points that were not raised by the State of U.P. nor could it be raised by it, cannot be restricted to be raised by the acquiring body, i.e., C.P.W.D./U.O.I.

24. The first point, therefore, is decided in favour of C.P.W.D./U.O.I. holding that the adjudication made by this Court in Ran Singh's case would not amount to merger or confirmation of this Court's judgment dated 10.01.2002 in the Supreme Court's orders, at least affecting or prejudicing any

right of acquiring body, i.e. C.P.W.D./U.O.I., to get the determination of compensation as Rs.84/- per Sq. Yd. Set aside/reduced.

SECOND POINT:

“Whether the tenure holders having not raised a claim pursuant to notice issued under section 9 of the Land Acquisition Act, 1894, as it then existed, they are, at all, entitled for any amount over and above the one awarded by the S.L.A.O. in view of bar contained in section 25?”

25. Now coming to the arguments based upon Sections 9 and 25 of the Act of 1894 as existing at the time of issuance of notifications giving rise to these cases, it would be significant to note that the said aspect has remained untouched in Ran Singh's matter. It is apt to quote the said provisions for a ready reference:-

“9. Notice to persons interested- (1)

The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.

(2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under Section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

(4) In case any person so interested resides elsewhere, and has no such agent, the notice shall be sent to him by post in a letter addressed to

him at his last known residence, address or place of business and registered under Part III of the Indian Post Office Act, 1866.”

"25. Rules as to amount of compensation- (1) When the applicant has made a claim to compensation, pursuant to any notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector."

26. It has been found in these matters that the objector in the Objection No. 4 was one Ram Kishan Pradhan, who did not object in relation to the amount of compensation, rather, he stated that there was a public rasta in certain Khasras, which should also be acquired. As regards other objections, though it is mentioned that 56 objections were filed, the Court finds that they were not in pursuance of notice issued under Section 9 of the Act, rather, the same were under Section 5-A of the Act. Scope of objections under both provisions of law is altogether different and this Court, by no stretch of imagination, can substitute objection under one statutory provision by an objection under another statutory provision, particularly when the appeal does not arise out of challenge to the acquisition made but is an appeal challenging the judgment of Reference Court. Therefore, this Court is of the view that the claimants involved in these appeals had not made any claim pursuant to notice issued under Section 9 of the Act. Even no dispute regarding service of notice has been raised before this Court. Therefore, this Court cannot ignore the rider contained in Section 25 in clear and unambiguous terms restricting the rights of such claimants to make any claim over and above the one contained in award passed by the Collector/S.L.A.O.

27. Reference to judgment of Supreme Court cited by Shri Subodh Kumar as reported in **Dadoo**

Yogendranath Singh and others vs. The Collector, Seoni , 1977 (2) SCC 1, can be made here. In paragraph No. 6 of the said judgment, Hon'ble Supreme Court held as under:-

“6. On merits, we find, in agreement with the High Court, that the District Judge was palpably wrong inasmuch as he awarded compensation at a rate far higher than what had been claimed by the appellants themselves, pursuant to the notice under Section 9 of the Act. The learned Additional District Judge acted contrary to the legislative mandate contained in Section 25 (1) of the Act, according to which, the Court "shall not award" compensation to an applicant in excess of the amount claimed by him pursuant to any notice under Section 9.”

28. On the same issue, the matter again travelled up to Supreme Court in **Gobardhan Mahto vs. State of Bihar, 1979 (4) SCC 330** in paragraph 8 whereof the Supreme Court held as under:-

“8. It is urged by the learned counsel that, at any rate, there was no justification for the High Court for reducing the compensation awarded for the well. The short answer to this contention is to be found in the provisions of Section 25 of the Land Acquisition Act. By sub-section (1) of that section, when an applicant makes a claim to compensation pursuant to a notice given to him under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed. By sub-section (2) of Section 25, when the applicant has refused to make such claim or has omitted without sufficient reason to make such claim, the amount awarded by the court shall in no case exceed that amount awarded by the Collector. It is common ground that in pursuance of the notice given under Section 9, the appellant contented himself by saying that there was a deep and wide well on the land. He did not ask for any specific amount as representing the value of the well. The learned District Judge would appear to have overlooked the provisions of Section 25(2) and in any case, his judgment does not show that he had come to the conclusion that the appellant was prevented by any sufficient reason from making a claim for compensation in respect of the well.”

29. The Supreme Court, even earlier, in **Dilawarsab Babusab Mullasab and others vs.**

Special Land Acquisition Officer, 1975 (1) SCC 158, had explained the aforesaid proposition based upon Section 25 of the Act and laid down that non-claimants would not be entitled for any compensation higher than what had been awarded by the Land Acquisition Officer. Placing reliance upon the Supreme Court's judgment in *Dilawarsab (supra)*, the Division Bench of Bombay High Court in **State of Maharashtra vs. Shanta Bai and another, AIR 1980 Bombay 36**, laid down the same proposition.

30. Shri Shailesh Upadhyay, learned counsel for tenure holders, however, has placed reliance upon the decisions of Supreme Court in **Ashok Kumar and another vs. State of Haryana, (2016) 4 SCC 544** and **Narendra Kumar and others vs. State of U.P. and others, 2017 (9) SCC 426** and he submits that Section 25 of the Act does not create a bar in award of higher compensation.

31. The Court finds that in **Ashok Kumar (supra)**, the effect of non-filing of objections under Section 9 was not the matter in issue before the Supreme Court and the observation made in paragraph 10 of the report was based upon another judgment in the case of **Krishi Utpadan Mandi Samiti vs. Kanhaiya Lal and others, 2002 (7) SCC 756** observing that amended provisions of Land Acquisition Act would be applicable under which there is no restriction that award could only be upto the amount claimed by the claimant. Similarly, in **Narendra Kumar (supra)**, the matter had arisen out of notifications issued after the Land Acquisition Act had been amended w.e.f. 24.09.1984 and the Supreme Court clearly held that pre-amended provision puts a cap on the maximum, the compensation by Court should not be beyond the amount claimed and cannot be less than what was awarded by the Land Acquisition Collector. The Supreme Court also dealt with the effect of omission of cap on maximum amount by way of amendment made in the statute. With due regards to the decisions of Supreme Court in **Ashok Kumar (supra)** and **Narendra Kumar (supra)**, they would be of no help to the tenure holders, inasmuch as the notifications in the instant case were issued 20 years prior to the amendment made in the Act and when Section 25 existed in the statute book. The facts of cited decisions being clearly distinguishable, with

great respect, the said judgments have no application in the present case, rather they would be read against the tenure-holders.

32. In view of aforesaid discussion, this Court is of the considered view that Section 25 of the Act, as existed on the date of issuance of notifications, would operate as a statutory obstruction standing against the claimants to claim any higher compensation over and above Rs.1.90/- per Sq. Yd. as determined by the S.L.A.O. under the initial award. Further, the facts noted in the order dated 10.01.2002 based upon Anoop Singh's case and the adjudication made on all the parameters discussed in the said judgment, being totally irrelevant as far as the controversy involved in these pending appeals is concerned, this Court is of the view that C.P.W.D./U.O.I. has successfully established that no amount over and above Rs.1.90/- per Sq. Yd. could be awarded as compensation. Second point is also, accordingly, decided in favour of C.P.W.D./U.O.I.

33. As a consequence of above discussion, following is the end result of these appeals:-

(i) First Appeal No. 388 of 2015 (Natthan Singh and others vs. State of U.P.) is dismissed.

(ii) First Appeal No. 357 of 2015 (Ganga Ram and others vs. State of U.P.) is dismissed.

(iii) First Appeal No. 1104 of 2003 (State of U.P. vs. Nathan) is allowed.

(iv) First Appeal No. 1138 of 2003 (State of U.P. vs. Ganga Ram) is allowed.

34. The initial award dated 22.09.1986 passed by the Special Land Acquisition Officer, Ghaziabad is upheld in favour of C.P.W.D./U.O.I. Judgment and order dated 30.03.1991 passed by learned Additional District Judge, Ghaziabad in L.A.R. Nos. 26 of 1987 and 29 of 1987 is set aside.

35. This Court records its all appreciation for Shri Shailesh Upadhyay, Shri Subodh Kumar and Shri Udit Chandra, learned Advocates, for very ably presenting the cases and assisting the Court in deciding these old matters arising out of acquisition made in the decade of 1960.

(2024) 12 ILRA 85
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 512 of 2000

Prem Kumar & Ors. ...Appellants
Versus
Subhash Chand & Ors. ...Respondents

Counsel for the Appellants:

K.P. Upadhyay, Amitabh Agarwal, Ayush Jain,
B.N.Agrawal, K.S.Chauhan, Madan Lal Rai, Manish
Kumar Nigam, Munna Pandey, Muridhar,
N.C.Tripathi, P.K. Jain, P.K.Srivastava, R.P. Singh,
Rahul Sahai, Ram Prakash Srivastava, S.K.
Srivastava, Sanjay Agrawal, Srijan Mehrotra

Counsel for the Respondents:

Manish Goyal, Archit Mehrotra, Devansh Misra,
M.K. Sharma, Nalin Kumar Sharma, R.P. Singh,
S.C., S.K. Singh, Saumitra Dwivedi

A. Tenancy Law – Eviction – Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 49 - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 331 - Specific Relief Act, 1963 - Section 34 - Civil Procedure Code, 1908 - Order XXXIX Rule 2-A.

Bar under Section 34 of S.R. Act - The bar u/s 34 of the Act comes into play when declaration is claimed by the plaintiff as regards any legal character or to any right as to the property and he omits to claim further relief than a mere declaration of title.

Whether in the face of the admitted position of plaintiffs' ouster since prior to the suit and the rejection of plaintiffs' application for amendment by addition of a prayer for possession of the disputed land on the ground of the plea being barred by limitation, the suit is barred by section 34 of Specific Relief Act and the finding of the lower appellate court to the contrary is illegal and untenable?

Section 34 finds place in Chapter VI of the Act titled as "DECLARATORY DECREES" whereas Chapter V contains provisions for "CANCELLATION OF INSTRUMENTS" and Section 31 is placed under this Chapter. It is a provision which is invoked by any person against whom a written instrument is void or voidable and he has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury. The authorities cited on behalf of rival sides on this aspect, when carefully appreciated, the court finds that **the suit in question, being a simplicitor suit for cancellation of sale deed and no relief of declaratory rights u/s 34 having been claimed, the suit squarely falls under Chapter V of the Act and has no concern with Chapter VI thereof.** Hence, irrespective of rejection of amendment application at appellate stage in 1998, whereby the plaintiff was precluded from amending his plaint by incorporating relief of possession, the suit was very much maintainable u/s 31 of the Act. Therefore, first question is answered in favour of the respondents in the manner that the suit was not barred by Section 34 of S.R. Act. (Para 37)

B. Bar u/s 49 of the U.P. CH. Act – (1) Oral St.ment of a witness cannot replace the statutory requirement of issuance of notification, either in relation to initiation of consolidation operations or their closure.

Whether in the face of the fact that Jethanand alone was recorded as the Bhumidhar of the land during consolidation operations and the name of the second appellant as Vendee of Jethanand under the sale-deed dated 23.8.1968 was also mutated during those operations under orders of consolidation authorities, the plaintiff's claim to be co-bhumidhars with Jethanand is barred by Section 49 Consolidation of Holdings Act?

U.P. C.H. Act being the Statute governing all the aspects qua consolidation, recognizes both commencement and closure of consolidation operations by issuance of notifications respectively u/Ss 4 and 52 thereof and their publication in the official gazette and by no other manner. One may visualize that in case valuable property rights involving these aspects are decided merely on the basis of oral testimony of witnesses, it would play a havoc and statutory requirements would be thrown into air. Therefore, unless there are statutory notifications published in official gazettes as required under the afore-quoted provisions, no presumption can be drawn either qua commencement or closure of consolidation operations. (Para 24)

(2) Section 49 of the U.P.C.H. Act is a provision for transitory suspension of jurisdiction of civil and revenue court only during the period when consolidation proceedings are pending. The suit

in question having been filed during consolidation operations and there being no oral or documentary evidence on record that at any stage of proceedings u/s 12 or otherwise, any objections were raised by the plaintiffs against the claim raised by the appellants, the suit was clearly barred u/s 49 of the U.P.C.H. Act. In view of the above, second question is answered in favour of the appellants holding that the suit was barred by Section 49 of the U.P. C.H. Act. (Para 36)

C. Bar u/s 331 of the U.P.Z.A. & L.R. Act - Suit for cancellation of sale deed is covered by Section 31 of the S.R. Act and is unaffected by the bar u/s 331 of the U.P. Z.A. & L.R. Act.

Whether the pith and substance of plaintiffs' suit being a declaration of their co-Bhumidhar rights in the disputed land, the suit is exclusively cognizable by Revenue court in view of Section 331 Z.A. and L.R. Act and the fact that cancellation of the sale deed as prayed for does not make any difference to this position?

Therefore, the third question is answered in favour of the respondents holding that the suit was not barred by Section 331 of the U.P. Z.A. & L.R. Act. (Para 38)

D. HUF/Joint Hindu Family property – (1) When a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisitions standing in the names of the persons who were in the management of the family properties are family acquisitions. (Para 39)

Whether the finding regarding the funds for the sale deed dated 6.6.1953 being joint family fund provided by the grand father Jhanda Ram is arbitrary and legally perverse and whether even assuming this to be so, this cannot in the circumstances of this case legally suffice for the conclusion that Jethanand's sons were co- bhumidhars with him?

Where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family funds. (Para 40, 41)

There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a

fact and it never shifts, but the onus of proof shifts. The circumstances do not alter the incidence of the burden of proof but having regard to the circumstances of a particular case, the onus of proof may be shifted. Such a shifting of onus is a continuous process in the evaluation of evidence. (Para 42)

In the present case, the Court is not in a position to accept the bare plaint version in absence of any cogent evidence regarding formation of Joint Hindu Family or acquisition of property therefrom. Therefore, findings recorded by the courts below to the effect that funds in the sale deed dated 06.06.1953 were Joint Hindu Family fund provided by JR are perverse and, consequently, the conclusion drawn by the courts that sons of JN were co-bhumidhars with him is wholly unsustainable. (Para 45)

(2) For a question of law to be involved in the case, its foundation has to be laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the Court of fact.

The Supreme Court condemning the approach of the High Court in considering the question which was not supported by pleadings or evidence on record has held that such an approach was contrary to the principles governing second appellate jurisdiction u/s 100 CPC. Therefore, this Court refrains itself from examining the validity of sale on that pretext, also for the reason that it is not covered by questions framed in the appeal nor does this Court feel it appropriate to frame any additional question of law in this regard in absence of necessary material on record. (Para 46)

E. Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive. The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands. (Para 55)

Since, this Court is reversing the decree impugned herein holding that cancellation of sale deed was not according to law and the appellants having been dispossessed on that basis, the application u/s 144 CPC stands allowed. (Para 56)

The trial court as well as the first appellate court have grossly erred in presuming that the property in dispute had been purchased by JR in the year 1953 from joint family fund and that members of the HUF were tenants in common. The judgments impugned are based upon misreading of the pleadings and lack of proper scrutiny of evidence on record as well as misinterpretation of the law applicable to the concept of jointness of a Hindu family and acquisition of property. Findings that even if the property was

recorded in the name of one person only, the other members would be deemed to have coparcenary rights intact or that these rights could be conferred on individuals who were or could be deemed to be actual tillers of the soil are not according to the facts and the law governing the case. **The Courts have cursorily decided the issues of jointness vis-à-vis bar u/s 49 of the U.P. C.H. Act without meticulously examining the pleadings and oral and documentary evidence on record.** (Para 47)

Second appeal allowed. Original suit dismissed. (E-4)

Precedent followed:

1. Rameshwar & ors. Vs Deputy Director Consolidation, Azamgarh & ors., 2012 (115) R.D. 541 (Para 15)

2. Makhan Singh (D) by Lrs. Vs Kulwant Singh, (2007) 10 SCC 602 (Para 15)

3. Audhar & ors. Vs Chandrapati & ors., (2003) 11 SCC 458 (Para 15)

4. D.S. Lakshmaiah & anr. Vs L. Balasubramanyam & anr., (2003) 10 SCC 310 (Para 15)

5. Madan Mohan Mishra Vs Chandrika Pandey (Dead) by Lrs., (2009) 3 SCC 720 (Para 15)

6. Nagendra Pal Singh Vs Bhadrpal Singh, 2013(7) ADJ 682 (Para 15)

7. U.O.I. Vs Ibrahim Uddin, (2012) 8 SCC 148 (Para 15)

8. Venkataraja Vs Vidyane Doureradjaperumal, (2014) 14 SCC 502 (Para 15)

9. Ram Balak Singh Vs St. of Bihar & anr., 2024 (4) AWC 3233 (SC) (Para 15)

10. Section 81 of the Indian Evidence Act, 1872 (Para 17)

11. Section 5(c)(ii) of the U.P. C.H. Act read with Section 45-A (Para 19)

12. Smt. Sitabai & anr. Vs Ramchandra, (1969) 2 SCC 544 (Para 20)

13. T. Ravi & anr. Vs B. Chinna Narasimha & ors., (2017) 7 SCC 342 (Para 20)

14. Kiran Devi Vs Bihar St. Sunni Waqf Board & ors., (2021) 15 SCC 15 (Para 20)

15. Shankar & ors. Vs Surendra Singh Rawat (dead) through Lrs. & anr., (2021) 20 SCC 425 (Para 20)

16. Smt. Bhuriya & ors. Vs Board of Revenue at Allahabad & ors., 1970 RD 466 (Para 20)

17. Ram Audh Singh & ors. Vs St. of U.P. & ors., 1969 ALJ 748 (FB) (Para 20)

18. Suba Singh Vs Mahendra Singh & ors., (1974) 1 SCC 418 (Para 20)

19. Karbalai Begum Vs Mohd. Sayeed & anr., (1980) 4 SCC 396 (Para 20)

20. Prashant Singh & ors. Vs Meena & ors., (2024) 6 SCC 818 (Para 20)

21. Bhagwan Dayal (Since Deceased) and thereafter his heirs and legal representatives Bansgoal Dubey and anr., Vs Mst. Reoti Devi (Deceased) and after her death, Mst Dayavati, her daughter, AIR 1962 SC 287 (Para 20)

22. The St. Bank of Travancore Vs Aravindan Kunju Panicker & ors., (1972) 4 SCC 274 (Para 20)

23. Ram Awalamb & ors. Vs Jata Shankar & ors., 1968 SCC Online All 178 (Para 20)

24. Patram Singh (deceased by L.R's.) Vs Bahadur Singh, AIR 1983 ALL 348 (Para 20)

25. Mata Badal Pandey & anr. Vs The Board of Revenue & ors., AIR 1976 Allahabad 420 (Para 20)

26. Smt. Ram Rati Vs Gram Samaj Jehwa, AIR 1974 ALL 106 (FB) (Para 21)

27. The Displaced Persons (Claims) Act, 1950 (Act No.44 of 1950) and The Displaced Persons (Compensation and Rehabilitation) Act, 1954 (Act No.44 of 1954) (Para 22)

28. Narendra Singh & ors. Vs Jai Bhagwan & ors., 2006 (100) RD 69 (Para 28)

29. Madan Mohan Mishra Vs Chandrika Pandey (Dead) by Legal Heirs, 2009 (107) RD 2 Supreme Court (Para 28)

30. Audhar & ors. Vs Chandrapati & ors., (2003) 11 SCC 458 (Para 28)

31. Narender Singh & ors. Vs Jai Bhagwan & ors., 2005 (9) SCC 157 (Para 28)

32. Malkhan Singh Vs Sohan Singh & ors.,
AIR 1986 SC 500 (Para 30)

(Delivered by Hon'ble Kshitij Shailendra, J.)

33. Surendra Singh Vs Board of Revenue,
U.P., Agra & ors., 2015 (127) RD 694 (Para
30)

The Appeal

1. This is defendants' second appeal arising out of concurrent judgments passed by the civil court and the first appellate court whereby Original Suit No.625 of 1971 (Shri Subhash Chand and others vs. Shri Jetha Nand and others) claiming a decree for cancellation of a registered sale deed dated 23.08.1968 (hereinafter referred to as 'the sale deed') has been decreed and the Civil Appeal No.641 of 1979 (Shri Shiv Charan Das and others vs. Shri Subhash Chand & others) arising therefrom has been dismissed.

BRIEF FACTS AND PLAINT CASE

2. One Jhanda Ram (in short 'JR') had four sons namely Ram Chandra (non-party), Pyare Lal (defendant No.3) (in short 'PL'), Khanda Ram (non-party) and Jetha Nand (in short 'JN') (defendant No.1). JN was married to Smt. Dhanwanti Devi (in short 'DD') (defendant No.2). JR died in the year 1959, PL died in the year 1973 and JN died in the year 1993. PL had six sons, out of whom, reference of only three is relevant. These are Prem Kumar (Defendant No.4), Navin Kumar (defendant No.5) and Shyam Kumar. JN (since deceased) is succeeded by his five sons Subhash Chandra and four others who are respondent Nos.1 to 5 in the instant second appeal whereas wife and two sons of late PL are appellants herein.

34. Hakam Ali and anr. Vs St. of U.P. & ors.,
2014 (122) RD 463 (Para 30)

35. Smt. Bhagwan Dei (Dead) Through Lrs.
Vs Board of Revenue, U.P. Allahabad & ors.,
2010 (110) RD 747 (Para 30)

36. Ram Audh Singh & ors. Vs St. of U.P. &
ors., 1969 SCC Online All 110 (Para 33)

37. Mangoo Singh & ors. Vs Ram Autar,
2024(9) ADJ 351 (Para 39)

38. Baikuntha Nath Paramanik (dead) by his
L.Rs. & heirs Vs Sashi Bhusan Pramanik
(dead) by his L.Rs. & ors. (1973) 2 SCC 334
(Para 40)

39. Surendra Kumar Vs Phoolchand (dead)
through Lrs. & anr. (1996) 2 SCC 491 (Para
41)

40. Appalaswami Vs Survanarayanamurti, AIR
1947 PC 189 (Para 42)

41. Ratnagiri Nagar Parishad Vs Gangaram
Narayan Ambekar & ors., (2020) 7 SCC 275
(Para 43)

42. Addagada Raghavamma & anr. Vs
Addagada Chenchamma & anr., AIR 1964 SC
136 (Para 43)

43. The Displaced Persons (Compensation and
Rehabilitation) Act, 1954 (Act No.44 of 1954)
(Para 46)

44. Govindaraju Vs Mariamman, JT 2005 (2) SC
107 (Para 47)

45. Santosh Hazari Vs Purushottam Tiwari
(Deceased) By LRs., JT 2001 (2) SC 407 (Para
47)

46. Panchugopal Barua & ors. Vs Umesh
Chandra Goswami & ors., AIR 1997 SC 1041
(Para 47)

47. Mrs. Kavita Trehan & anr. Vs Balsara
Hygiene Products Ltd., (1994) 5 SCC 380 (Para
56)

3. The suit was instituted stating that plaintiffs were living as members of Joint Hindu Family (in short 'HUF') with

defendant Nos. 1 and 2 and JR was Karta of the HUF; the said HUF being in existence since 1947. JR, the grandfather of plaintiffs, purchased an agricultural land in district Meerut from HUF funds in the name of defendant No.1-JN in the year 1953 and also purchased some landed property separately in the names of his other sons (non-parties) in the same year. After the death of JR, defendant No.1-JN who was subsequently transposed as plaintiff No.6 pursuant to various proceedings referred to hereinlater, managed the land for a couple of years as Karta of HUF. JN had to go out of Meerut for business purposes in 1963 and, while his sons were minors, JN entrusted management of the said HUF in the hands of defendant No.3-PL. The village and land in question came under consolidation operations in the year 1966, a separate chak was allotted in the name of JN and PL continued to supervise cultivation activities but withheld rabi crops of 1378 Fasli and, on asking, he denied plaintiffs' entitlement to the crops stating that the same belonged to defendants No.4 and 5. The plaintiffs came to know in May 1971 that HUF land had been transferred by PL to defendant Nos.4 and 5 on 23.08.1968 at the strength of a power of attorney executed by JN. Assailing the sale deed, it was alleged that JN had no right to execute the power of attorney dated 19.06.1963 in favour of PL in respect of HUF property, the sale was based upon malafides, collusion, for an inadequate consideration and was a sham transaction. Accordingly, a decree for cancellation of the sale deed was claimed.

DEFENCE

4. Defendants No.1 and 2 (JN and DD), in their joint written statement, admitted execution of the sale deed as well

as power of attorney. They denied the allegations that JN had no right to execute power of attorney, however, they pleaded existence of HUF and JR being its Karta since partition of India and stated that HUF had a joint fund and the property had been purchased in the year 1953 by JN, who executed a power of attorney in favour of his elder brother PL for the purposes of looking after the litigation and cultivation but PL broke the confidence by executing sale deed in favour of his sons. Seller and purchaser, i.e PL and his son Navin Kumar, filed joint written statement denying constitution of a Joint Hindu Family stating that JR was a person of ordinary means and status; his sons, after attaining majority, separated themselves and used to earn their own livelihood; PL was separated in 1927; he plied a taxi for sometime and, thereafter, got employment in different firms; he then became a working partner in 1939 in M/s D.M. Gopi Chand and sons in business of Canteen; PL started contract of military canteen at different places; he was assessed to income tax as an individual; he had never been a member of a Joint Hindu Family, nor were his savings sufficient to purchase the property of HUF; JN was in service since 1939 to 1947 with M/s DM Gopi Chand and sons in New Delhi and then in Bareilly; PL kept JN in his employment and paid salary to him and in order to improve financial status of JN, he sublet the business to him. Since a sum of Rs.20,000/- was invested by PL in the business, it was treated as a loan to JN which was repaid by him to PL during course of time; PL improved his financial position and decided to carry out agricultural farming; he purchased the land in dispute with other lands in 1953 with his own money and it was not an HUF property nor was any money paid by JR towards sale consideration. Since PL could

not purchase beyond permissible limits, he purchased the same in the name of his brother, nephews and sons as benami by investing his own funds. Real ownership in the property was pleaded in PL stating that it was in the name of JN as benami and the same was never his personal property nor did it belong to HUF. As regards JR, it was pleaded that financial condition of JR was not sound and when he came from Pakistan to India after partition; he got only two acres of land in district Gurgaon and a sum of Rs.1000/- for his property in district Gurgaon. This land was gifted by JR to the wives of this three sons. He left nothing on his death, there was neither HUF nor any HUF property; JR was living in upper portion of PL's house No.102, Ghor Mohalla, Lal Kurti, Meerut Cantt until his death; JN had no ancestral money nor any such property which could form nucleus for the purchase of land. Neither JR nor JN ever managed the land and it was PL alone who was continuing in possession of the land and managing the same making huge investments making the land worth cultivation.

5. After filing of the written statement by defendants No.3 to 5, the defendants No.1 and 2 amended their written statement stating that property was purchased by JR with the money that he had received as compensation, also from the income of the land situated in district Gurgaon and the money/gold ornaments which he had brought from Pakistan. After the death of PL, his legal representatives filed a written statement taking the same stand and defended the transaction of disputed sale. It is quite significant that plaintiffs also moved an application seeking transposition of JN (defendant No.1) as plaintiff No.6. The application was rejected by the trial court.

TRIAL COURT'S JUDGMENT

6. The trial court framed issues as regards cancellation of sale deed, maintainability of suit and bar of Section 49 of Uttar Pradesh Consolidation of Holdings Act, 1953 (in short 'the U.P.C.H. Act') apart from other issues on some compromise etc. By judgment and order dated 19.12.1979, it held the property as belonging to HUF holding that members of HUF would become and would acquire the land as tenants in common and in spite of the fact that their names were not recorded as co-tenants in the land records, they would be deemed to be co-tenants. The trial court arrived at a conclusion that JR had purchased the land as a Karta of Joint Hindu Family and acquisition by him was not as an individual as the land had been purchased from HUF funds. It decided the bar under Section 49 of the U.P.C.H. Act against the defendants and decreed the suit in part to the extent of 5/6th share of the plaintiffs and 1/6th share of JN. Consequently, the sale deed was cancelled to the extent of 5/6th share holding the plaintiffs as co-owners along with defendants No.4 and 5 to the extent of their 5/6th share in the property.

FIRST APPELLATE COURT'S JUDGMENT

7. Defendants assailed the judgment of the trial court before the District Judge by filing Civil Appeal No.641 of 1979, in which, the plaintiffs filed cross-objections praying for modification of the decree requesting for decreeing the suit in toto. The first appellate court, during the course of hearing the civil appeal, allowed an application on 30.11.1983 seeking transposition of defendant No.1 (JN) as plaintiff No.6, also allowed the civil appeal

setting aside the trial court's judgment and remanded the matter for fresh decision by the trial court. Defendants challenged the order of remand by filing F.A.F.O. No.92 of 1984 which was allowed by this Court setting aside the remand order dated 30.11.1983 with the observation that the first appellate court could have allowed the application for transposition and have proceeded with the case itself and, if necessary, it could remand the relevant issue to the trial court but should not have reopened the entire case.

8. After remand by the High Court, an application for transposition of defendant No.1-JN as plaintiff No.6 was allowed by the first appellate court. An additional written statement was filed by the legal representatives of deceased PL pleading that the land was not the acquisition of HUF on or before the commencement of consolidation operations; the land in dispute was recorded in the name of JN as the sole bhumidhar; no objection was filed by the plaintiffs for co-bhumidhari rights during consolidation operations; chak was carved out in the name of JN as a sole bhumidhar; Power of Attorney as well as sale deed was validly executed for adequate consideration; plaintiffs are not the recorded tenure holders and, therefore, they could not get the relief of cancellation of sale deed until they were declared as co-bhumidhars with JN; since the relief claimed involves declaration of bhumidhari rights, the suit was barred by Section 331 of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'the U.P. Z.A. & L.R. Act'); plaintiffs Madan Lal and Hira Lal were not even born in the year 1953 and, hence, they could not be members of the alleged HUF. Bar of Section 49 of U.P.C.H. Act was also pleaded stating that at the time of

notification of the village for consolidation, JN alone was recorded as sole bhumidhar, chak was carved out in his own name and no objection having been filed by the plaintiffs and the statements published at the stage of sections 9 and 10 of the Act having become final, no one had proceeded to question the entries; proceedings for recording of names on the basis of the disputed sale deed were also undertaken by the consolidation authorities and there being no objection in the proceedings under Section 12 of the Act, the civil suit was barred. Additionally a plea regarding bar of Section 34 of the Specific Relief Act, 1963 (hereinafter referred to as 'the S.R. Act') was also taken.

9. The first appellate court framed two additional points/issues. First, as to whether the suit was barred by Section 331 of the U.P. Z.A. & L.R. Act and the court had jurisdiction to try the suit and, secondly, as to whether the suit was barred by Section 34 of the S.R. Act. The first appellate court dismissed Civil Appeal No.641 of 1979 by the judgment and decree dated 25.03.2000 confirming the decision of the trial court. It also allowed the cross objections and decreed the suit in toto cancelling the entire sale deed.

ADMISSION ORDER IN THE INSTANT SECOND APPEAL

10. The instant second appeal was admitted in the year 2000 by a Co-ordinate Bench of this Court on the following substantial questions of law:-

“1. Whether in the face of the admitted position of plaintiffs' ouster since prior to the suit and the rejection of plaintiffs' application for amendment by addition of a prayer for possession of the

disputed land on the ground of the plea being barred by limitation, the suit is barred by section 34 of Specific Relief Act and the finding of the lower appellate court to the contrary is illegal and untenable?

2. Whether in the face of the fact that Jethanand alone was recorded as the Bhumidhar of the land during consolidation operations and the name of the second appellant as Vendee of Jethanand under the sale-deed dated 23.8.1968 was also mutated during those operations under orders of consolidation authorities, the plaintiff's claim to be co-bhumidhars with Jethanand is barred by Section 49 Consolidation of Holdings Act?

3. Whether the pith and substance of plaintiffs' suit being a declaration of their co-Bhumidhar rights in the disputed land, the suit is exclusively cognizable by Revenue court in view of Section 331 Z.A. and L.R. Act and the fact that cancellation of the sale deed as prayed for does not make any difference to this position?

4. Whether the finding regarding the funds for the sale deed dated 6.6.1953 being joint family fund provided by the grand father Jhanda Ram is arbitrary and legally perverse and whether even assuming this to be so, this can not in the circumstances of this case legally suffice for the conclusion that Jethanand's sons were co- bhumidhars with him? ”

LEARNED COUNSEL HEARD

11. I have extensively heard on many dates Shri Pramod Jain, learned Senior Counsel assisted by Shri Sanjay Agrawal for the appellants and Shri Manish Goyal, learned Senior Counsel assisted by Shri Archit Mehrotra for the respondents and perused the original record of courts below.

SUBMISSIONS OF THE APPELLANTS

12. By referring to the pleadings of the respective parties as well as statements of witnesses, it has been vehemently argued by Shri Pramod Jain, learned Senior Counsel that the plaintiffs had utterly failed to plead and prove formation/creation/existence of a Joint Hindu Family or HUF. Contention is that JR was a person of ordinary means and status and he did not receive any compensation in lieu of his land. JN stated in his cross-examination that he had never been a Karta of Joint Hindu Family and he deposited tax in his individual capacity. As regards bar of Section 49 of U.P. C.H. Act, it has been argued that notification under Section 4 of the U.P. C.H. Act was issued in the year 1966 and notification under Section 52 on 01.09.1973 and, therefore, the suit instituted in the year 1971 during the subsistence of consolidation operations was not maintainable before the civil court and both the courts have wrongly decided the said aspect. Further submission is that at the strength of disputed sale deed, when proceedings for recording the names of the transferees (appellants) were initiated and decided, no objections having been preferred by the plaintiff-respondents, the issues could not be decided by the civil court as all matters relating to changes and transfer and rights and interest, for which, cause of action had not arisen when the proceedings under Sections 7 to 9 of the U.P.C.H. Act had started or were in progress, could only be decided by the consolidation authorities and not by any other court including the civil court. Submission is that CH Forms 5 and 23 were issued in the name of JN as sole bhumidhar and pursuant to proceedings under Section 12, CH Form-45 was issued

in appellants' name. Pendency of consolidation operations was admitted by JN in the written statement and also in the cross-examination of PW-1 Harish Sachdeva; neither any son of JN nor anyone else filed any objections before any consolidation authorities and possession was delivered to the appellants after adjudication of their rights; proceedings under Section 12 not being summary in nature in view of the language incorporated in the provision, finality was attached to such adjudication and civil court could not, directly or indirectly, nullify the orders passed by the consolidation court.

13. As regards bar of Section 34 of the S.R. Act, submission is that except relief of cancellation of the sale deed, since no relief of delivery of possession was claimed by the plaintiffs, the suit was barred under Section 34, particularly, in view of the fact that plaintiffs, at the first appellate stage, made an attempt to incorporate relief of possession by filling an amendment application, however, the same was rejected by the first appellate court on 19.01.1998 which order having attained finality, the suit was not maintainable. As regards the bar of Section 331 of U.P. Z.A. & L.R. Act, learned Senior Counsel very fairly concedes that such bar would not come in the way of deciding civil suit for cancellation of sale deed, however, he submits that merely because bar under Section 331 is not strictly attracted, the same would not mean that bar of other provisions i.e. Section 34 of the S.R. Act or Section 49 of U.P. C.H. Act would not apply.

14. It is further urged that an interim order was passed by this Court in the instant second appeal on 18.04.2000 staying execution proceedings and another order of

status quo was passed on 10.04.2003, however, the second appeal was dismissed for want of prosecution on 06.09.2007, on which date, the stay order was also vacated but, soon thereafter, the order of dismissal was recalled on 27.09.2007, the appeal was restored and interim order was revived. Despite the fact that intimation regarding restoration of appeal and revival of the interim order was duly served upon administrative authorities and all concerned and the same was in the knowledge of the respondents, the District Magistrate, in a very high-handed manner, delivered possession of the property in dispute to the respondents. Submission is that the administrative authorities had no role in delivering possession and they had no competence in that regard, inasmuch as, any decree could be executed by the executing court only and, therefore, without there being any order of executing court, dispossession of the appellants despite an interim order of this Court being in existence, was wholly uncalled for. Learned Senior Counsel not only pressed his application under Order XXXIX Rule 2-A of Civil Procedure Code, 1908 (hereinafter referred to as 'C.P.C.') filed in the instant appeal but also an application under Section 144 C.P.C. dated 29.10.2007 requesting delivery of possession to the appellants.

JUDICIAL PRECEDENTS CITED

15. In support of his submissions, Shri Jain has placed reliance on the following authorities:-

(i). Rameshwar and others vs. Deputy Director Consolidation, Azamgarh and others, 2012 (115) R.D. 541;

(ii). Makhan Singh (D) by Lrs. vs. Kulwant Singh, (2007) 10 SCC 602;

(iii). **Audhar and others vs. Chandrapati and others, (2003) 11 SCC 458;**

(iv). **D.S. Lakshmaiah & Anr. vs. L. Balasubramanyam & Anr., (2003) 10 SCC 310;**

(v). **Madan Mohan Mishra vs. Chandrika Pandey (Dead) by Lrs., (2009) 3 SCC 720;**

(vi). **Nagendra Pal Singh vs. Bhadrpal Singh, 2013(7) ADJ 682;**

(vii). **Union of India vs. Ibrahim Uddin, (2012) 8 SCC 148;**

(viii). **Venkatarama vs. Vidyane Doureradjaperumal, (2014) 14 SCC 502;**

(ix) **Ram Balak Singh v. State of Bihar and another, 2024 (4) AWC 3233 (SC).**

SUBMISSIONS OF THE RESPONDENTS

16. Shri Manish Goyal, learned Senior Counsel, has vehemently opposed all the submissions raised from the appellants' side. As regards HUF, it is contended that there is a presumption of jointness of a hindu family but such a presumption does not apply in relation to properties which are distinct. By referring to unamended and amended pleadings contained in the plaint and written statements, it has been argued that when JR purchased landed property separately in the names of his sons, entire family was Joint Hindu Family and the ancestor of the parties namely JR, in order to avoid future complications, had purchased property in separate names, PL had no authority to transfer the land at the strength of the power of attorney in favour of his minor sons; there was a vague denial of jointness in paragraphs 17 and 24 of the written statement filed by the defendant No.3-Prem Kumar; the defence contained two contradictory versions as regards non-

existence of jointness and also benami transaction. He further submits that in order to dislodge the presumption of jointness as regards the Hindu family, burden lies upon the person who asserts against jointness and it was not discharged by the defendants, either jointly or severally. Referring to the statement of DW-4 Puran Chand, it was emphasized that he stated his birth in 1952 and that consolidation operations had closed in the village in the year 1969 whereas chaks had been carved out in 1967. Submission, therefore, is that once the consolidation operations were closed in the year 1969 as per the defendants themselves, suit instituted after two years in the year 1971 was not barred by the provisions of Section 49 of U.P. C.H. Act.

17. Vehemently opposing the submissions of the appellants based upon notification under Section 52 of the U.P. C.H. Act, it has been argued that no such notification was brought on record by either side during the course of trial or before the first appellate court and it is for the first time that a photo-stat copy of a gazette notification dated 01.09.1973 has been annexed alongwith application under Order XLI Rule 27 C.P.C. dated 30.06.2022 by the appellants requesting to admit and read such document as an 'additional evidence'. Shri Goyal submits that such document is not readable in evidence and the application under Order XLI Rule 27 C.P.C. is bound to be rejected not only for the reason that the requirements of the said provision are not fulfilled but also in view of Section 81 of the Indian Evidence Act, 1872. He submits that the appellants have failed to establish as to source wherefrom the said document has been obtained by them and unless it is proved beyond doubt that the concerned

gazette notification has been produced from proper custody, presumption under Section 81 of the Indian Evidence Act, 1872 read with Section 57 thereof would not stand attracted. He submits that except stating that gazette notification is a public document would not suffice allowing the application for additional evidence at second appellate stage and that as per sub-Section (2) of Section 57 of the Evidence Act, the Court can take judicial notice of all local and personal Acts of Parliament but the alleged gazette notification under Section 52 of the U.P. C.H. Act is not an Act of Parliament but is an administrative action, as is apparent from the notification itself that has been issued by a consolidation authority (Chankbandi Sanchalak), namely, one Shri Satya Prakash Bhatnagar. He further submits that after all the arguments against admissibility of the notification were advanced by him on a particular date during the course of final hearing of this appeal, the appellants, in order to improve their case, filed a supplementary affidavit dated 18.09.2024 without leave of the Court, annexing therewith another copy of the same notification stating in the affidavit that due to inadvertent error of the earlier counsel, authenticated and attested copy of the notification of 1973 could not be filed alongwith initial application dated 30.06.2022 and only a photo-stat copy of the same was filed. Regarding contents of the affidavits, it was argued that annexure to the supplementary affidavit was shown to have been obtained from government library- Amar Shaheed Chandra Shekhar Azad Pustkalaya Nagar Nigam Allahabad on 22.05.2022. He emphasized on the discrepancies qua seal affixed at the first page of the notification forming part of the application under Order XLI Rule 27 C.P.C. and the one at first page of the same

notification attached to the supplementary affidavit. Submission is that the document brought earlier contained no date and the same was in English language, the subsequent document contains a blurred seal but readable to the extent that it is in Hindi but surprisingly contains a date 22.05.2022. The over all argument is that the requirements of Order XLI Rule 27 C.P.C. having not been fulfilled coupled with no clear source as regards “proper custody” and there being interpolations and manipulations in the alleged notification, the same cannot be read in evidence.

18. Necessary consequence, according to Shri Goyal, therefore, is that once chak was carved out in 1967 whereas consolidation operations were closed in 1969, not only suit instituted in 1971 was maintainable and unaffected by the bar under Section 49 of the U.P. C.H. Act but also there was no requirement of adjudication of any rights by the consolidation authorities as nothing remained to be adjudicated upon by them after things were settled in 1967 itself. It was also argued that provision comes into effect only as a measure of transitory/temporary suspension and does not create an absolute bar. Regarding alleged bar of Section 34 of the S.R. Act, it was argued that irrespective of rejection of the amendment application by the first appellate court whereby relief of possession was not permitted to be incorporated in the plaint, since the suit in question was a simplicitor suit for cancellation of the disputed sale deed as per Section 31 of the S.R. Act, there being no relief of declaration ever claimed, bar under Section 34 of the S.R. Act would not be attracted. Shri Goyal terms substantial question of law framed regarding the said bar as

redundant and submits that it does not at all arise in the present case.

19. Shri Goyal further submits that power of attorney of 1963, when read as a whole, would infer that right to sale was not given to PL, rather, it was for persuasion of matters before the consolidation authorities and other administrative offices. Emphasizing upon Section 5(c)(ii) of the U.P. C.H. Act read with Section 45-A thereof, it was urged that since no permission was obtained from the consolidation authorities prior to execution of the disputed sale deed, it was *void-ab-initio*.

JUDICIAL PRECEDENTS CITED

20. In support of his submissions, Shri Goyal has placed reliance on the following authorities:-

(i). **Smt. Sitabai and another vs. Ramchandra**, (1969) 2 SCC 544;

(ii). **T. Ravi and another vs. B. Chinna Narasimha and others**, (2017) 7 SCC 342;

(iii). **Kiran Devi vs. Bihar State Sunni Waqf Board and others**, (2021) 15 SCC 15;

(iv). **Shankar and others vs. Surendra Singh Rawat (dead) through Lrs. and another**, (2021) 20 SCC 425;

(v). **Smt. Bhuriya & Ors. vs. Board of Revenue at Allahabad & Ors.**, 1970 RD 466;

(vi). **Ram Audh Singh and others vs. State of U.P. and others**, 1969 ALJ 748 (FB);

(vii). **Suba Singh vs. Mahendra Singh and others**, (1974) 1 SCC 418;

(viii). **Karbalai Begum vs. Mohd. Sayeed and another**, (1980) 4 SCC 396;

(ix). **Prashant Singh and others vs. Meena and others**, (2024) 6 SCC 818

(x). **Bhagwan Dayal (Since Deceased) and thereafter his heirs and legal representatives Bansgoal Dubey and anr., vs. Mst. Reoti Devi (Deceased) and after her death, Mst Dayavati, her daughter**, AIR 1962 SC 287;

(xi). **The State Bank of Travancore vs. Aravindan Kunju Panicker and others**, (1972) 4 SCC 274;

(xii). **Ram Awalamb and others vs. Jata Shankar and others**, 1968 SCC Online All 178;

(xiii). **Patram Singh (deceased by L.R's.) vs. Bahadur Singh**, AIR 1983 ALL 348;

(xiv). **Mata Badal Pandey and anr. vs. The Board of Revenue and others**, AIR 1976 Allahabad 420.

APPELLANTS' SUBMISSIONS IN REJOINDER

21. In rejoinder, Shri Jain submits that at the time when the sale deed was executed, unamended provisions of Section 5 of the U.P.C.H. Act were there which did not require prior permission from the consolidation authorities in case of sale of entire holdings but such requirement could come in picture when only a part of holdings was transferred by the concerned bhumidhar which is not the case here. It was argued that a reference was made by learned Single Judge in such regard and the matter was decided by a Full Bench in **Smt. Ram Rati vs. Gram Samaj Jehwa**, AIR 1974 ALL 106 (FB). He submits that judgments cited from the respondents side are based upon proposition of law only whereas, in the facts of the present case, the same would not be applicable, inasmuch as, JN acquired full-fledged rights by sale deed of 1953 after the date of vesting as an

individual and not in the capacity of Karta of HUF. He submits that in order to succeed in their contention, the plaintiffs should have established that JN acquired property as a Karta in a representative capacity for the benefit of family and there should have been a Joint Hindu Family fund in the hands of Karta. Arguments on strict requirement of “pleading and proof of creation/existence of HUF and existence of property” were emphatically raised and by referring to the statement of PW-1, Harish Sachdeva, it was argued that he expressed his ignorance about the fact as to whether his father had become Karta or not and he also stated that consolidation took place in the village in 1967 but he did not know that at that time any objection was raised by him to the effect that the land be recorded in the name of HUF.

22. Shri Jain, then, by referring to those portions of pleadings and statements of plaintiffs whereby they had tried to contend that JR, after being migrated from Pakistan to India, had been given compensation in lieu of his property in Pakistan, referred with vehemence, the provisions of **The Displaced Persons (Claims) Act, 1950 (Act No.44 of 1950)** and **The Displaced Persons (Compensation and Rehabilitation) Act, 1954 (Act No.44 of 1954)**. He submits that immediately after partition of India, the Act No.44 of 1950 was enacted to provide for the registration and verification of claims of displaced persons in respect of immovable property in Pakistan whereas after four years, Act No.44 of 1954 was enacted to provide for payment of compensation and rehabilitation grant to displaced persons. Submission is that since Act No.44 of 1950 did not provide for any mechanism for payment of compensation but only provided for registration and

verification of claims and for payment of compensation and rehabilitation grant, Act No.44 of 1954 was enacted, question of payment or receipt of compensation had not arisen before 1953 nor could it arise, as by that time, Act No.44 of 1954 had not even come into existence. Therefore, according to Shri Jain, entire story of having funds in hands qua purchase date of 1953 was cooked up by the plaintiffs but had no legs to stand on.

ANALYSIS OF RIVAL CONTENTIONS

Re:- Bar under Section 49 of the U.P. CH. Act (Second question)

24. In order to appreciate this aspect, first of all we should understand the legislative significance of the provisions of sections 4 and 52 of the Act, relevant portions whereof are reproduced as under:-

“Section 4. Declaration and notification regarding consolidation-

(1)(a). The State Government may, where it is of opinion that a district or part thereof may be brought under consolidation operations, **make a declaration to that effect in the Gazette**, whereupon it shall become lawful for any officer or authority who may be empowered in this behalf by the District Deputy Director of Consolidation-

(i). to enter upon and survey, in connection with rectangulation or otherwise, and to take levels of any land in such area;

(ii). to fix pillars in connection with rectangulation, and;

(iii). to do all acts necessary to ascertain the suitability of the area for consolidation operations.

(b). The District Deputy Director of Consolidation shall cause public notice of the declaration issued under clause (a) to be given at convenient places in the said district or part thereof.

(2)(a). When the State Government decides to start consolidation operations, either in an area covered by a declaration issued under sub-section (1) or in any other area, it may issue a notification to this effect.

(b). Every such notification shall be published in the Gazette and in a daily newspaper having circulation in the said area and shall also be published in each unit in the said area in such manner as may be considered appropriate.

Section 52. Close of consolidation operations.-(1) As soon as may be, after fresh maps and records have been prepared [under sub-section (1) of Section 27], the State Government shall issue a notification in the Official Gazette that the consolidation operations have been closed in the [unit and the village or villages forming a part of the unit] shall then cease to be under consolidation operations:

[Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and recover the cost of operations under this Act.][(1-A)] The notification issued under sub-section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper.]

.....

25. Therefore, U.P. C.H. Act being the Statute governing all the aspects qua consolidation, recognizes both commencement and closure of

consolidation operations by issuance of notifications respectively under Sections 4 and 52 thereof and their publication in the official gazette and by no other manner. Oral statement of a witness cannot replace the statutory requirement of issuance of notification, either in relation to initiation of consolidation operations or their closure. One may visualize that in case valuable property rights involving these aspects are decided merely on the basis of oral testimony of witnesses, it would play a havoc and statutory requirements would be thrown into air. Therefore, unless there are statutory notifications published in official gazettes as required under the afore-quoted provisions, no presumption can be drawn either qua commencement or closure of consolidation operations.

Re: Application filed by the appellants under Order XLI Rule 27 C.P.C.

26. The Court finds no dispute in the instant case regarding issuance of notification under Section 4 of the U.P. C.H. Act in 1966. The dispute is regarding closure of consolidation operations. Much emphasis has been laid by both sides on this aspect by referring to the copy of the gazette notification annexed to the application filed by the appellants under Order XLI Rule 27 C.P.C. Whereas the contention of the appellants is that the document being a public document, should be considered as a piece of 'additional evidence' in the instant second appeal, contrary submission was advanced from the respondents' side that the document is inadmissible in evidence. Various provisions of the Evidence Act were pressed into service regarding admissibility of the notification and authorities were cited by both sides with vehemence, however, on bare reading of the grounds

taken in the application under Order XLI Rule 27 CPC, the affidavit filed in support thereof as well as the supplementary affidavit filed after the respondents had advanced their arguments on admissibility of the gazette notification, no good ground stands made out to allow the application. The Supreme Court in **Union of India vs. Ibrahim Uddin and anr.** (supra), in relation to Order XLI Rule 27 CPC has held that the inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of Rule 27. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. This Court finds that strict requirements of Rule 27 of Order XLI do not at all stand satisfied in the instant case and, even otherwise, there being discrepancy in the documents attached to two affidavits in support of plea of additional evidence, makes them doubtful at least as regards the source, timing and custody. This Court is not dealing with the numerous authorities cited at the bar in relation to admissibility of notification under Section 52 of the U.P.C.H. Act as an additional evidence, inasmuch as, it has found the application under Order XLI Rule 27 CPC lacking the requirements of the Code. Therefore, the application under order XLI Rule 27 C.P.C. stands **rejected**.

27. The necessary consequence of such rejection would be that there is no documentary evidence on record as regards closure of consolidation operations, i.e., the statutory gazette notification under Section 52. Since the disputed sale deed was executed in the year 1968 i.e. two years

after the consolidation operations had commenced in 1966, in order to succeed in their plea that chaks were carved out after closure of consolidation operations, the burden to establish the same would lay upon the plaintiffs-respondents and not upon the defendants-appellants. To be more clear, it was for the plaintiffs to bring on record notification under Section 52 of the U.P. C.H. Act and they cannot get any advantage from reading statement of one or the other witness. The Court may refer to Sections 101 and 102 of the Evidence Act, 1872, according to which, whoever desires any Court to give judgment as any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist (Section 101) and the burden of proof in a suit lies on that person who would fail if no evidence at all were given by either side (Section 102). Therefore, the consolidation operations would be deemed to continue unless a contrary evidence is led regarding their closure which, not being on record, it is found that when the disputed sale deed was executed in the year 1968, consolidation operations did not stand closed. The contention of respondents that since DW4, in his cross-examination, had stated that consolidation operations had closed in 1969 whereas chaks had been carved out in 1967 does not have any force for multiple reasons; first, that a bare oral statement, in absence of gazette notification on record, is not a proof of closure of consolidation operations; secondly, even if the statement is accepted, it would mean that consolidation operations were closed in 1969 i.e. after the disputed sale deed was executed but before institution of suit; and, thirdly, carving out of chaks, as per this statement, in the year 1967 would be of no avail as the bar of Section 49 is to be seen in connection with adjudication of rights of

transferees (appellants) as per Section 12 of the U.P. C.H. Act. For ready reference, Section 12 of U.P.C.H. Act is quoted hereunder:-

“12. Decision of matters relating to changes and transactions affecting rights or interests recorded in revised records. - (1) All matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under sub-section (1) of Section 10 for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress, may be raised before the Assistant Consolidation Officer as and when they arise, but not later than the date of notification under Section 52, or under sub-section (1) of Section 6.

(2). The provisions of Sections 7 to 11 shall mutatis mutandis, apply to the hearing and decision of any matter raised under sub-section (1) as if it were a matter raised under the aforesaid sections.”

28. In **Narendra Singh and others vs. Jai Bhagwan and others, 2006 (100) RD 69**, this Court said that jurisdiction of civil court to adjudicate upon dispute upon rights and title relating to lands included in consolidation proceedings is barred by Section 49 of the U.P. C.H. Act as the same has been conferred by the Act exclusively on the authorities under the said Act. In **Madan Mohan Mishra vs. Chandrika Pandey (Dead) by Legal Heirs, 2009 (107) RD 2 SC**, referring to Section 49 of the U.P.C.H. Act, the Court said that “Jurisdiction of the civil court not only in respect of matters which are specified therein but also the matters which could and ought to have been the subject-matter of the proceedings under the said Act is barred.” The Court relied on its earlier two

decisions in **Audhar and others vs. Chandrapati and others, (2003) 11 SCC 458** and **Narender Singh and others vs. Jai Bhagwan and others, 2005 (9) SCC 157**. These authorities were reconsidered by this Court in **Nagendra Pal Singh (supra)**. In its latest decision in **Ram Balak Singh (supra)**, the Supreme Court has clearly laid down that when rights of tenure holder are determined and recognised by consolidation authorities, jurisdiction of civil court is excluded by very scheme of the Consolidation Act. Though the Supreme Court was dealing with a case arising from Bihar Act, principle of law applicable in the facts of the present case would be same.

29. On the aspect of presumption as regards HUF and matters associated thereto, particularly, considering the findings recorded by the first appellate court in the present case, this Court may observe that before the Apex Court in **Narender Singh (supra)**, argument advanced was that revenue entry existed only in the name of father was in representative capacity for the entire body of joint family and it was urged that bar of Section 49 of the Act would not be attracted. However, the Supreme Court turned down the argument and held that though the suit lands were exclusively recorded in the name of deceased father, his sons even after attaining majority and being fully aware of execution of agreement for sale did not made any attempt to get their names jointly recorded in revenue records. The Apex Court held that jurisdiction to decide the dispute of rights and title in consolidation proceedings has been conferred by the Act exclusively on the Authorities under the said Act and the sons who claim joint ownership, ought to have approached the Authority. They, having

failed to do so, the argument based upon “representative capacity” was found to be misleading and the decision of High Court in invoking bar under Section 49 of the U.P.C.H. Act was upheld.

30. The Supreme Court in **Malkhan Singh vs. Sohan Singh and others, AIR 1986 SC 500** held that Sections 7 to 11 of the Act deal with the rights and title of the tenure-holder and by the application of those provisions to the proceedings under Section 12 in matters for which cause of action had arisen subsequently will make the decision a decision of title. But the position prior to the amendment of 1963 was different and there was no provision for the adjudication of the rights and title of a tenure-holder once the title and interest of the original tenure-holder had been finally determined and chak had been allotted. The judgment of **Malkhan Singh (supra)** was relied upon by this Court in **Surendra Singh vs. Board of Revenue, U.P., Agra and others, 2015 (127) RD 694**, holding that after the amendment made in U.P.C.H. Act in 1963, proceedings under Section 12 are in the nature of regular title proceedings unlike mutation proceedings which are summary in nature. Similar view was taken in **Hakam Ali and anr. vs. State of U.P. and others, 2014 (122) RD 463** and **Smt. Bhagwan Dei (Dead) Through Lrs. vs. Board of Revenue, U.P. Allahabad and others, 2010 (110) RD 747**.

31. From a bare perusal of Section 12 and the ratio laid down in above-referred authorities, it is clear that the provision applies to all the matters relating to changes and transfers affecting any right or interest recorded in the revised records, for which, the cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress. Admittedly, the

appellants herein are transferees at the strength of sale deed of 1968 and, therefore, the cause of action for them had not arisen when proceedings under Sections 7 and 9 were pending. Their rights accrued immediately after sale and there is ample documentary evidence on record to establish that whereas CH Forms 5 and 23 were issued in the name of JN as sole bhumidhar, CH Form 45 was issued in appellants' name pursuant to orders passed by the Assistant Consolidation Officer.

32. The judgment of this Court in **Smt. Bhuriya and others (supra)**, cited by the respondents is of no help to them as, in that case, the argument regarding bar of Section 49 was rejected in view of peculiar facts of that case where Assistant Consolidation Officer had mutated name of widow based upon succession and it was observed that a claim which arises after the consolidation scheme having been confirmed under Section 52 of the U.P. C.H. Act cannot be adjudicated by consolidation authorities. In that case, title of Smt. Bhuriya had accrued after death of Suggan and it was observed that when Suggan was alive, Smt. Bhuriya had no right at all and cause of action as regards her claim to inherit the holdings as widow accrued after proceedings under Sections 7 and 9 of the Act had been completed. The facts of the present case are altogether different, that is to say that there is no claim based upon succession but it arose out of a sale deed executed in favour of the appellants. Further, no cause of action had arisen for them at the stage of Sections 7 and 9 of the Act but arose subsequently based upon title vested in them and, therefore, their substantive rights were adjudicated under Section 12 of the Act and, hence, in absence of objections raised

by the plaintiffs, bar under Section 49 stood clearly attracted.

33. The judgment in **Ram Audh Singh and others vs. State of U.P. and others**, 1969 SCC Online All 110 has also been considered in the judgments cited on behalf of the appellants and needs no further deliberation. The judgment of **Suba Singh** (supra) was also pronounced in the peculiar facts of that case and it was observed by the Supreme Court that nothing done in consolidation proceedings was undone by the suit and, therefore, the bar under Section 49 of the Act would not be attracted. In the present case, since title vested in the appellants at the strength of the sale deed was recognized by the consolidation authorities and incorporated in CH Form 45, the same could not be undone by the civil court that has wrongly decreed the suit by expressly or impliedly dislodging un-opposed adjudication made by the Consolidation Court. Therefore, the judgment in **Suba Singh** (supra) would be of no assistance for the respondents.

34. In **Karbalai Begum** (supra), the Apex Court dealt with Section 9 CPC and observed that unless there is an express provision barring the suit based on title, civil court will not easily infer bar and, on facts of that particular case, suit was held to be not barred under Section 49 of the Act. On careful examination of the facts of case in **Karbalai Begum**, this Court finds that a plea of fraudulent entry of names by some of the parties was taken in those proceedings and the dispute was with regard to substantially recording the names in *Khewat* by some of the parties to the exclusion of others who claimed joint ownership in the property. No rights were asserted on the basis of a sale deed nor did

that case arise out of adjudication made under Section 12 of the Act.

35. Much emphasis was laid by the respondents on the latest decision of Hon'ble Supreme Court in **Prashant Singh and others** (supra) and it was argued that under Section 49 of the U.P.C.H. Act, there is a provision for transitory suspension of jurisdiction of civil and revenue court only during the period when consolidation proceedings are pending. It was urged that power under Section 49 cannot be exercised to take away the vested title of a tenure-holder; no such jurisdiction is conferred upon a Consolidation Officer or any other Authority under the Act and power to declare ownership in an immovable property can be exercised only by a civil court. A close scrutiny of the judgment in **Prashant Singh** (supra) would reveal that the Apex Court has observed therein that unless a person is a pre-existing tenure holder, bar under Section 49 would not come in operation. In the instant case, JR purchased the property in 1953; notification under Section 4 of the Act was issued in 1966; the disputed sale deed was executed in 1968 during consolidation operations, therefore, JR had pre-existing rights at the strength of sale deed of 1953 and transferees from JN (son of JR) through power of attorney holder PL got their names mutated pursuant to proceedings under Section 12 of the Act. It is a case where dispute regarding pre-existing rights in JR or JN was of a different nature that is to say as to whether JR had purchased the property as Karta of Joint Hindu Family or in his individual capacity. Moreover, the case before the Apex Court, with great respect, did not involve question of adjudication of rights of transferees whose names were recorded

under CH Form-45 pursuant to uncontested proceedings under Section 12 of the Act.

36. The Court may emphasize here that under Section 20 of the U.P. C.H. Act, a provisional Consolidation Scheme is prepared and objections against the scheme are invited. Section 21 is the provision for disposal of objections and, after such disposal, a final Consolidation Scheme is prepared. As per Section 27 of the Act, as soon as may be, after the final Consolidation Scheme has come into force, the District Deputy Director of Consolidation shall cause to be prepared for each village, a new map, field-book and record of rights in respect of the consolidation area, on the basis of the entries in the map, as corrected under Section 7, the *Khasra Chakbandi*, the annual register prepared under Section 10 and the allotment orders as finally made and issued in accordance with the provisions of this Act. The provisions of the Uttar Pradesh Land Revenue Act, 1901, shall, subject to such modifications and alterations as may be prescribed, be followed in the preparation of the said map and records. It has come on record of this case that names of the purchasers-appellants were recorded in CH Form 45. The said Form corresponds to Rule 97 of the Uttar Pradesh Consolidation of Holdings Rules, 1954. The said Rule corresponds to Section 27 of the Act and reads as under:-

“Rule 97 (Section 27).-The Consolidation Lekhpal shall, with help of the Khasra Mutabiqat and other relevant records mentioned in sub-section (1) of Section 27, prepare the Khatauni in C.H. Form 45 in duplicate.”

37. As per Section 52(1) of the Act, notification for closure of consolidation operations is issued in the Official Gazette

after fresh maps and records have been prepared under sub-section (1) of Section 27. It, therefore, establishes that notification under Section 52 would be issued after names of the transferees/successors etc. are recorded in the consolidation records as per Section 27(1) read with Rule 97 and CH Form 45. That is to say that such a notification cannot be issued prior to the stage of Section 27(1). It is, therefore, established that once the names of the appellants were recorded in CH Form 45 without there being any objection at any stage of proceedings recognized by the Act, the bar under Section 49 of the Act would stand attracted and it cannot be said that consolidation authorities would lose their competence in the instant case and that the civil court would be competent to examine the challenge made to the sale deed which was given effect to not only in consolidation records but also on the spot with delivery of possession to the appellants. Hence, the judgment in **Prashant Singh and others** (supra) cannot be read against the appellants so as to remove the bar under Section 49 of the Act, more so when the Apex Court in the said judgment itself observed that Section 49 of the U.P.C.H. Act is a provision for transitory suspension of jurisdiction of civil and revenue court only during the period when consolidation proceedings are pending. The suit in question having been filed during consolidation operations and there being no oral or documentary evidence on record that at any stage of proceedings under Section 12 or otherwise, any objections were raised by the plaintiffs against the claim raised by the appellants, the suit was clearly barred under Section 49 of the U.P.C.H. Act. In view of the above, second question is answered in favour of the appellants holding that the suit was barred by Section 49 of the U.P. C.H. Act.

Re:- Bar under Section 34 of S.R. Act (First Question)

38. The bar under Section 34 of the Act comes into play when declaration is claimed by the plaintiff as regards any legal character or to any right as to the property and he omits to claim further relief than a mere declaration of title. Section 34 finds place in Chapter VI of the Act titled as “DECLARATORY DECREES” whereas Chapter V contains provisions for “CANCELLATION OF INSTRUMENTS” and Section 31 is placed under this Chapter. It is a provision which is invoked by any person against whom a written instrument is void or voidable and he has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury. The authorities cited on behalf of rival sides on this aspect, when carefully appreciated, the court finds that the suit in question, being a simplicitor suit for cancellation of sale deed and no relief of declaratory rights under section 34 having been claimed, the suit squarely falls under Chapter V of the Act and has no concern with Chapter VI thereof. Hence, irrespective of rejection of amendment application at appellate stage in 1998, whereby the plaintiff was precluded from amending his plaint by incorporating relief of possession, the suit was very much maintainable under Section 31 of the Act. Therefore, first question is answered in favour of the respondents in the manner that the suit was not barred by Section 34 of S.R. Act.

Re:-Bar under Section 331 of the U.P.Z.A. & L.R. Act (Third Question).

39. During the course of arguments, Shri Pramod Kumar Jain, learned Senior Counsel, very fairly concedes that Bar

under Section 331 would not be attracted in the facts of the present case and, therefore, he did not press the said substantial question of law. Even otherwise, in a recent judgment passed in **Mangoo Singh & others vs. Ram Autar, 2024(9) ADJ 351**, this Court, after considering various authorities, has held that suit for cancellation of sale deed is covered by Section 31 of the S.R. Act and is unaffected by the bar under Section 331 of the U.P. Z.A. & L.R. Act. Therefore, the third question is answered in favour of the respondents holding that the suit was not barred by Section 331 of the U.P. Z.A. & L.R. Act.

Re:- HUF/Joint Hindu Family property (Fourth Question)

40. Since plea of HUF arising out of a rebuttable presumption in civil proceedings requires proof beyond doubt, it would be appropriate to first discuss few authorities on burden of proof. In **Baikuntha Nath Paramanik (dead) by his L.Rs. & heirs vs. Sashi Bhusan Pramanik (dead) by his L.Rs. & ors. (1973) 2 SCC 334**, it was held that when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisitions standing in the names of the persons who were in the management of the family properties are family acquisitions.

41. In **Surendra Kumar vs. Phoolchand (dead) through Lrs. & Anr. (1996) 2 SCC 491**, the Supreme Court held that where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that

it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family funds.

42. In **D.S. Lakshmaiah & Anr. (supra)**, the Supreme Court held that there is no presumption of a property being joint family property only on account of existence of a Joint Hindu Family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was a nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. In **Patram Singh (deceased by L.R.s) (supra)**, decision of Privy Council in **Appalaswami vs. Survanarayanamurti, AIR 1947 PC 189** was referred to and proposition was laid down to the effect that proof of existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

43. In **Ratnagiri Nagar Parishad vs. Gangaram Narayan Ambekar and others, (2020) 7 SCC 275**, while dealing

with the provisions of Indian Evidence Act, 1872, the Supreme Court observed that weakness in defence cannot be the basis to grant relief to the plaintiffs and shifts burden on defendants and, therefore, held the decision of first appellate court, by which it had proceeded to find fault of the defendants to answer the controversy in favour of the plaintiff, as erroneous. In **Addagada Raghavamma and another vs. Addagada Chenchamma and another, AIR 1964 SC 136**, it was held that there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The circumstances do not alter the incidence of the burden of proof but having regard to the circumstances of a particular case, the onus of proof may be shifted. Such a shifting of onus is a continuous process in the evaluation of evidence.

44. In the present case, the disputed sale deed was challenged mainly on the ground that PL was not competent to transfer the HUF property at the strength of the power of attorney. Other assertions that the sale was based upon malafides, collusion, for an inadequate consideration and was a sham transaction, were not made substantial grounds of challenge and necessary evidence to that effect is also lacking on record. Therefore, it has to be seen as to whether the property in the hands of JN was, in fact, the property purchased by JR from Joint Hindu Family funds, what is the evidence in that regard and to what extent the parties succeeded to prove their case. There are various sale deeds on record and none of them, contains any mention or whisper that they were executed by or in favour of JN/JR as a Karta of HUF or that the sale consideration had been paid from the HUF funds or that these transfers

were for the benefit of HUF. General Power of attorney dated 19.06.1963 (111-Ka) and notice dated 26.07.1969 (150-Ka) served on behalf of JN through his counsel Shri Om Prakash Gupta to PL also mention that the land in dispute exclusively belongs to JN with no averment of Joint Hindu Family property. Further, names of vendees of the sale deeds on record including those of the disputed sale deed were recorded in their respective names establishing that presumption qua existence of a Joint Hindu Family was not there.

45. The plaintiffs claimed that after partition of India in 1947, the Joint Hindu Family consisted of JR, JN, his wife and sons. Merely on these pleadings, it cannot be inferred that transfer in favour of other sons including non-parties to the lis was made from the HUF funds. Further, the plaintiffs furnished absolutely no specified details of the alleged HUF funds. JN and his wife duly admitted execution of power of attorney in favour of PL and sale deed by PL in favour of his sons. Amended written statement filed by the defendants tried to fill up the omissions made in the plaint as regards the formation of nucleus or source of alleged HUF funds. They did not plead that the land or the properties for which JR allegedly received compensation were ancestral or that the land in District Gurgaon purchased by him was in his personal capacity or money or earnings allegedly brought by him were ancestral or contributed by the members of the Joint Hindu Family. PW-1 Harish Sachdeva S/o JN also stated in his oral testimony that his grandfather, i.e., JR had purchased property in 1953 from his own funds. He also expressed his ignorance about the source of funds utilized by JR for purchasing property in 1953. He further expressed his ignorance whether after death of JR, his

father JN had become Karta or not. His statement is clear also to the effect that no objections were raised taking plea of HUF during consolidation operations. Though he said that his father was paying income tax as Karta, no documentary evidence to support this statement was brought on record. It has also come on record that at the time of partition, the plaintiffs were minors, JN was in service and other sons were living separately having their separate business.

46. Further, since JR acquired property in 1953, the Court finds considerable force in the submission of Shri Jain that plea of receiving compensation as a result of migration from Pakistan to India was not supported by any statutory sanction. **The Displaced Persons (Claims) Act, 1950 (Act No.44 of 1950)** was enacted to provide for the registration and verification of claims of displaced persons in respect of immovable property in Pakistan and **The Displaced Persons (Compensation and Rehabilitation) Act, 1954 (Act No.44 of 1954)** was enacted to provide for payment of compensation and rehabilitation grant to displaced persons. Since Act No.44 of 1950 did not contain any provision for payment of compensation but only provided for registration and verification of claims and for payment of compensation and rehabilitation grant, Act No.44 of 1954 was enacted, question of payment or receipt of compensation could not have arisen in or before 1953. Hence, the Court is not in a position to accept the bare plaint version in absence of any cogent evidence regarding formation of Joint Hindu Family or acquisition of property therefrom. In view of the above discussion, the fourth question is answered in the manner that findings recorded by the courts below to the effect that funds in the sale deed dated 06.06.1953

were Joint Hindu Family fund provided by JR are perverse and, consequently, the conclusion drawn by the courts that sons of JN were co-bhumidhars with him is wholly unsustainable.

47. As regards the arguments of Shri Manish Goyal on applicability of Section 5(c), both prior or subsequent to the amendments incorporated in the U.P. C.H. Act, the Court observes that the disputed sale deed was not challenged on the ground of non-obtaining prior permission from the consolidation authorities. There being neither any pleadings nor evidence in that direction, examining the validity of the sale deed on that line would be beyond the scope of exercise of second appellate jurisdiction under Section 100 CPC. In **Govindaraju vs. Mariamman, JT 2005 (2) SC 107**, after placing reliance upon its judgment in **Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., JT 2001 (2) SC 407**, the Supreme Court held that for a question of law to be involved in the case, its foundation has to be laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the Court of fact. In **Panchugopal Barua and others vs. Umesh Chandra Goswami and others, AIR 1997 Supreme Court 1041**, the Supreme Court condemned the approach of the High Court in considering the question which was not supported by pleadings or evidence on record and held that such an approach was contrary to the principles governing second appellate jurisdiction under Section 100 CPC. Therefore, this Court refrains itself from examining the validity of sale on that pretext, also for the reason that it is not covered by questions framed in the appeal nor does this Court feel it appropriate to frame any additional question of law in this

regard in absence of necessary material on record.

48. In view of the above discussion on merits of the instant second appeal, this Court finds that the trial court as well as the first appellate court have grossly erred in presuming that the property in dispute had been purchased by JR in the year 1953 from joint family fund and that members of the HUF were tenants in common. The judgments impugned are based upon misreading of the pleadings and lack of proper scrutiny of evidence on record as well as misinterpretation of the law applicable to the concept of jointness of a Hindu family and acquisition of property. Findings that even if the property was recorded in the name of one person only, the other members would be deemed to have coparcenary rights intact or that these rights could be conferred on individuals who were or could be deemed to be actual tillers of the soil are not according to the facts and the law governing the case. The Courts have cursorily decided the issues of jointness vis-a-vis bar under Section 49 of the U.P. C.H. Act without meticulously examining the pleadings and oral and documentary evidence on record.

Conclusion

49. The conclusion drawn, therefore, is that the suit is held to be barred by Section 49 of the U.P Consolidation of Holdings Act, 1953, not barred by either Section 34 of the Specific Relief Act, 1963 or Section 331 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and it is also held that plaintiffs have failed to prove their plaint case of joint nucleus or creation/existence of HUF and purchase of property as such. The questions framed are accordingly answered.

Civil Misc. Impleadment
Application No.44 of 2024

50. By means of this application, prayer to implead four persons as respondents No.18, 19, 20 and 21 has been made with a further prayer that they be heard in the instant second appeal. This application is dated 25.08.2024 and, for the first time, it came up before the Court as a bare application without record on 31.08.2024, on which date, the Court directed the office to list the application with previous papers. It was thus placed on record. However, the Court finds that final hearing in this appeal had commenced on 21.08.2024, on which date, substantial arguments on behalf of appellants were also heard and they stood concluded on 28.08.2024, whereafter arguments on behalf of contesting respondents were heard on 10.09.2024 that stood concluded on 17.09.2024. Thereafter, on 30.09.2024, arguments from the appellants' side, in rejoinder, were heard and, then, arguments on behalf of contesting respondents were again heard and both the sides completed their all arguments on 03.10.2024. Further judgment was reserved on 22.11.2024 when arguments in connected Second Appeal No.694 of 2001 were concluded. No arguments were advanced on any date in support of the present impleadment application. The application is, therefore, **rejected**.

RE- Civil Misc. Application No.271217
of 2007 (under Section 144 CPC)

RE- Civil Misc. Application No.76134 of
2008

(under Order XXXIX Rule 2-A CPC).

51. These two applications raise grievance arising out of appellant's

dispossession from the property in dispute pending instant appeal.

52. By means of application u/s 144 CPC, prayer to direct restitution of possession of the applicants/appellants over plot Nos.1035 area 3.563 hectares and 1049 area 5.817 hectares (total area 9.380 hectares) situated in revenue Village Ghat, Pargana, Tehsil and District Meerut which formed subject matter of original suit, civil appeal as well as instant second appeal, has been made. The application is supported by affidavit of appellant No.1 describing the history of litigation. The averments made in the affidavit and the supporting documents reveal that the names of the appellants were recorded in CH Form 45 concerning new Gata No.1035 and 1049 (old No.110). An interim order was passed by this Court in the instant second appeal on 18.04.2000 staying execution proceedings and another order of status quo was passed on 10.04.2003, however, the second appeal was dismissed for want on prosecution on 06.09.2007, on which date, the stay order was also vacated but, soon thereafter, the order of dismissal was recalled on 27.09.2007, the appeal was restored and interim order was revived.

53. The information regarding restoration of appeal of the second appeal on 27.09.2007 and revival of the interim order was served through affidavit of appellant No.1 upon the District Magistrate, Meerut at 02:37 PM, the same day. The District Magistrate marked the affidavit to Additional District Magistrate (E)/S.D.M. Meerut. The affidavit contained a prayer that the proceedings for transfer of possession being carried out on administrative side pursuant to order dated 06.09.2007 dismissing the appeal for want of prosecution be stayed as the appeal had

been restored and order of status quo had been revived by the High Court. The Naib Tehsildar (IV), Meerut, however, submitted a report pursuant to the District Magistrate's letter dated 24.09.2007 and further orders of District Magistrate, Sub Divisional Magistrate and Tehsildar that the possession over the aforesaid property had been delivered to Subhash Chand and others, i.e. the respondents, in the presence of police force.

54. The affidavit supporting application under Order XXXIX Rule 2-A CPC and the documents attached thereto reveal that on 27.09.2007, the police force moved from the police station concerned pursuant to letter No.294/7-DLRC/07 dated 24.09.2007 submitted by Lekhpal and Tehsildar at police station at about 02:55 PM, by which time, affidavit informing restoration of the second appeal as well as revival of an interim order of status quo had been served in the office of the District Magistrate as aforesaid. At 07:00 PM, the same day, the police force came back from the spot, however, by that time, the appellants had been dispossessed through police force with delivery of possession to the respondents. There is on record a report signed by revenue officials on different dates of March 2008 to the effect that appellants were in possession over the property prior to 06.09.2007, on which date the instant second appeal was dismissed for want of prosecution and on 27.09.2007, possession was delivered to Subhash Chand and others on account of vacation of the said order. The report further states that a prayer was made by appellants to redeliver possession to them on account of revival of the interim order, however, since matter for change of possession was pending before the High Court, no proceedings at Tehsil level were warranted. The revenue officials

continued to report to one or the other officer in the departmental hierarchy, however, there is neither any order nor any report on record, by which, possession taken from the appellants through police force was redelivered to them. Contrarily, it is established that despite full knowledge to all the administrative and revenue officer, from top to bottom in the district, about restoration of the instant second appeal and revival of the interim order of status quo, they deliberately delivered possession to the respondents and very cleverly left the question of redelivery of possession up to the High Court. This happened in 2007-2008 and, since then, the appellants are out of possession and their applications under Section 144 CPC and under Order XXXIX Rule 2-A CPC have yet not been decided.

55. The Court expresses its serious anguish on the mode and manner in which the revenue officers and administrative machinery, by adopting all coercive measures and taking recourse to high-handedness, committed abuse of their position and flouted the order passed by this Court. They committed two sins; one, by forcibly dispossessing the appellant on administrative side with the aid of police force without intervention of the executing court and, secondly, they refused to redeliver possession to the appellants by preparing and submitting one or the other report, taking aid of pendency of the second appeal before this Court. The Court must emphasize here that the suit giving rise to the instant second appeal was a simplicitor suit for cancellation of the disputed sale deed. As noted in this judgment, prayer to amend the plaint at first appellate stage attempting to add a relief for delivery of possession was rejected in the year 1998, which order attained finality. Therefore, even if, the

decree impugned in this second appeal was put into execution or might have been put into execution, it could be executed only to the extent of making an endorsement in the record kept in the office of the Sub-Registrar as regards cancellation of the disputed sale deed and for no other purpose. The decree could not be executed for delivery of possession as there was no such decree in existence. It is for this reason that the respondents moved the giant wheels of administrative and police machinery and by practically teasing and brushing aside the executing court as well as this Court and making mockery of established procedure of law, they succeeded in forcibly dispossessing the appellants. In the memo of delivery of possession, no reference of any order passed by the executing court finds place. This act of the respondents in collusion with the administrative and police officials leads this Court to exercise its inherent powers under section 151 C.P.C. also to impose heavy damages upon the respondents on account of they being in unauthorized possession over the aforesaid land in dispute for a period of about more than seventeen (17) years. Considering the fact that the appellants were dispossessed from more than 90000 sq. mtrs. of land by all illegal means, this Court assesses the damages as **Rs.10,00,000/- (Rs. Ten lacs).**

56. This Court may observe that section 144 CPC would apply if the decree is varied or reversed in any appeal, revision or any other proceedings. It was held by Supreme Court in **Mrs. Kavita Trehan and another vs. Balsara Hygiene Products Ltd. (1994) 5 SCC 380** that: "Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive." (See Gangadhar v. Raghubar Dayal [AIR 1975 ALL 102 (FB): 1974

ALL LJ 751] and State Government of A.P. v. Manickchand Jeevraj & Co. [AIR 1973 AP 27;(1972) 2 Andh LT 23]. The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands.

57. Since, this Court is reversing the decree impugned herein holding that cancellation of sale deed was not according to law and the appellants having been dispossessed on that basis, the **application under Section 144 CPC stands allowed** and it is hereby directed that the executing court shall ensure hassle-free delivery of possession of the property covered by the disputed sale deed to the appellants within 2 months henceforth and, for that purpose, if required, it may use such force as the law permits. It also directs the respondents to deposit damages to the tune of Rs.10,00,000/- (Rs. Ten lacs) before the executing court within two months, failing which the said sum shall be recovered by the executing court from the respondents by all legally permissible means as if it is a money decree within a period of next six months and not later than that in any case. For these purposes, a Misc. Case may also be registered before the civil court.

58. As regards application under Order XXXIX Rule 2-A CPC, in view of the order passed on application under section 144 C.P.C. granting substantial relief to the appellants, the Court does not feel it appropriate to proceed for adjudicating the issue as regards awarding or not awarding punishment to the alleged violators of the interim order or the proceedings of this appeal. Necessary consequences arising from final order would confer substantive rights upon parties qua the property in dispute. The application under Order

XXXIX Rule 2-A CPC, accordingly stands **disposed off.**

59. The second appeal succeeds and stands **ALLOWED** with above observations and directions. The impugned judgment and order dated 19.12.1979 pronounced and passed by learned Munsif, Meerut Court No.12 in Original Suit No.625 of 1971 (Subhash Chand and others vs. Jetha Nand and others) as well as judgment and order dated 25.03.2000 pronounced and passed by Vth Additional District Judge, Meerut in Civil Appeal No.641 of 1979 (Shiv Charan Dass and others vs. Subhas Chand and others) and the decree drawn on that basis are hereby **SET ASIDE**. The Original suit stands **DISMISSED**.

60. A copy of this judgment may also be filed by the appellants before the Sub-Registrar concerned in order to make necessary endorsements in the concerned records in terms of Section 31 of the Specific Relief Act, 1963.

(2024) 12 ILRA 111
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 694 of 2001

Prem Kumar & Ors. ...Appellants
Versus
Gurudev Singh & Ors. ...Respondents

Counsel for the Appellants:

Counsel for the Respondents:

A. Civil Law - Unregistered Agreement for Sale - Effect - Registration Act, 1908 - Transfer of Property Act, 1882 - Sections 3, 49 & 54 - U.P. Civil Laws (Reforms and

Amendment) Act, 1976 (U.P. Act No. 57 of 1976) came into force w.e.f. 1-1-1977. Issue: Whether an unregistered document for sale of an immovable property could be enforced in a suit for specific performance? Whether a decree for specific performance based upon an unregistered agreement for sale is sustainable? Held: From a combined reading of Sections 3, 4, and 54 of the Act of 1882 and Section 17 of the Act of 1908, as applicable to the State of U.P., as amended by U.P. Act 57 of 1976, it is clear that every contract of sale of an immovable property situated in any district of U.P. shall be made only by a registered instrument w.e.f. 1-1-1977. Prior to 01.01.1977, an unregistered contract for sale qua immovable property situated in U.P. could be enforced in a suit for specific performance of a contract, but after the amendment in Section 49 of the Registration Act w.e.f. 01.01.1977, an unregistered agreement cannot be enforced in a suit for specific performance of a contract nor can it be read in evidence. In the instant case the unregistered AFS, though executed in Jalandhar, State of Punjab, but being in respect of immovable property situated in Meerut, i.e., State of U.P., and after the coming into force of the amendments incorporated by U.P. Act No. 57 of 1976, was clearly inadmissible in evidence, and no decree for specific performance could be drawn on that basis. Decree based upon an unregistered AFS dated 31.05.1977 not according to law. (Para 24, 26, 27)

B. Specific Relief Act, 1963 - Section 16 - Suit for specific performance - Pleadings and Proof - Order VI Rule 3, Appendix A, Forms 47 and 48 - Forms 47 and 48 of Appendix A to the CPC. provide for making an averment that the plaintiff "has been and still is ready and willing specifically to perform the agreement on his part" or that "the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant". Specific performance of a contract cannot be enforced in favour of person who fails

to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him - *Meaning of expression 'ready' and 'willing'* - 'ready' is preparedness for the moment or to be equipped with what is needed; whereas 'willing' denotes inclination to do a thing voluntarily or without reluctance. Expression "ready and willing" implies capacity to act as well as inclination to do a thing. Court while deciding the question of "readiness and willingness" has to focus on the maintained continuity or discontinuity as regards "readiness and willingness". (Para 34, 35)

C. Specific Relief Act, 1963 - Section 16 - Suit for specific performance - Agreement For Sale was dated 31.05.1977. Date fixed for execution of the sale deed was 15.07.1977. On 14.07.1977, the plaintiff tendered balance sale price. Through a telegram dated 11.07.1977, plaintiff intimated the defendants that the plaintiff would reach on 14.07.1977 for registration of sale deed. On 15.07.1977, the plaintiff waited for the defendants before the competent registering authority at Meerut but defendants did not appear to execute the sale deed. On 29.05.1979, the plaintiff sent a notice calling upon the defendant to pay a sum of Rs. 55,000/-. Suit instituted in Jalandhar on 27.05.1982. Plaint was returned and was presented on 30.05.1982 before the civil court, Meerut. In 'paragraph 8' of the plaint read as under:- *"8. That the plaintiff was and is still ready to pay the balance purchase money of the said property to the defendants."* Held: Court held that the pleadings contained in the plaint were not strictly in consonance with the prescribed Forms 47 and 48 of Appendix A to the CPC and lacked the necessary averment of 'willingness' of the plaintiff to carry out his obligation as per the agreement. Nothing was done by the plaintiff from 15.07.1977 till 28.05.1979, i.e. for about two years in the direction of getting the sale deed executed though the date fixed for performance had passed away. Notice dated 29.05.1979 does not

raise a demand for executing the sale deed. It showed that the plaintiff was neither ready nor willing to get the sale deed executed but was interested in refund of money only. Plaintiff's case of readiness and willingness was neither pleaded nor proved. (Para 34, 35, 39, 41)

D. Civil Law - Specific Relief Act - suit for specific performance - Evidence led by power of attorney holder - Specific Relief Act, 1963, S. 16 - "readiness and willingness" - Issue: Whether evidence led by power of attorney holder in respect of matters which were not in his personal knowledge could suffice granting a decree? *Held:* If a plaintiff, in a suit for specific performance, is required to prove that he was always ready and willing to perform his part of the contract, it is necessary for him to step into the witness box and depose the said fact and subject himself to cross-examination on that issue. A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. A third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness. Plaintiff did not make attempt to prove his plaint case and though the attorney was real brother of plaintiff, that was not sufficient to prove continuous "readiness and willingness" on the part of the plaintiff to get the sale deed executed. A very heavy burden was upon the plaintiff to establish at least five years of readiness and willingness i.e. since 1977 to 1982 but evidence to that effect lacked. (Para 40)

Allowed. (E-5)

List of Cases cited:

1. Surendra Kumar Vs Amarjeet Singh & ors., 2004 (4) AWC 3134 All
2. Vijay Kumar Sharma Vs Devesh Behari Saxena, AIR 2008 All 66

3. K. Arumuga Velaiah Vs P.R. Ramasami & ors., (2022) 3 SCC 757

4. K.Nanjappa (Dead) by Lrs. Vs R.A. Hameed @ Ameersab (Dead) by Lrs. & anr., (2016) 1 SCC

5. Ram Singh Vs Sughar Singh, 2010 (6) AWC 6331

6. Manisha Mahendra Gala & ors. Vs Shalini Bhagwan Avatramani & ors., (2024) 6 SCC 130

7. Rajesh Kumar Vs Anand Kumar & ors., 2024 (4) AWC 3271

8. Janki Vashdeo Bhojwani & anr. Vs Indusind Bank Ltd. & ors., (2005) 2 SCC 217

9. Man Kaur Vs Hartar Singh Sangha, (2010) 10 SCC 512

10. A.C. Narayanan Vs St. of Mah. & anr., (2014) 11 SCC 790

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. The instant second appeal at the instance of defendants of Original Suit No.169 of 1983 (Gurudev Singh v. Prem Kumar and others) arises from a suit for specific performance of an unregistered Agreement for Sale (in short 'AFS') in relation to an immovable property situated in District Meerut. The trial court decreed the suit by judgment and order dated 20.10.1997, against which, the defendants filed Civil Appeal No. 84 of 1997 (Prem Kumar Sachdeva and another v. Gurudev Singh) which met the fate of dismissal by judgment and decree dated 25.01.2001.

Brief facts of the case

2. One Gurudev Singh instituted the suit in question, initially at Jullundur (now known as Jalandhar), State of Punjab,

where it was registered as Original Suit No.26 of 1980. Decree was claimed against three defendants on the basis of AFS dated 31.05.1977 qua land bearing Khasra Nos. 1035 and 1049 situated at Village Ghat, Pargana, Tehsil and District Meerut on the plea that defendants No.1 and 2 had executed a registered power of attorney dated 24.04.1977 in favour of defendant No.3- Puran Chand Sachdeva (in short 'PCS') authorizing him to enter into an AFS. An agreement was, accordingly, executed by the Attorney and a sum of Rs.55,000/- was received by the defendants in advance as part of sale consideration and he agreed to pay the balance amount before the competent registering authority at the time of registration of sale deed. The date fixed for execution of the sale deed was pleaded as 15.07.1977. It was stated in the plaint that on 14.07.1977, the plaintiff tendered balance sale price amounting to Rs.1,42,014/- besides cost of stamp and registration expenses and through a telegram dated 11.07.1977, he intimated the defendants that the plaintiff would reach Meerut on 14.07.1977 for registration of sale deed and the defendants should keep ready the income tax certificate. When, on 15.07.1977, the plaintiff waited for the defendants before the competent registering authority at Meerut but defendants did not appear to execute the sale deed, the suit was filed. The cause of action was alleged to have accrued on 31.05.1977 at Jalandhar and, then, on 15.07.1977.

3. The defendants No.1 and 2, i.e. the appellants herein, filed written statement taking a ground that power of attorney dated 23.05.1977 executed in favour of defendant No.3 had been cancelled on 25.05.1977, publication in respect whereof was made in daily newspaper Dainik Prabhat on 26.05.1977 and, therefore, the

Attorney did not remain competent to execute an agreement or to receive advance money. Regarding execution of the agreement, it was pleaded that someone had made defendant No.3 to drink in Jalandhar, he did not remain in his senses and execution of the agreement was the result of such mischief.

Trial Court's Judgment

4. The trial court, after recording a finding that defendant Nos.1 and 2 had admitted execution of power of attorney in favour of defendant No.3 who failed to prove its due cancellation, the defendant No.3 was competent to execute an agreement. It disbelieved the defence and held the agreement as a duly proved document. As far as the question of "readiness and willingness", the trial court recorded that plaintiff had successfully established the said component by not only reaching the Sub Registrar's office on 15.07.1977 but also by opening a bank account on 14.07.1977 and depositing the money therein for the purposes of making payment to the appellants. When the plea was taken by the appellants as regards non-maintainability of the suit for want of registration of AFS, the trial court discarded the said objection by observing that since the agreement was executed in Jalandhar, i.e the State of Punjab, there being no requirement of registration in Punjab, merely because the property is situated in the State of U.P., the agreement could not be discarded.

Appellate Court's Judgment

5. The defendant appellants filed Civil Appeal No.84 of 1997 that was also dismissed by the first appellate court on

25.01.2001 simply confirming the decision of the trial court.

Return of Plaintiff from Punjab to U.P.

6. A significant feature of this case is that the suit was filed in Jalandhar, State of Punjab where an issue was framed regarding territorial jurisdiction of Punjab Court. The issue was decided in favour of the defendants and, consequently, the plaint was returned for being presented before the competent court at Meerut. Consequently, the plaint was represented before Civil Court, Meerut where it was numbered as Original Suit No.169 of 1983.

Admission Order

7. The instant second appeal was admitted by order dated 10.05.2001 on the following single question:-

"Whether the Trial Court and Lower Appellate Court wrongly held that provisions of Section 17(1) of Indian Registration Act are not applicable to the agreement in question?"

8. However, recently, Civil Misc. Application No. 32 of 2024 was filed by the appellants with a prayer to add three more questions of law and to hear the appeal on those questions too. This Court, by order dated 15.07.2024, disposed off the said application with the observation that by virtue of power conferred upon this Court under sub-Section (5) of Section 100 Civil Procedure Code, 1908, the appeal can be heard on additional questions also with a further observation that the additional questions of law pressed by the appellants shall be considered at the time of final hearing of appeal and it would be open for

the respondents side to argue that such questions do not arise for consideration.

**Substantial questions of law reframed
and added**

9. The appeal was heard at length and during the course of hearing and based upon the arguments advanced by both the sides, this Court proceeds to hear instant appeal on following substantial questions of law:-

(i). Whether a decree for specific performance based upon an unregistered agreement for sale dated 31.05.1977 is at all sustainable?

(ii). Whether the plaintiff-respondents utterly failed to aver and prove “readiness and willingness” as regards execution of the sale deed as per parameters of law recognized by Civil Procedure Code, 1908 and Specific Relief Act, 1963?

(iii). Whether evidence led by power of attorney holder in respect of matters which were not in his personal knowledge could suffice granting a decree?”

Learned Counsel heard

10. Heard Sri Pramod Kumar Jain, learned Senior Counsel assisted by Mr. Sanjay Agrawal, for the appellants and Sri Rakesh Pandey, learned Senior Counsel assisted by Sri Jyoti Kumar Singh, Ms. Vishakha Pandey, Sri Adarsh Kumar & Ms. Krishna Shukla for the contesting respondents.

Appellants’ arguments

11. Assailing the validity of the impugned decree(s), Shri Pramod Kumar Jain, learned counsel vehemently argued that

the AFS dated 31.05.1977, being an unregistered document, in view of the amendments made in the Transfer of Property Act, 1882 (hereinafter referred to as ‘the Act of 1882’) as well as Registration Act, 1908 (hereinafter referred to as the Act of 1908), suit could not be decreed and both the courts below have grossly erred in this regard; that the plaintiff utterly failed to specifically aver and prove “readiness and willingness” on his part to get the sale deed executed and the pleadings contained in paragraph No.8 of the plaint are not in consonance with Section 16 (c) of the Specific Relief Act, 1963 (hereinafter referred to as ‘the Act of 1963’) read with Order VI Rule 3, Appendix A, Forms 47 and 48; that the suit was instituted in the year 1980 in Jalandhar, the plaint was returned on 27.08.1982, the suit was re-registered before the Civil Court, Meerut on 30.08.1982 and, just before that, the plaintiff Gurudev Singh executed a power of attorney in favour of Gurubaksh Singh on 27.05.1982 and since the plaintiff did not appear in witness box, the oral testimony of attorney Gurubaksh Singh would not suffice proving “readiness and willingness” of the plaintiff, inasmuch as, in order to succeed in his claim, a plaintiff has to establish before the civil court that he was, is and has been ready and willing to get the sale deed executed right from the date of execution of the agreement or the date fixed for performance of the agreement till the decree is drawn. Submission is that attorney Gurubaksh Singh did nothing nor could he do anything to establish readiness and willingness since 1977 till 1982 i.e. for a period of five years and, hence, the courts below have wrongly treated the claim for specific performance as proved.

12. Assailing the finding of the courts below that there was no requirement of registration in the State of Punjab, Shri Jain

vehemently argued that as per Section 17 read with Section 49(c) of the Act of 1908 and Section 54 of the Act of 1882, as applicable in the State of U.P. after amendments incorporated by U.P. Act No.57 of 1976, since the property is situated in Meerut, i.e. the State of U.P., if the plaintiff wanted the Court to receive and read the agreement in evidence, he should have got the agreement re-registered in U.P. in terms of Sections 23, 24 and 25 of the Act of 1908 and, in the event of refusal by the Registrar to re-register the agreement, the plaintiff had a remedy of filing appeal under Section 72 of the Act of 1908 but he, having done nothing and having continued to press his claim based upon an unregistered agreement, the suit was bound to fail. Shri Jain pressed various statutory provisions during the course of arguments and placed reliance upon various authorities out of which relevant authorities shall be discussed hereinlater.

13. Shri Jain also argued that on 29.05.1979, the plaintiff sent a notice (Paper No.17-Ka, Ex. P9) calling upon the defendant to pay a sum of Rs.55,000/- alongwith cost of notice within one month with a clear stipulation that, in default, suit for recovery of the said amount would be filed in civil court at Jalandhar. Submission is that two years after the date fixed for execution of the sale deed, when the plaintiff did not issue notice calling upon the defendants to execute the sale deed but pressed his claim for refund of money paid to the defendants' attorney, the notice, in itself, establishes that the plaintiff was neither ready nor willing to get the sale deed executed but was interested in refund of money only.

Respondents' Arguments

14. *Per contra*, Shri Rakesh Pandey, learned Senior Counsel vehemently opposed all the submissions advanced by Shri Jain and submitted that once the defendants No.1 and 2 admitted execution of power of attorney in favour of the defendant No.3.- 'PCS', and failed to establish due cancellation thereof, they cannot raise any challenge to the competence of the attorney PCS; there being no bar under the law restraining execution of agreement at any place in India, since the agreement was executed in the State of Punjab where there is no requirement of registration, it was neither necessary to get the agreement re-registered in U.P. nor could the suit fail for want of registration. He further submitted that since the defendants No.1 and 2 denied execution of the agreement or atleast its due execution, the Registrar was bound to refuse to register the document as per Section 35 of the Registration Act, 1908 and, for this reason, any exercise suggested by Shri Jain to get the agreement re-registered would have been a futile exercise. Further submission is that since the document formed part of record of the suit proceedings, the plaintiff could not take it back from the civil court for the purposes of re-registration as the executant of the document was defendant No.3 and not the plaintiff.

15. As regards the amended provisions of Act of 1908 and Act of 1882, Shri Pandey, by referring to Section 17(1)(b) of the Act of 1908, submitted that agreement by itself does not create, declare, assign, limit or extinguish any right, title or interest in an immovable property and, therefore, it need not be registered. He vehemently argued that the only right created by an agreement in favour of a proposed transferee is the right to get the sale deed

executed, which cannot be termed as a right in immovable property. He took aid of Section 54 of the Act of 1882 and submitted that a contract for sale, by itself, does not create any interest in or charge on immovable property and even the amended provisions would not come in the way of the plaintiff. By referring to Section 17(2)(v) of the Act of 1908, it was argued that requirements of sub-Section (1) Clauses (b) and (c) of Section 17 would not apply to any document other than contract for sale and such an exemption does not give rise to a legal necessity to get the contract for sale registered, inasmuch as, Clause (v) of sub-Section (2) would again relate back to Section 17(1)(b) and, therefore, it would again have to be seen as to whether contract for sale, in itself, would create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest to or in immovable property and once, it does not, there is no requirement of its registration.

16. As regards “readiness and willingness”, Shri Pandey urged that when the date for execution of sale deed was fixed as 15.07.1977 and time was the essence of contract, since the plaintiff has successfully established that he came all through from Jalandhar to Meerut on 14.07.1977, opened a bank account in his name, deposited the balance amount required to be paid to the defendants No.1 and 2, presented himself before the Sub Registrar on 15.07.1977, “readiness and willingness” was well established and nothing more was required for decreeing the suit. As regards competence of Gurubaksh Singh to prove the plaintiff’s case, Shri Pandey submitted that he was real brother of plaintiff-Gurudev Singh and his testimony could not be discarded merely because he was also an attorney and

plaintiff did not appear in witness box. He also submitted that law recognises oral transfer and oral understanding regarding transaction of sale and, therefore, registration or non-registration of the agreement would be irrelevant in the instant case, particularly when the appellants’ attorney PCS acted in furtherance of the power attorned upon him.

17. As regards Shri Jain’s submission based upon notice 17-Ka, it was argued that sending a notice calling upon the defendants to execute a sale deed, not being a pre-requisite of institution of suit for specific performance, merely because the plaintiff sent notice 17-Ka asking the defendants to refund the advance money to the plaintiff, this, in itself, does not mean that plaintiff lost his claim for getting the sale deed executed and the notice, therefore, does not amount to either waiver or relinquishment of right to get the sale deed executed. Shri Pandey, in support of his submissions placed reliance upon various authorities relevant of which shall be discussed hereinafter.

Analysis of Rival Contentions

Re:- First Question:- Whether a decree for specific performance based upon an unregistered for sale dated 31.05.1977 is at all sustainable?

18. In view of the questions framed by this Court, it is not necessary to comment upon requirement or no requirement of getting the AFS re-registered in the State of U.P. and whether the plaintiff was obliged or not obliged to do that, is irrelevant as the Court has to examine validity of the decree based upon unregistered agreement,

whatever might have been the reason behind its non-registration.

19. As regards requirement of registration of an AFS, it is to note that the U.P. Civil Laws (Reforms and Amendment) Act, 1976 (U.P. Act No. 57 of 1976) came into force w.e.f. 1-1-1977. This Act amended the Registration Act 1908 as well as the Transfer of Property Act, 1882, besides several other enactments. Section 54 of the Transfer of Property Act, 1882, as applicable to the State of U.P., w.e.f. 1-1-1977, reads as under:

"Section 54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made- Such transfer, in the case of tangible immovable property [***], or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Contract of Sale- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Such contract can be made only by a registered instrument."

20. Section 3 of the Transfer of Property Act, 1882 defines-

"Instrument- as a non testamentary instrument

"Registered- means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents."

21. Section 17 of the Registration Act, 1908 Act provides that certain documents

are required to be compulsorily registered and, other documents are exempted from being registered. Section 17(1)(b) of the Registration Act, 1908, as applicable in the State of U.P., reads as under:

"Section 17(1)- The following documents shall be registered- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

.....
(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to in immovable property."

22. Section 17(2)(v) of the Act of 1908 reads as under:

"Section 17(2)- Nothing in clauses (b) and (c) of sub-section (1) applies to-

(v) any documents other than documents specified in sub-section (1-A)] **[other than contract for sale]** not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

The words **"other than contract for sale"** occurring in Section 17(2)(v) of the Registration Act have been inserted by U.P. Act No. 57 of 1976 w.e.f. 1-1-77.

23. Section 4 of the Transfer of Property Act, 1882 reads as under:

"4. Enactments relating to contracts to be taken as part of Contract Act and supplemental to the Registration Act. - The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (IX of 1872).

[And Section 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908 (XVI of 1908).]"

24. Thus, from a combined reading of Sections 3, 4 and 54 of the Act of 1882 and, Section 17 of the Act of 1908, as applicable to the State of U.P., as amended by U.P. Act 57 of 1976, it is clear that every contract of sale of an immovable property situated in any district of U.P. shall be made only by a registered instrument. Even though a contract for sale of immovable property does not by itself create any interest in or charge on such property and only creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest, nonetheless, the said contract for sale of an immovable property is required to be registered in the State of U.P. w.e.f. 1-1-1977.

25. The next question which arises for consideration is whether an unregistered document for sale of an immovable property, could still be enforced in a suit for specific performance. At this stage, the Court may refer to Section 49 contained in the Registration Act, 1908 alongwith U.P. Amendments made therein by U.P. Act No.57 of 1976, w.e.f. 01.01.1977. A careful perusal of the amendments made would

reflect that certain provisions relating to admissibility of an unregistered agreement in a suit for specific performance have been "omitted" and requirement of registration has been "inserted." The provision reads as under:-

Central Act

"49. Effect of non-registration of documents required to be registered.-

No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882) to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882 (4 of 1882), to be registered **may be received as evidence of a contract in a suit for specific performance** under Chapter II of the Specific Relief Act, 1877 (3 of 1877) [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]

In Uttar Pradesh:

In Section 49,-

(i) in the first paragraph, after the words "or by any provision of the Transfer of Property Act, 1882", **insert** the words **"or of any other law for the time being in force"**;

(ii) for clause (b), substitute the following clause, namely:-

(b) confer any power or create any right or relationship, or";

(iii) in clause (c), after the words “such power”, insert the words “or creating such right or relationship”;

(iv) in the proviso, **omit** the words “**as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or.**”

[Vide Uttar Pradesh Act 57 of 1976, sec. 34 (w.e.f. 1--1-1977).]

26. The result of these amendments is, that, prior to 01.01.1977, an unregistered contract for sale qua immovable property situated in U.P. could be enforced in a suit for specific performance of a contract, but after the amendment in Section 49 of the Registration Act w.e.f. 01.01.1977, an unregistered agreement cannot be enforced in a suit for specific performance of a contract nor can it be read in evidence.

27. Reliance placed by Shri Jain on the judgments of **Surendra Kumar v. Amarjeet Singh and others, 2004 (4) AWC 3134 All, Vijay Kumar Sharma v. Devesh Behari Saxena, AIR 2008 All 66** supports the submissions made by him and, therefore, it is held that an unregistered AFS, though executed in Jalandhar, State of Punjab but being in respect of immovable property situated in Meerut i.e. State of U.P. and after coming into force of the amendments incorporated by U.P. Act No.57 of 1976 was clearly inadmissible in evidence and no decree for specific performance could be drawn on that basis. Reliance placed by Shri Rakesh Pandey on the judgment of **K. Arumuga Velaiah v. P.R. Ramasami & others, (2022) 3 SCC 757** does not help him for the reason that the Apex Court was dealing with a case arising from State of Madras with reference to a different provision contained under Section 17 of the Act of 1908 and though it was held that the

agreement does not by itself create a right or interest in immovable property but merely creates a right to obtain another document and, therefore, the former document does not require registration, since there was no discussion, nor could there be, as regards admissibility of an unregistered document executed after 01.01.1977 in relation to an immovable property situated in the State of U.P. where, as aforesaid, such document has been held to be inadmissible, the ratio of law laid down by Supreme Court in **K. Arumuga Velaiah (supra)**, with due respect, does not apply in the present case.

28. Similarly, judgment of **K.Nanjappa (Dead) by Lrs. v. R.A. Hameed @ Ameersab (Dead) by Lrs. and another, (2016) 1 SCC 762** based upon oral contract would be of no assistance for the respondents, inasmuch as, the said case had arisen from State of Karnataka and the Supreme Court held that in a case where the plaintiff comes forward to seek a decree for specific performance based upon an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties in the concluded AFS. The Court may note here that in the instant case, the agreement was seriously attacked on by the defendant-appellants and there was no consensus ad idem between the parties to the suit. Even otherwise, the plea of oral transfer based upon Section 9 which provides that “a transfer of property may be made without writing in every case in which a writing is not expressly required by law” is not available to the respondents since, in the State of U.P., requirement of law is that there has to be a written and duly registered AFS for the purposes of granting a decree for specific performance.

Hence, the argument based upon oral contract has no substance.

29. In view of the above, first question is answered in favour of the defendant-appellants and it is held that decree based upon an unregistered AFS dated 31.05.1977 is not according to law.

Re: Second and Third Questions:-

“(ii). Whether the plaintiff-respondents utterly failed to aver and prove “readiness and willingness” as regards execution of the sale deed as per parameters of law recognized by Civil Procedure Code, 1908 and Specific Relief Act, 1963?

(iii). Whether evidence led by power of attorney holder in respect of matters which were not in his personal knowledge could suffice granting a decree?”

30. Although the appeal can succeed only in the light of answer to the first question, since two more questions have been framed and require answer in the light of arguments advanced and also being necessity of law, the arguments of both sides on the question of “readiness and willingness” are being dealt with.

31. It is first necessary to refer Section 16(c) of the Specific Relief Act, 1963 which reads as under:-

“16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of person-

.....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the

performance of which has been prevented or waived by the defendant.”

32. Simultaneously, Order VI Rule 3 CPC needs reproduction as under:-

“3. Forms of Pleading.-The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.”

33. Corresponding Forms 47 and 48 are also reproduced as under:-

“Form No.47

SPECIFIC PERFORMANCE

(NO.1)

(Title)

A.B., the above-named plaintiff, states as follows:-

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of Form No.1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

Form No.48

Specific Performance (No.2)

(Title)

A.B., the above-named plaintiff,
states as follows:-

1. On the day of 20 , the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed. The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the day of 20 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 20 ,the plaintiff again demanded such transfer [or the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras 4 and 5 of Form No.1.]

6. The plaintiff claims-

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument

[following the terms of the agreement];

(2) rupees compensation for withholding the same.”

34. Section 16(c) of the Act of 1963 postulates that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been 'ready and willing' to perform the essential terms of the contract which are to be performed by him. It provides for making a categorical averment about the party's readiness and willingness to perform his

part of the terms and conditions and also to prove it. The expression used is "ready and willing" which is of great significance. It is a combination of two words 'ready' and 'willing' which may appear to carry the same meaning but are not synonyms. The simple dictionary meaning of the word 'ready' is preparedness for the moment or to be equipped with what is needed; whereas 'willing' denotes inclination to do a thing voluntarily or without reluctance. So 'readiness' connotes physical state of affairs and 'willingness' is linked with the mental state of things. To put it more lucidly, the expression "ready and willing" implies capacity to act as well as inclination to do a thing. Few examples may illustrate the concept:-

(i) Army may be ready for a war but may not be willing to go for a war;

(ii) a person may be ready to establish a new business but not willing to put his earnings at a risk and;

(iii) on a lighter note relating to our own institution of justice, a learned counsel may be fully ready to argue a case in terms of his preparation but not willing to argue it before a particular bench.

35. Now dealing with relevant provisions of C.P.C., the essentials of pleadings are provided in Order VI Rule 3 that stipulates that Forms as prescribed shall be used for all pleadings. Format of complaints for suits for specific performance of an agreement is provided in afore-quoted Forms 47 and 48 of Appendix A to the CPC. The aforesaid forms clearly provide for making an averment that the plaintiff “has been and still is ready and willing specifically to perform the agreement on his part” or that “the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant”. The

aforesaid forms make the requirements more strict as would be apparent from use of present perfect tense as well as present indefinite tense. The Court finds that the pleadings contained in the plaint in the present case are not strictly in consonance with the prescribed Forms 47 and 48 of Appendix A to the CPC and lack the necessary averment of 'willingness' of the plaintiff to carry out his obligation as per the agreement.

36. On the same lines, this Court had allowed a second appeal filed by the defendants in the case of **Ram Singh v. Sughar Singh, 2010 (6) AWC 6331** by reproducing the fourth paragraph of the plaint of the suit giving rise to the said appeal. In the instant case, 'paragraph 8' of the plaint needs reproduction as under:-

“8. That the plaintiff was and is still ready to pay the balance purchase money of the said property to the defendants besides cost of stamp and registration expenses in terms of the agreement for sale and get a sufficient instrument of transfer in his favour.”

37. Notably, the strict requirements of law, as discussed above, were not fulfilled by the plaintiff and, therefore, merely because the plaintiff came from Jalandhar to Meerut on 14.07.1977, opened a bank account and presented himself before the Sub-Registrar on 15.07.1977 was not sufficient to decree the suit. At the most, such steps by the plaintiff could be treated as a proof of his readiness and willingness in the year 1977 but averments in that regard in consonance with the strict requirements of law being missing from the plaint filed in 1980 and few other circumstances being reflective of plaintiff's

unwillingness, the decree drawn is not according to law.

38. Here the Court may also mention that the suit was filed in Jalandhar on 27.05.1980 i.e. just two months before expiry of period of limitation. Though bar of suit on the ground of limitation is not an issue involved in the present case, some attending circumstances on record are relevant to adjudge validity of the decree. As established on record, nothing was done by the plaintiff from 15.07.1977 till 28.05.1979, i.e. for about two years in the direction of getting the sale deed executed though the date fixed for performance had passed away. Interestingly, the only written notice by the plaintiff to the defendants is the notice dated 29.05.1979 (Paper No.17 Ka, Ex. P9) which does not raise a demand for executing the sale deed.

39. The Court while deciding the question of “readiness and willingness” has to focus on the maintained continuity or discontinuity as regards “readiness and willingness”. In the instant case, there was continuous silence for about two years from the date fixed for performance. The silence broke in terms of issuance of notice of demand of earnest money and not a request for execution of sale deed. Further, the power of attorney was executed by plaintiff in favour of Gurubaksh Singh, two years after institution of suit in Jalandhar i.e. on 27.05.1982 and, immediately thereafter, the plaint was returned and was presented on 30.05.1982 before the civil court, Meerut. The endorsement made on plaint is that it was returned to Gurubaksh Singh. The plaintiff did not make attempt to prove his plaint case and though the attorney was real brother of plaintiff, this, in itself, is not sufficient to prove continuous “readiness and willingness” on

the part of the plaintiff to get the sale deed executed. A very heavy burden would lay upon the plaintiff to establish at least five years of readiness and willingness i.e. since 1977 to 1982 but evidence to that effect is quite lacking. Here, the judgment of Division Bench cited on behalf of the appellants in **Manisha Mahendra Gala & others v. Shalini Bhagwan Avatramani & others**, (2024) 6 SCC 130 should be referred. The Supreme Court, in paragraphs 28, 29, 30 and 31 of the report, held as under:-

28. The law as understood earlier was that a General Power of Attorney holder though can appear, plead and act on behalf of a party he represents but he cannot become a witness on behalf of the party represented by him as no one can delegate his power to appear in the witness box to another party. However, subsequently in **Janki Vashdeo Bhojwani v. IndusInd Bank Ltd.**, (2005) 2 SCC 217, the Apex Court held that the Power of Attorney holder can maintain a plaint on behalf of the person he represents provided he has personal knowledge of the transaction in question. It was opined that the Power of Attorney holder or the legal representative should have knowledge about the transaction in question so as to bring on record the truth in relation to the grievance or the offence. However, to resolve the controversy with regard to the powers of the General Power of Attorney holder to depose on behalf of the person he represents, this Court upon consideration of all previous relevant decisions on the aspect including that of **Janki Vashdeo Bhojwani** (supra) in **A.C. Narayan v. State of Maharashtra**, (2014) 11 SCC 790 concluded by upholding the principle of law laid down in **Janki Vashdeo Bhojwani** (supra) and clarified that Power of Attorney holder can depose and verify

on oath before the court but he must have witnessed the transaction as an agent and must have due knowledge about it. The Power of Attorney holder who has no knowledge regarding the transaction cannot be examined as a witness. The functions of the General Power of Attorney holder cannot be delegated to any other person without there being a specific clause permitting such delegation in the Power of Attorney; meaning thereby ordinarily there cannot be any sub-delegation.

29. It is, therefore, settled in law that Power of Attorney holder can only depose about the facts within his personal knowledge and not about those facts which are not within his knowledge or are within the personal knowledge of the person who he represents or about the facts that may have transpired much before he entered the scene. The aforesaid Power of Attorney holder PW-1 had clearly deposed that he is giving evidence on behalf of plaintiff Nos. 2 to 4 i.e. the Gala's. He was not having any authority to act as the Power of Attorney of the Gala's at the time his statement was recorded. He was granted Power of Attorney subsequently as submitted and accepted by the parties. Therefore, his evidence is completely meaningless to establish that Gala's have acquired or perfected any easementary right over the disputed rasta in 1994 when the suit was instituted.

30. The only proper and valuable evidence in this regard could have been that of Joki Woler Ruzer who had instituted the suit but he failed to depose before the court. His pleadings are also vague and do not specifically state that he had been in use of the rasta in dispute for over 20 years or that he had acquired and perfected easementary right over the said rasta by prescription or necessity.

31. In the absence of any evidence or material to show that Joki Woler Ruzer had actually acquired any easementary right over the rasta in dispute before the institution of the suit, he could not have transferred any such right in favour of the Gala's.

40. Another decision cited by Shri Jain in the case of **Rajesh Kumar v. Anand Kumar and others, 2024 (4) AWC 3271 (SC)** needs a mention here. The Division Bench, having noticed the three judgments of Supreme Court in **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others, (2005) 2 SCC 217**, **Man Kaur v. Hartar Singh Sangha, (2010) 10 SCC 512** & **A.C. Narayanan v. State of Maharashtra and another, (2014) 11 SCC 790**, held that in view of Section 12 of the Act of 1963, in a suit for specific performance wherein the plaintiff is required to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, a power of attorney holder is not entitled to depose in place and instead of the plaintiff (principal). In other words, if the Power of Attorney Holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the act done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined. If a plaintiff, in a suit for specific performance is required to prove that he was always ready and willing to perform his part of the contract, it is necessary for him to step into the witness box and depose the said fact and subject himself to cross-examination on that issue.

A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. The term 'readiness and willingness' refers to the state of mind and conduct of the purchaser, as also his capacity and preparedness, one without the other being not sufficient. Therefore, a third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness.

41. In view of the above discussion, it is held that plaintiff's case of readiness and willingness was neither pleaded nor proved in accordance with the requirements of law. Consequently, second and third questions are also answered in favour of the appellants.

Impleadment Application

42. It is noteworthy that few persons namely Subhash Chanda and others filed an impleadment application No.150372 of 2004 under Order I Rule 10 C.P.C. seeking their impleadment and right of hearing in the present appeal in the capacity of respondents. The application was allowed by a Co-ordinate Bench of this Court by order dated 08.04.2022. Hearing in this appeal continued on various dates, however, on none of the dates any argument was advanced on behalf of the newly impleaded respondents though they are the contesting respondents in connected Second Appeal No.512 of 2000. Even on the last date i.e. 22.11.2024 when the judgment in both the appeals was reserved and connection in between the two appeals was described in the orders in the presence of learned counsel for all the parties to the lis covered by both the second appeals, no argument on behalf of newly impleaded

persons was raised. Therefore, the matter has been decided on the basis of contest made by plaintiff and defendants and/or their substituted heirs.

Whether any relief can be granted to respondents.

43. Once this Court has held that suit could not be decreed for relief of specific performance of the agreement, but execution of the agreement was well established and the defendant-appellants had failed to dislodge its due execution, a question would arise as to whether the plaintiff-respondents would also be entitled for any relief. In this regard, Shri Jain drew attention of this Court towards order dated 26.08.2004 passed in the instant appeal whereby execution of the impugned decree was stayed subject to deposit of a sum of Rs.20,000/- per year by the appellants before the trial court w.e.f. 01.12.2004 onwards with a further observation that disposal of the amount so deposited would abide by the final decision in the appeal. The Court also observed that the amount deposited would be invested in some interest bearing Term Deposit in a Nationalized Bank. Shri Jain submits that the aforesaid order is being continuously complied with by the appellants by making yearly deposits strictly as directed by this Court. Therefore, once the Court has held that plaintiff is not entitled for a decree for specific performance of the agreement, in order to balance the equities and considering the length of litigation, it is hereby directed that the amount deposited by the appellants and invested in Nationalized Bank in terms of the order dated 26.08.2004 passed in the instant appeal shall be released with accrued interest in favour of the plaintiff-respondents forthwith. The concerned bank

is directed not to cause any delay in this regard. If some aid of machinery of district court is required, the same shall be facilitated without any delay.

44. Consequently, the appeal is **allowed.**

45. The impugned judgment, order and decree dated 20.10.1997 pronounced, passed and drawn by the First Additional Civil Judge, (Senior Division), Meerut in Original Suit No.169 of 1983 (Gurudev Singh v. Prem Kumar and others) and judgment, order and decree dated 25.01.2001 pronounced, passed and drawn by 18th Additional District Judge, Meerut in Civil Appeal No.84 of 1997 (Prem Kumar and another v. Gurudev Singh and another) are hereby **set aside** and the Original Suit No.169 of 1983 stands **dismissed for the relief of specific performance** but a relief of refund of money to the plainiffs in terms of releasing the amount deposited by the appellants, as directed under paragraph 43 of this judgment, is granted to the respondents.

46. No order as to cost.

(2024) 12 ILRA 126
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 42 of 2016

UPSRTC		...Appellant
	Versus	
Bhawani Prasad Manjhi		...Respondent

Counsel for the Appellant:
Akhter Abbas, Ambika Prasad

Counsel for the Respondent:

Raj Kumar Pandey, Bhavya Upadhyay,
Desh Deepak Singh, Kulbhushan Singh,
Vidya Dhar Upadhyay, Vikas Sharma,
Yashovardhan Swarup

Civil Law - Motor Vehicles Act, 1988 - Sections 149, 171 & 173 - Uttar Pradesh Motor Vehicles Rules, 1998 - Rule 220-A - Enhancement of compensation - Claim petition filed alleging that daughter of claimant was traveling by bus - At about 02:30 in morning, Neelgai crossed road and due to high speed and rash and negligent driving, driver lost control over steering and bus fell into trench, consequently deceased and other passengers sustained fatal injuries - Deceased was taken to Community Health Centre by Police, she was declared dead - FIR lodged by conductor of bus - On account of sudden demise of deceased, claimants suffered irreparable loss of love and affection and financial help - Claimant parents were dependent on deceased - During pendency of claim petition, mother of deceased died. (Para 3)

Appellant St.d that vehicle was driven by competent driver, having valid driving license and conductor - Vehicle was driven with required speed - Bus was also damaged in accident and no fault of driver - Claim petition allowed - Impugned order. (Para 4, 6)

Appellant contended that father can't be dependent in absence of evidence, therefore, claim petition not maintainable and mother could have been dependent on deceased. (Para 7)

Claimant submitted that he had retired from service, not pensionable - The driver has not been produced to prove accident, accident on account of rash and negligent driving proved by eye-witness - Father proved that he had no independent income. (Para 8, 16)

The multiplier of 16 applicable for age group of 31-35 years, tribunal considered

age of deceased as 33 years on date of accident, therefore tribunal erred in allowing multiplier of 17 in place of 16 - The claimant was entitled for enhancement of compensation by adding 50% of salary of deceased towards future prospects in her income. (Para 19, 25)

Accordingly, looking to fall in interest rate and period from which interest was to be awarded, interest can be enhanced from 6% to 9% p.a instead of 12% as claimed w.e.f date of application till date of actual payment. (Para 38)

Appeal partly allowed. (E-13)

List of Cases cited:

1. National Insurance Co. Ltd.Vs Pranay Sethi & ors.; (2017) 16 SCC 680, (Para 59.3, 59.5)
2. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corporation & anr.; (2009) 6 SCC 121, (Para 19, 30 to 32, 42)
3. Manjuri Bera (Smt.) Vs Oriental Insurance Co. Ltd & anr.; (2007) 10 SCC 643
4. Magma General Insurance Co. Ltd.Vs Nanu Ram @ Chuhru Ram & ors.; (2018) 18 SCC 130, (Para 20 to 24)
5. ICICI Lombard General Insurance Co. Ltd. Vs Smt. Seema Devi & ors.; FAFO No.3325 of 2016, order dated 24.06.2024
6. Gohar Mohammed Vs Uttar Pradesh St. Road Transport Corporation & ors.; (2023) 4 SCC 381, (Para 46)
7. The Reliance General Insurance Co. Ltd.Vs Supreeth S. @ Supreeth Sathyendra since dead by his LRs; M.F.A. No.511 of 2020 (MV-D), (Para 33 to 38)
8. Bindu Mishra & ors. Vs Uday Yadav & ors.; Misc. Appeal No.2526 of 2018, order dated 06.08.2024, (Para 31 to 33)
9. Central Bank of India Vs Ravindra & ors.; (2002) 1 SCC 367

10. Thazhathe Purayil Sarabi & ors. Vs U.O.I.& anr.; (2009) 7 SCC 372

11. Panjab and Sind Bank Vs Allied Beverage Co. Private Limited & ors.; (2010) 10 SCC 640, (Para 18)

12. U.O.I.Vs Rina Devi; (2019) 3 SCC 572

13. Nutan Rani & anr. Vs Gurmail Singh & ors.; (2018) 17 SCC 109

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

1. Heard, Shri Ambika Prasad, learned counsel for the appellant and Shri Yashovardhan Swarup Assisted by Ms. Bhavya Upadhyay, learned counsel for the respondent.

2. This first appeal from order under Section 173 of the Motor Vehicles Act, 1988 (here-in-after referred as the Act of 1988) has been filed for setting aside the judgment and award dated 29.10.2015 passed in Motor Accident Claim Petition No.150 of 2012; Bhawani Prasad Manjhi and Another Vs. U.P. State Road Transport Corporation, by means of which the claim petition has been partly allowed and an amount of Rs.35,42,823/- has been awarded alongwith simple interest at the rate of 7% from the date of filing of the claim petition.

3. The claim petition was filed alleging therein that the daughter of the claimant-respondent Dr. Tandra Manjhi was traveling on 18.05.2011 by Bus No.U.P.-30A-8092 of Hardoi Depot of the appellant U.P.S.R.T.C. She was a bona fide passenger of the bus from Anand Vihar Bus Terminal, Delhi to Lucknow. The bus was being driven by its driver Valeel Ahamad at a high speed and in negligent manner. When it reached about 8 km. ahead of

Sandila on Kachauna-Sandila road within P.S. Kachauna, District- Hardoi at about 02:30 in the morning, a blue cow (Neelgai) crossed the road and due to high speed and rash and negligent driving, the driver of the bus lost his control over the steering and the bus fell into a trench, consequently the deceased and other passengers sustained fatal injuries. The deceased was taken to Community Health Centre, Sandila, Hardoi by the Police, where she was declared dead. Her postmortem was conducted in mortuary Hardoi. The deceased died due to fatal injuries sustained by her in the said accident. A first information report was lodged by the conductor of the bus at Police Station Kachauna, District, Hardoi at G.D. No.15/10.15 on 18.05.2011. Had the deceased not met with the fatal injuries, she would have survived up to age of 80 years. On account of sudden demise of deceased the family structure of the entire family has been shattered and claimants are virtually on dearth and have suffered irreparable loss of love and affection as well as financial help. The deceased was working on the post of Lecturer in Bio-Chemistry, Mental Health Department of Chhatrapati Sahji Maharaj Medical University, Lucknow. The claim petition was filed claiming that the claimant father and mother were dependent on the deceased. During pendency of the claim petition, the claimant no.2 Smt. Archana Manjhi i.e. mother of the deceased died. Accordingly, the claim petition was amended writing dead against her.

4. The claim petition was contested by the appellant by filing written statement denying the averments made in the claim petition mostly for want of knowledge. In the additional statement in the written statement, it has been admitted that the Bus No.U.P.-30A-8092 (Hardoi Depot) of the

appellant corporation was operating on 18.05.2011 on Delhi-Hardoi route to Lucknow. It was further stated that the vehicle was being driven by a competent driver Valeel Ahmad, having a valid driving license and conductor Rajesh Singh Somvanshi. The vehicle was being driven with the required speed and carefully. While the vehicle reached eight kilo meters ahead of Sandila near Dabur Plant at about 02:00 in the night, suddenly a blue cow came running in front of bus, therefore, the driver of the bus turned on the right side of the road to save the animal, on account of which the bus was uncontrolled and fell in a three feet ditch, accordingly the accident had occurred. The bus was also damaged in the accident. The said accident had occurred on account of sudden coming of blue cow in front of bus, therefore, there was no fault of the driver. The information of the accident was given by the conductor to the concerned police station. The compensation has been demanded on the higher side, which is not acceptable. The claim petition has been filed on misconceived and baseless grounds, which is liable to be dismissed with cost.

5. On the basis of pleadings of the parties, two issues were framed, which are extracted here-in-below:-

"1. क्या दिनांक 18.05.2011 को समय 2-30 ए०एम० पर स्थान कचौना सण्डीला रोड, थाना कचौना जिला हरदोई में यू०पी० एस०आर०टी० की बस संख्या यू०पी० 30 ए / 8092 के चालक द्वारा वाहन को तेजी व लापरवाहीपूर्वक चलाने एवं उसके आगे नीलगाय आ जाने पर वाहन पर नियंत्रण खो देने के कारण बस पलट गयी जिससे उस पर सवार डा० तन्द्रा माझी को गंभीर चोटें आने के कारण उसकी मृत्यु हुई?"

2. क्या याचीगण कोई प्रतिकर पाने के अधिकारी हैं? यदि हां तो कितना?"

6. The claimant-respondent got himself examined as PW-1 and one Shri Suresh Chandra Pandey an eye witness as PW-2. Shri Lal Ji Upadhyay was produced to prove the income of the deceased as PW-3. They were cross-examined. On behalf of the claimant-respondent several documents were filed. On behalf of the respondent-appellant the conductor of the bus Rajesh Singh Somvanshi was examined as DW-1. No documentary evidence was filed by the respondent-appellant. After hearing learned counsel for the parties and considering the pleadings, evidence and material on record, the tribunal allowed the claim petition and awarded the aforesaid amount.

7. Learned counsel for the respondent-appellant submitted that the father can not be a dependent in absence of evidence, therefore, the claim petition by him was not maintainable. Mother could have been treated dependent on the deceased, however, she died during pendency of the claim petition, therefore no compensation could have been awarded. It was further alleged that there was no fault of driver in the accident because the accident had occurred as a blue cow had suddenly come in front of the bus. It was also submitted that even if the claim petition could have been allowed, the multiplier of 17 has wrongly been applied in place of 16 because the deceased was aged about 33 years at the time of accident. Thus, the submission is that the impugned judgment and award is not sustainable in the eyes of law and liable to be set-aside. Learned counsel for the appellant relied on **National Insurance Company Limited Vs. Pranay Sethi and Others; (2017) 16 SCC 680, Sarla Verma (Smt.) And Others Vs. Delhi Transport Corporation and Another; (2009) 6 SCC 121 and Manjuri**

Bera (Smt.) Vs. Oriental Insurance Company Ltd and Another; (2007) 10 SCC 643.

8. Per contra, learned counsel for the claimant-respondent submitted that the claimant-respondent i.e. the father of the deceased had retired from service on 21.12.2000 and his service was not pensionable, therefore, after retirement he and his wife i.e. the mother of the deceased were dependent on the deceased and residing with her. The deceased daughter was supporting her father and mother for the last 11 years before the accident on 18.05.2011. The mother died during pendency of the claim petition. The plea of dependency in the claim petition has not been denied in the written statement. He also submitted that the claimant-respondent was dependent on her daughter and no evidence contrary to it has been adduced by the respondent-appellant. Even in the cross-examination, no question was put about the dependency of father. Thus, the submission of learned counsel for the respondent-appellant in regard to dependency is misconceived and not tenable. He further submitted that the accident with blue cow has not been proved. Even the driver has not been produced to prove the accident, whereas the accident on account of rash and negligent driving of the driver of the respondent-appellant corporation has been proved by the evidence of eye witness.

9. He further, pressing his cross-objection, submitted that the learned tribunal has failed to award the future prospects and awarded lesser amount towards conventional heads, whereas 50% of the salary should have been awarded towards the future prospects in view of the judgment of Hon'ble Supreme Court in the case of National Insurance Company

Limited Vs. Pranay Sethi and Others and the interest has also been awarded towards the lower side. However he could not dispute submission of learned counsel for the appellant about multiplier. Thus, the submission is that the appeal is liable to be dismissed accordingly and cross-objection is liable to be allowed and award is liable to be modified accordingly. He relied on **National Insurance Company Limited Vs. Pranay Sethi and Others; (2017) 16 SCC 680 and Magma General Insurance Company Limited Vs. Nanu Ram alias Chuhru Ram and Others; (2018) 18 SCC 130.**

10. Opposing the submissions of learned counsel for the claimant-respondent in regard to enhancement of compensation and award of the future prospects, learned counsel for the respondent-appellants submitted that since the impugned judgment and award is not sustainable and liable to be set-aside, therefore, the question of award of future prospects does not arise. However, even if, the impugned judgment and award is sustained and cross-objection is to be allowed awarding future prospects, the interest can not be awarded on the future prospects as the same is for income in future. He relied on a coordinate bench judgment and order dated 24.06.2024 passed in **ICICI Lombard General Insurance Co. Ltd. Vs. Smt. Seema Devi and 6 Others; First Appeal From Order No.3325 of 2016.**

11. I have considered the submissions of learned counsel for the parties and perused the records.

12. The learned tribunal while considering the issue no.1, after considering the pleadings of the parties and the evidence before it, came to the

conclusion that it has been admitted by DW-1 in his cross-examination that the bus takes 14-15 hours in reaching Lucknow from Delhi, whereas on the date of accident it had taken about 15 hours in reaching Hardoi, therefore, it is apparent that the bus had stopped at several places for long period and for reaching on time, the driver of the bus must have driven the bus rashly and negligently, on account of which the accident had occurred. The PW-2, who is an eye witness and his statement has also been considered by the tribunal, has stated that he was traveling in the bus No.U.P.-30A-8092 of Hardoi Depot, which was coming from Anand Vihar Bus Terminal to Lucknow on 17.05.2011. The accident occurred on 18.05.2011 at 02.15 in the night. The deceased Tandra Manjhi was traveling in the bus. The bus was being driven rashly and negligently by its driver at a very high speed, on account of which the passengers sitting on the back seat had fallen twice and the seat had also fallen. The driver and conductor had taken more than half an hour in having tea at several places. At about 06:45 on 17.05.2011, when it reached Farrukhabad, the driver said that we will start after taking the dinner and the passengers may also take the dinner, tea etc., thereafter, the driver and conductor disappeared and they came back at about 08:30. Thereafter the bus started at about 09:00. The driver had again driven the bus rashly and negligently, on account of which the luggage of the passengers had also fallen. The bus had started at about 01:00 on 18.05.2011 from Hardoi and the accident had occurred at 02:15. In cross-examination he reiterated the evidence given in the affidavit of examination-in-chief. He also stated that he had not seen that the accident had occurred on account of any collision with any body. He also said that the bus had fallen in a ditch on the

right side. The Police had come about 03:30, who had taken Tandra Manjhi to the Community Health Centre, Sandila, Hardoi. Thus, it is apparent that nothing could be extracted from PW-2, who is an eye witness and an employee working in the office of the Deputy Transport Commissioner, which may create any doubt about his veracity

13. The DW-1 is the conductor of the bus. The driver of the bus has not been produced by the appellant. The DW-1 has stated in his evidence that the blue cow had come in front of bus, which was running with a high speed, therefore, the driver had taken emergency breaks and tried to save the animal by turning to the right, therefore, it is not disputed that the bus was being driven by the driver with a very high speed, whereas at 02:00 in the intervening night, a driver should have driven the bus at the proper speed and carefully so that he may control in case of any exigency but it is apparent that the driver was not cautious enough and driving bus rashly and negligently at a very high speed to cover the time and on account of rash and negligent driving by the driver, the accident had occurred. Though the coming of a blue cow suddenly before the bus has been stated by him but it could not be proved by any cogent evidence as it has been denied by the eye-witness PW-2. PW-1 has stated that he had come to know about blue cow through news paper. The driver has not been produced to prove it, who could have been the best witness. Even otherwise, even if it has come before the bus, the accident had occurred on account of rash and negligent driving of the vehicle of the driver at a very high speed. Thus, the contention of learned counsel for the appellant that there was no fault of the

driver in the accident is misconceived and not tenable and is accordingly repelled.

14. Learned counsel for the respondent-appellant had also submitted that the father can not be treated a dependent without any proof, while the mother can be treated and the mother had died during pendency of the claim petition, therefore, the claim petition could not have been allowed by the tribunal. The claimant-respondent i.e. father and mother Smt. Archana Manjhi filed the claim petition as dependent of the deceased Dr. Tandra Manjhi, stating in paragraph-2 that the deceased was the earning member of the family, who was maintaining the family consisting of old father and mother as the father of the deceased was not keeping good health. The father and mother have been shown as dependant in paragraph-7 of the claim petition also, which is name and ages of the dependents of the dead persons indicating relationship with him and also monthly income and the source of such income but no income has been shown. The written statement was filed denying the averments of paragraphs-1 to 8 for want of knowledge and any documentary evidence. It was further stated in paragraph-22 (sub-paragraph-2) of the claim-petition that the deceased was the earning member of her family who was maintaining the entire family consisting of old father and mother of the deceased not keeping good health. The contents of paragraph-22 have also been denied stating that the proof of the same is on the claimants and the compensation has been demanded on the higher side. Thus, the dependency of the claimant-respondent father on the deceased has specifically not been denied.

15. The claimant-respondent appeared as PW-1 and stated in his evidence that on

account of death of daughter he and his family has suffered irreparable loss. In his cross-examination he stated that he retired from the post of Senior Production Engineer in TSL, Naini, Allahabad on 31.12.2000 and he is not getting any pension after his retirement. He has also stated that he has two sons and wife. The elder son is deaf and dumb and married and residing with him. The younger son is unmarried and has been appointed on the post of Assistant Cashier in Medical College, Lucknow on compassionate ground in place of his deceased daughter Tandra Manjhi. His younger son is residing separately in Lucknow. Thus they does not seem to be able to maintain the father and mother i.e the claimants. The cross-examination indicates that no question has been put in regard to the dependency of the claimant-respondent, who is the father of the deceased. It is also not in dispute that he alongwith his deceased wife was residing with his deceased daughter Dr. Tandra Manjhi. Therefore, it can not be said that he was not dependent on the deceased.

16. The Hon'ble Supreme Court, in the case of **Sarla Verma (Smt) And Others Vs. Delhi Transport Corporation and Another (Supra)**, has observed that subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependent. Therefore, if the father proves that he has no independent income then he has to be considered as dependent and in the present case it has been proved. In the present case the claimant-father has proved it. Paragraph 30 to 32 are extracted here-in-below:-

"30. Though in some cases the deduction to be made towards personal and

living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362], the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

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.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where

he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

17. The Hon'ble Supreme Court, in the case of **Manjuri Bera (Smt.) Vs. Oriental Insurance Company Ltd and Another**, has held that if a legal representative, who is not dependant files an application for compensation, the quantum cannot be less than the liability referable to Section 140 of the Act. Therefore, even if there is no loss of dependency, the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the liability flowing from Section 140 of the Act. However, this case is not applicable on the facts and circumstances of the present case because the claimant-respondent has proved his dependency and nothing could be extracted from him or no contrary evidence has been adduced on account of which, it may be said that the claimant-respondent i.e. the father alongwith his wife was not dependent on the deceased. Therefore, the appellant is not entitled for the benefit of aforesaid cases. The Hon'ble Supreme Court, in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others (Supra)**, has held in paragraph 59.5 that for determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma. The paragraph 59.5 is extracted here-in-below:-

"59.5. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32

of Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] which we have reproduced hereinbefore."

18. One of the ground for challenge by learned counsel for the appellant is that the multiplier of 17 has wrongly been applied in place of 16 because age of the deceased was 33 years, at the time of accident, in view of Constitution Bench judgment of the Hon'ble Supreme Court in the case of **National Insurance Company Vs. Pranay Sethi and Others (Supra)**. In the said judgment, it has been held that as far as the multiplier is concerned, the claims tribunal and the Courts shall be guided by Step-2 that finds place in paragraph 19 of Sarla Verma read with paragraph 42 of the said judgment. The relevant paragraph 42 is extracted here-in-below:-

"42. As far as the multiplier is concerned, the Claims Tribunal and the courts shall be guided by Step 2 that finds place in para 19 of Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] read with para 42 of the said judgment. For the sake of completeness, para 42 is extracted below : (Sarla Verma case [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , SCC p. 140)

"42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the Table above (prepared by applying Susamma Thomas [Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 : 1994 SCC (Cri) 335] , Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] and Charlie [New India Assurance Co. Ltd. v. Charlie, (2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an

operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is, M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

19. In view of above, the multiplier of 16 is applicable for the age group of 31-35 years. The tribunal has considered the age of the deceased 33 years on the date of accident, which has not been disputed by the claimant-respondent, therefore, this Court is of the view that the learned tribunal has erred in allowing the multiplier of 17 in place of 16. Thus, the appeal is liable to be partly allowed and the multiplier of 16 is to be applied in place of 17 and impugned award is liable to be modified accordingly.

20. Now the Court proceeds to consider the cross-objection. The claim petition was filed under Section 166 of the Act of 1988. Section 166 of the Act of 1988 provides for application for compensation. Section 168 of the Act of 1988 provides for award of claims tribunal. It provides that 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 an opportunity of being heard, hold an inquiry to the claim and subject to the provisions of section 162, which provides refund in certain cases of compensation paid under section 161, may make an award determining the amount of compensation which appears to it to be "just". Thus, the duty has been cast

upon the claims tribunal to award the "just compensation" after an enquiry.

21. The Hon'ble Supreme Court, in the case of **Magma General Insurance Company Limited Vs. Nanu Ram alias Chuhru Ram and Others(supra)**, has held that the Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty bound and entitled to award "just compensation", irrespective of whether any plea in that behalf was raised by the Claimant. It has further been observed that a Constitution Bench of the Hon'ble Supreme Court, in the case of 'Pranay Sethi(supra)' has dealt with various heads under which compensation is to be awarded in a death case and one of these heads is loss of consortium thus the consortium is one of the components of consortiums. The relevant paragraphs 20 to 21 are extracted here-in-below:-

"20. MACT as well as the High Court have not awarded any compensation with respect to loss of consortium and loss of estate, which are the other conventional heads under which compensation is awarded in the event of death, as recognised by the Constitution Bench in Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . The Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty-bound and entitled to award "just compensation", irrespective of whether any plea in that behalf was raised by the claimant. In exercise of our power under Article 142, and in the interests of justice, we deem it appropriate to award an amount of Rs 15,000 towards loss of estate to Respondents 1 and 2.

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]"

22. The Hon'ble Supreme Court, in the case of **Magma General Insurance Company Limited versus Nanu Ram Alias Chuhru Ram and others(supra)** has held that one of heads of compensation is 'loss of consortium' and the kinds of consortium have been given in paragraphs 21.1 to 21.3. The relevant paragraphs 21 to 24 are extracted here-in-below:-

"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.

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"

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.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing

relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down in *Pranay Sethi*. In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

23. In view of above, once a claim petition has been filed claiming compensation, it is the duty of the tribunal or court to make an enquiry into the matter in accordance with law and the rules and thereafter award "just compensation" as admissible in accordance with law, irrespective of whether any claim has been made or not, therefore, when an appeal has been filed before this Court, this Court has to consider as to whether the "just compensation" has been awarded by the tribunal or not and in case it has not been awarded, this court can award the same, if it is "just" and in accordance with law. In this case, a cross-objection has also been filed for enhancement of compensation alleging that "just compensation" has not been awarded because the learned tribunal has failed to award the future prospects in accordance with law and the aforesaid

judgment of Hon'ble Supreme Court in the case of 'Pranay Sethi'(supra), therefore, the same may be allowed and 50% of salary of deceased may be enhanced. It has been alleged that the deceased was an energetic doctor of about 33 years old and she was very actively performing the duties towards the service as well as her domestic affairs of her family and if she would have not met with the fatal accident, she would have survived till the age of 80 years.

24. The Hon'ble Supreme Court, in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others (Supra)**, has recorded his conclusions in paragraph 59 and paragraph 59.3 provides that an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years, should be made. The relevant paragraph 59.3 is extracted here-in-below:-

"59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

25. Admittedly, the deceased was aged about 33 years at the time of accident, therefore, applying the aforesaid, this Court is of the view that the 50% of the actual salary of the deceased is to be awarded towards the future prospects. However, the learned tribunal has failed to consider it and has not awarded any amount towards future

prospects. It is also noticed that in Rule 220-A of the Uttar Pradesh Motor Vehicles Rules, 1998, it has been provided that the future prospects of a deceased, shall be added in the actual salary or minimum wages as 50% of the salary below the 40 years of age. Thus, this Court is of the view that the claimant-respondent is entitled for enhancement of compensation by adding 50% of salary of deceased towards future prospects in her income.

26. Learned counsel for the claimant-respondent also submitted that the interest has been awarded on the lower side, therefore, it should be enhanced to 12%, relying on the judgment of the Hon'ble Supreme Court, in the case of **Magma General Insurance Company Limited Vs. Nanu Ram alias Chuhru Ram and Others (Supra)**, whereas it has been submitted by the appellant that the interest has rightly been awarded and no interest can be awarded on the future prospects as the same is given for the future income, which was yet to be paid. He relied on a coordinate bench order of this court, in the case of **ICICI Lombard General Insurance Co. Ltd. Vs. Smt. Seema Devi and 6 Others (Supra)**. The said judgment has been passed by a coordinate bench, relying on the judgments of Guahati High Court, Bombay High Court and Jammu & Kashmir and Laddakh High Court, stating that I am in agreement with the decisions of said court that no interest can be awarded on the future prospects, as interest can not be awarded for income, which is due in future.

27. The compensation on account of accident is awarded under the Motor Vehicles Act. The legislative intent is that the claim should be settled within the least possible time. Section 149 of the Act of

1988, as amended, casts liability on the insurance company to designate an officer to settle the claim relating to accident immediately upon receiving information of the accident either from the claimant or through accident information report or otherwise. But despite the provisions for settlement of claim at the earliest, it is taking years for settlement of claims and it is not being paid without an order of the tribunal or court, even before the amendment and the interest is awarded only for the period from the date of filing of the claim petition and up to the date of payment on the amount of compensation, which had become due on the date of accident, which should have been paid including the future prospects which are calculated after deducting the personal expenses at the earliest to avoid penury and sufferance to the family on account of death of an earning member in an accident as held by a constitution bench of Hon'ble Supreme Court in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others (Supra)**. The future prospects is a component of compensation. However, in the present case the payment of compensation was to be made by the U.P.S.R.T.C. It can not be disputed that accident had occurred by a bus of U.P.S.R.T.C., therefore, the U.P.S.R.T.C. was in the knowledge of the accident and it could have settled the matter and paid the compensation after calculating as per law, but no effort was made, therefore, the claimant-respondent had to approach the tribunal and file the claim petition, which was contested by the tribunal and even after disposal of the claim petition, the appeal was filed, which has been contested by the claimant-respondent.

28. The Hon'ble Supreme Court, in the case of **Gohar Mohammed versus Uttar**

Pradesh State Road Transport Corporation and Others;(2023) 4 SCC 381, after considering the provisions of Section 149 of the M.V. Act observed as under in paragraph 46:-"

46.As per Section 149, on receiving the information of the accident from claimant or from the Accident Information Report (AIR), the insurance company shall appoint a 'Designated Officer' to settle the claim. The said officer is required to make an offer to the claimant(s), specifying its detail within 30 days by following such procedure, as prescribed by the Central Government. Subsection (3) of Section 149 makes it clear that the offer made by the Designated Officer may either be accepted or rejected by the injured/victim or legal heirs of the deceased. In case, the offer is accepted, the Claims Tribunal shall record the settlement and treat such a claim as settled by consent. On such settlement, the payment has to be made by insurance company within 30 days. But, in the latter situation of rejection of such offer, the Claims Tribunals shall fix a date of hearing for adjudication of such claim on merits."

29. Section 171 of the Act of 1988 provides award of interest, where any claim is allowed, which is extracted here-in-below:-

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

30. The aforesaid Section 171 does not draw any distinction in regard to award of interest and it is to be awarded on the amount of "just compensation" awarded by the tribunal, which had become due on the date of accident. It only provides that the interest shall be paid in addition to amount of compensation. Future prospects is a component of the compensation as held by the Hon'ble Supreme Court, in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others (Supra)**. It is also a component of compensation under Rule-220-A (3) of the U.P. Motor Vehicles Rules, 1998. Sub-rule (6) of the said rules also provides for the rate of interest on the compensation, where also no distinction has been made in this regard.

31. A division bench of the High Court of Karnataka at Bengaluru, in the case of **The Reliance General Insurance Company Limited Vs. Supreeth S. @ Supreeth Sathyendra since dead by his LR's; M.F.A. No.511 of 2020 (MV-D)**, has held that in all motor vehicles claims, if the dependents are denied with the interest over the amount awarded under the head 'loss of future prospects', it would be most unjustifiable. The relevant paragraphs 33 to 38 are extracted here-in-below:-

"33. Despite of the aforementioned facts, in this case, the insurance company has raised a plea that it is not liable to pay any interest on the amount awarded towards loss of future prospects. The justification in such a plea can be verified through the following illustration:

"X' met with an accident and succumbed to injuries in the year 2014. 'Y' his wife, A and B, their children, files a petition claiming compensation in the light of the death of their bread winner. The

insurance company enters into appearance. On contest, the Tribunal allows the claim petition in the year 2018 and awards a sum of Rs.50,00,000/- as compensation. The insurance company prefers appeal and the appeal gets dismissed in the year 2022 upholding the award of the Tribunal. The insurance company approaches the Hon'ble Apex Court and the Hon'ble Apex Court passes judgment in the year 2024 negating the pleas taken by the insurance company. Thus, the award attains finality in the year 2024.

'Y' the wife, A and B the children of the deceased 'X' would be bearing legal expenses for the entire period of ten years i.e. from 2014 to 2024. That apart, 'Y' would be at liability to provide education to her children either by begging or by borrowing. For all the three to survive, food, shelter and clothing are required. Therefore, 'Y' might have incurred debts, would have sold out any valuable property, or would have mortgaged the said property or might have pledged the valuable articles like gold. Thus, for all the expenditure incurred for the ten years, 'Y' and her children A and B would be liable to pay interest.

On the other hand, the insurance company would be reaping the profit in the form of interest on the amount that fell due to the claimants for all the said ten years period."

34. In the circumstances aforementioned which would be present in almost all motor vehicles claims, if the dependents are denied with the interest over the amount awarded under the head 'loss of future prospects', it would be most unjustifiable. The reasons are two fold.

(i) Despite making stringent provisions for settlement of claims at the earliest date, it is taking years and decades for settlement of claims. In the interregnum

period, the survival of claimants would be based on the available resources and the capability of getting debts.

(ii) The insurance companies who are liable to pay the compensation as soon as possible as indicated under the Motor Vehicles Act, 1988 would be enjoying the principle amount and the fruits that accrued through the investment of the principle amount.

35. The amount payable to the claimants which lies with the insurance companies for years together is one way the debt the insurance companies have to make good to the claimants. When the insurance companies are enjoying the fruits of the said amount and the accrued interest for years together, they cannot take plea that they are not liable to pay interest to the claimants over the amount which they are liable.

36. In the case on hand, the accident occurred in the year 2014 and the claim is not settled till this day. Thus, the amount which the claimants are legally entitled to is being enjoyed by the insurance company for a long period of ten years. Now the insurance company has taken a plea that it is not liable to pay the interest on future prospects.

37. The plea taken by the insurance company that it is not liable to pay interest on the future prospects, as the amount awarded under that head would be the future earnings of the deceased is not justifiable due to the reason that the claimants are not being paid the entire earnings of the deceased which he would have earned had he been alive. Cases where there is no proof in certainty regarding exact income, the Courts are taking notional income into consideration. Either applying appropriate multiplier as per the decision in *Sarala Verma's case* or taking percentage of the said income

towards future prospects as per the decision in *Pranay Sethi's case* is on probabilities but not on exact figures. In no case, the claimants get the exact amount which the deceased would have earned had he been alive. In all cases the amount which the claimants would get for their livelihood through the deceased would be many times more than the actual amount awarded. That apart, the insurance companies are depositing the compensation years after the date of accident which is in clear violation of Section 149 of the Motor Vehicles Act, 1988.

38. Further more, award of amount as compensation is a one time procedure. Even if in the future course it is found that the deceased would have earned much more amount in the light of hike in his position and global opportunities, the Tribunals will not order payment of any further amount and insurance companies will not be made liable on that count. Such being the case, this Court is of the view that the insurance companies are liable to pay the awarded amount including the amount awarded under the head future prospects together with banking rate of interest which is prevalent during relevant time. Thus, we ultimately hold that, the insurance company cannot escape from the liability to pay interest on the future prospects."

32. A coordinate bench of the Madhya Pradesh High Court at Jabalpur, in the case of **Bindu Mishra and Others Vs. Uday Yadav and Others; Misc. Appeal No.2526 of 2018**, by means of the judgment and order dated 06.08.2024 held that in this Court's opinion, there is an underlying object for grant/award of interest on compensation that a person is entitled for compensation immediately/within a reasonable period after death/injury/damage in an accident

arising out of use of motor vehicle. But if such compensation is not paid and he is compelled to file a claim petition for the same, only then the interest is awarded on compensation for delay in payment of compensation. Similarly, in case of death, a claimant/person becomes entitled for "future prospects" and also alongwith other amounts immediately after the accident, therefore, he is entitled for interest of future prospects from the date of filing of the claim petition. The relevant paragraphs- 31 to 33 are extracted here-in-below:-

"31. In the instant case, accident occurred on 12.02.2016. Award has been passed on 27.02.2018 and present appeal is pending since 2018. Learned counsel for the respondent/ Insurance company has not drawn this Court's attention to any statutory provision of law or pronouncements of Hon'ble Apex Court or co-ordinate Bench of this Court so to show that interest on future prospects should be awarded from the date of award and not from the date of filing of claim petition.

32. In this Court's opinion, there is an underlying object for grant/award of interest on compensation. A person is entitled for compensation immediately/within a reasonable period/after/ death/ injury/damage in an accident arising out of use of motor vehicle. But if such compensation is not paid immediately after the accident/within reasonable period of accident, and a person etc. is compelled to file a claim petition for the same, only then in such a situation a Court/Tribunal grants/award interest on compensation for delay in payment of compensation. Thus, interest is granted/awarded for delayed/deferred payment of compensation.

33. Similarly, in case of death, a claimant/person becomes entitled for

"Future Prospects" also along with other amount, immediately after the accident and the same is required to be paid to claimant immediately after the accident/within reasonable period of accident, along with other amount. Hence, there is no justification for not awarding interest on "Future Prospects" from the date of filing of claim petition. This Court does not agree with principle laid down in Mst. Aisha Bano (Supra). Therefore, submissions of learned counsel for the respondent with respect to above are also rejected. In this Court's opinion, interest on future prospects is also to be awarded from the date of filing of claim petition.

33. A Constitution Bench of the Hon'ble Supreme Court, in the case of **Central Bank of India Vs. Ravindra and Others; (2002) 1 SCC 367**, has held that interest pendente lite and future interest shall be awarded on such principal sum i.e. the principal sum adjudged on the date of the suit. It is settled law that the interest can be claimed, decreed or awarded for the period during which the money was due and yet remain unpaid to the claimants and right to claim compensation accrues on the date of accident. Thus, the interest is essentially a compensation payable on account of denial of the right to utilize the money due, which has been, in fact, utilized by the person withholding the same. Thus, in case the amount due on the date of accident would have been paid immediately thereafter, the person in need must have utilized it for his personal use or could have invested and earned interest on the same.

34. The Hon'ble Supreme Court, in the case of **Thazhathe Purayil Sarabi and Others Vs. Union of India and Another; (2009) 7 SCC 372**, has held that there is no

denying the fact that the right to claim compensation accrued on the date of the incident and the interest is payable from the date, the claim for the principal sum is made, namely, the date of institution of the proceedings in the recovery. Though this case is in regard to the claims under the Railways Act but the principle applicable on the claims of compensation can not be denied.

35. The Hon'ble Supreme Court, in the case of **Panjab and Sind Bank Vs. Allied Beverage Company Private Limited and Others; (2010) 10 SCC 640**, while considering the provisions of Section 34 of C.P.C. considered the meaning of 'interest' and it's definitions given in the various dictionaries in paragraph-18, which is extracted here-in-below:-

"18. While considering the above issue, the Constitution Bench has also considered "interest", "penal interest", several "usury laws" and finally made certain observations which are binding on the banking institutions as well as all others dealing with money transactions with them : (Ravindra case [(2002) 1 SCC 367], SCC pp. 393-95, paras 37-39)

"Interest and its classes

37. Black's Law Dictionary (7th Edn.) defines 'interest' inter alia as:

'3. The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of [the] borrowed money.'

According to Stroud's Judicial Dictionary of Words And Phrases (5th Edn.) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his

money. In Irrigation Deptt., Govt. of Orissa v. G.C. Roy [(1992) 1 SCC 508] the Constitution Bench opined that : (SCC pp. 532-33, para 43)

'(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. ... This is the principle of Section 34 of the Civil Procedure Code....'

In Sham Lal Narula (Dr.) v. CIT [AIR 1964 SC 1878] this Court held that interest is paid for the deprivation of the use of the money. The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd. [1947 AC 390 : (1947) 1 All ER 469 (HL)] (AC at p. 400 : All ER at p. 472 E-F) is that:

'... it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation';

the money due to the creditor was not paid, or, in other words,

'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.

A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in CIT v. Dr. Sham Lal Narula [AIR 1963 Punj 411] thus articulated the concept of interest : (AIR p. 414, para 8)

'8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest"

in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money. ...

In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable.'

It is the appeal against this decision of the Punjab High Court which was dismissed by the Supreme Court in Sham Lal Narula (Dr.) case [AIR 1964 SC 1878].

38. However 'penal interest' has to be distinguished from 'interest'. Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrongdoer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. Penal interest can be charged only once for one period of default and, therefore, cannot be permitted to be capitalised.

39. Mulla on the Code of Civil Procedure (1995 Edn.) sets out three divisions of interest as dealt in Section 34 CPC. The division is according to the period for which interest is allowed by the

court, namely,—(1) interest accrued due prior to the institution of the suit on the principal sum adjudged; (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, at such rate as the court deems reasonable; (3) further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the court thinks fit, at a rate not exceeding 6 per cent per annum. Popularly the three interests are called pre-suit interest, interest pendente lite and interest post-decree or future interest. Interest for the period anterior to institution of suit is not a matter of procedure; interest pendente lite is not a matter of substantive law (see Irrigation Deptt., Govt. of Orissa v. G.C. Roy [(1992) 1 SCC 508], SCC para 43-(v))."

36. The Hon'ble Supreme Court, in the case **Union of India Vs. Rina Devi; (2019) 3 SCC 572**, considered the issue of interest on the compensation in case of untowered incident under the Railways Act. However, held that legal position in this regard is at par with the cases of accident claims under the Motor Vehicles Act, 1988 and conflicting views stand resolved in this manner. It has been held in this case that the law law in the present context should be taken to be that the liability will accrue on the date of the accident and the amount applicable as on that date will be the amount recoverable but the claimant will get interest from the date of accident till the payment at such rate as may be considered just and fair from time to time. In this context, rate of interest applicable in motor accident claim cases can be held to be reasonable and fair. Thus, the Hon'ble Supreme Court concluded that compensation will be payable as applicable on the date of the accident with interest as

may be considered reasonable from time to time on the same pattern as in accident claim cases.

37. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that the contention of the learned counsel for the appellant is misconceived and not tenable and this Court is of the view that the claimant-respondent is entitled for the future prospects and interest thereon also.

38. So far as the enhancement of interest awarded to the claimant-respondent is concerned, a three judge bench of Hon'ble Supreme Court, in the case **Nutan Rani and Another Vs. Gurmail Singh and Others; (2018) 17 SCC 109**, has enhanced the interest from 6% to 9% and the same is on the future prospects also. Accordingly, this Court is of the view that looking to the fall in the interest rate and the period from which the interest is to be awarded and the aforesaid judgment of Hon'ble Supreme Court, the interest can be enhanced from 6% to 9% per annum instead of 12% as claimed and it is accordingly enhanced to 9% per annum w.e.f the date of application till the date of actual payment. Accordingly the cross-objection is also liable to be partly allowed.

39. The appeal and the cross-objection are, accordingly, **partly allowed**. Thus, the total compensation payable to the claimant-respondent/ objector in terms of *National Insurance Company Limited Vs. Pranay Sethi and Others(supra)* is calculated as under:-

Yearly Income after deduction of income tax on the basis of proof of pay slip of April, 2011 (A):	Rs.4,15,038/-
Increase towards future prospects (B): (50% of income)	Rs.2,07,519/-
A+B	Rs.6,22,557/-

Deductions towards personal expenses (1/2): (C)	Rs.3,11,278.50
Multiplier applied:	16 (since age of deceased was 33 years)
Loss of Dependency: (C X 16):	Rs.49,80,456/-
Loss of consortium:	Rs.40,000/-
Loss of estate:	Rs.10,000/-
Funeral expenses:	Rs.5000/-
Total Compensation:	Rs.50,35,456/-
Interest:	@ 9% per annum

40. The impugned judgment and award is, accordingly, modified in the aforesaid terms. No order as to costs.

(2024) 12 ILRA 144
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 258 of 2017

The New India Assurance Co. Ltd.

...Appellant

Versus

Chhedana & Ors.

...Respondents

Counsel for the Appellant:

Anurodh Kumar Srivastava

Counsel for the Respondents:

Vinay Kumar Verma

Civil Law - Motor Vehicles Act, 1988 - Sections 66, 149 & 150 - Indian Evidence Act, 1872 - Sections 17, 21, 58 - Against payment of compensation - Appellant submits that vehicle involved in accident as alleged was DLIV-5126 but Insurance Co. insured vehicle No.DL1V-5126, admitted by owner and he also pleaded that his vehicle was in workshop for repairing of steering on date of accident and proved by appearing himself and producing owner of workshop, discarded on ground that in criminal case charge sheet has been filed, whereas evidence of

criminal case could not have been considered to discard evidence adduced before trial court without proof. (Para 2)

Claim petition was filed alleging that son of claimant was coming back to his house after closing his shop, driver of Bus driving rashly and negligently hit her son, died on spot - Accordingly, compensation of Rs.12,00,000/- was claimed as he was earning Rs.40,000/- annually - Claim petition allowed. (Para 5, 7)

Once a fact was admitted by party, it need not be proved in any proceeding, therefore, findings of tribunal that burden to prove that vehicle was being plied on date of incident without valid permit was on appellant-Insurance Co. was misconceived and not tenable. (Para 21)

In absence of permit of vehicle on date and time of accident, appellant cannot be held liable to make payment of compensation - Impugned judgment liable to be modified, compensation shall be paid by appellant to claimant and Insurance Co. will have right to recover same from owner and driver in accordance with law. (Para 24)

Appeal partly allowed. (E-13)

List of Cases cited:

1. Chandresh Kumar Agarwal Vs Yogendra Kumar Srivastava & anr.; 2005 (2) TAC 6 (All.)
2. Amrit Paul Singh & anr. Vs Tata AIG General Insurance Co. Ltd. & ors.; (2018) 7 SCC 558, (Para 24)
3. National Insurance Co. Vs Challa Upendra Rao passed in Civil Appeal No.6178 of 2004, decided on 21st of September 2004, (2004) 8 SCC 517, (Para 11 to 13)
4. Avtar Singh & ors. Vs Gurdial Singh & ors.; (2006) 12 SCC 552
5. Bharat Singh & ors. Vs MST.Bhagirathi; 1965 SCC Online SC 57 (AIR 1966 SC 405), (Para 19)

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

1. Heard, Shri Anurodh Kumar Srivastava, learned counsel for the appellant and Shri Vinay Kumar Verma, learned counsel for the claimant-respondent no.1. None appeared on behalf of respondents no.2 and 3 despite sufficient service and served personally.

2. Learned counsel for the appellant-Insurance Company submits that the vehicle involved in the accident as alleged was DLIV-5126 but the Insurance Company had insured the vehicle No.DL1V-5126 and it was admitted by the owner, who appeared before the Tribunal. He further submits that the owner had also pleaded that his vehicle was in the workshop on the date of accident i.e. 24.09.2013 and it was proved by appearing himself and producing the owner of the workshop Mohd.Haseeb, but the said evidence has been discarded on the ground that in the criminal case charge sheet has been filed, whereas the evidence and material of the criminal case could not have been considered to discard the evidence adduced before the trial court without proof. He further submits that the vehicle was not having the permit on the date of accident i.e. 24.09.2013 as per copies of the permit filed by him, but the learned tribunal has wrongly and illegally held the appellant-Insurance Company liable for payment of compensation awarded by it, whereas absence of permit was violation of the terms and conditions of the policy, therefore, the appellant-Insurance Company could not have been held liable for payment of compensation. He relies on **Chandresh Kumar Agarwal Versus Yogendra Kumar Srivastava and another; 2005 (2) TAC 6 (All.), Amrit Paul Singh and another Versus Tata**

AIG General Insurance Company Limited and others; (2018) 7 SCC 558 and National Insurance Company Versus Challa Upendra Rao passed in Civil Appeal No.6178 of 2004 decided on 21st of September 2004; (2004) 8 SCC 517.

3. Per contra, learned counsel for the claimant-respondent No.1 submits that the Bus DLIV-5126 was involved in the accident. It was specifically pleaded in the claim petition and it has been admitted by respondent no.2 i.e. Aftab Alam that he is the owner of the said vehicle and he has also given the Insurance policy number in his written statement and in his evidence also. He has not denied or doubted the said vehicle. Even otherwise as per registration number of the vehicle mentioned on the policy, the vehicle number is DLIV-5126, therefore, the contention of learned counsel for the appellant is misconceived and not tenable. He further submits that the learned Tribunal, after considering the pleadings and evidence of the owner in regard to plea that the vehicle was in work shop on the date of accident, has recorded a finding that the owner has failed to prove that the vehicle was standing in the workshop for repairing of steering on the date and time of accident. Thus the involvement of the vehicle cannot be denied. He further submits that though the learned tribunal held that the vehicle had no permit was to be proved by the appellant-Insurance Company and it has failed to prove, therefore, it is liable to make the payment of compensation. However if this court comes to the conclusion that the vehicle was not having the valid permit on the date of accident, which is not against the claimant-respondent No.1 and only right of recovery can be granted to the appellant-Insurance Company and the compensation

awarded by the claims tribunal is liable to be paid by the appellant- Insurance Company, which has been deposited by the appellant before the tribunal under the order passed by this court and the same may be released and paid to the appellant. Thus the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed with costs.

4. I have considered the submissions of learned counsel for the parties and perused the records.

5. The claim petition was filed alleging therein that son of the claimant-respondent no.1 Parideen, aged about 30 years son of Chhedi Lal, resident of Village-Hamidnagar, Police Station-Safdarganj, district-Barabanki was coming back from Mahmoodabad to his house after closing his shop of Shoe making on 24.09.2013, when at Udhauli-Sirauli-Gaushpur Road near village Mahmoodabad and clinic of Dr.Shambhoo, the driver of Bus No.DLIV-5126, driving rashly and negligently hit her son, in which he died on the spot. Accordingly a compensation of Rs.12,00,000/- was claimed as he was earning Rs.40,000/- annually.

6. The claim petition was contested by the owner and driver i.e. respondents no.2 and 3 in the present appeal, who were respondents no. no.1 and 2 in the claim petition, by filing a written statement denying most of the averments. However it has been admitted that the respondent no.2 was the owner and respondent no.3 the driver of the bus. The negligence of the driver was denied. It was further pleaded that the Bus No.DLIV-5126 was standing in the workshop of Shri Haseeb Mistri at Barabanki for repairing of steering on the

date of accident and the vehicle number given in the First Information Report is also some other and since it could not be traced, the respondent no.2 and his vehicle has been implanted in collusion with the police. The appellant-Insurance Company had also filed written statement denying the averments made in the claim petition and reserving right for filing a written statement, if some material is placed on record by the other side.

7. After exchange of pleadings five issues were framed. Thereafter the evidence was adduced by the parties. After considering the pleadings, evidence and material on record, the Tribunal allowed the claim petition. The learned Tribunal, while considering the issue no.1 considered the evidence of respondent no.2, who had appeared as D.W.-1 and also evidence of Mohd.Haseeb, who appeared as D.W.-2 to prove that the vehicle was in the workshop on the date of accident.

8. Perusal of record indicates that the vehicle No.DLIV-5126 has been given in the claim petition in clause 15, 17 and in paragraph 23. In the written statement filed by the respondents no.1 and 2 i.e. the owner and driver of offending vehicle, who are respondents no.2 and 3 in this appeal, the paragraph no.15 alongwith 16 has been denied stating based on wrong facts. Paragraph 17 has not been denied and in reply thereof it has been stated that the Insurer of the bus number given in paragraph is correct and the policy number has also been given. In reply to paragraph 23, it has been stated that the same is not admitted in the manner stated and the subsequent special statements may be seen. It has further been stated by the owner of the bus that the bus number DLIV-5126 of the answering respondent

was in the workshop of Shri Haseeb for repairing of steering. Thus the vehicle number has been admitted by the owner. However he pleaded that it was in workshop on the date of accident. The insurance company has also not specifically denied the number in its written statement. However it has been stated that the policy number of bus No.DLIV-5126 has not been given and the details of the owner of the bus have also not been given, therefore it is denied at this stage and in case the details of the policy would be informed, the detailed written statement may be filed by the appellant. Thereafter no written statement was filed, rather the Insurance policy was placed on record by the appellant-Insurance Company itself alongwith the application dated 10.11.2016. The insurance policy indicates the registration number DLIV-5126 of the vehicle.

9. The vehicle number mentioned on the insurance policy indicates that one(1) is coming in 5126 and the number 1(one) shown in it is not before V and it is I, thus the number of vehicle shown in the policy issued by the appellant-Insurance company is DL-IV-5126, therefore, contention of learned for the appellant that the vehicle number has been denied by the owner and the vehicle is not insured by the appellant-Insurance Company is wrong and misconceived and not tenable. Even otherwise the same has been proved by the claimant-respondent by adducing evidence and the owner has also not denied the same in his evidence, while he appeared as D.W.-1. So far as the mention of number of vehicle in the First Information Report is concerned, since the same has been written by some other person and in Hindi, it may have inadvertently been written as B in

place of 'V' and it does not give any benefit to the appellant.

10. The other plea taken by the owner is that the vehicle was in the workshop on the date and time of accident, therefore, it could not have been involved in the accident. The D.W.-1 i.e. the owner has admitted in his evidence that he had not given the documents of repairs during investigation. He has also stated that he has also not produced the same at the time of bail of the Driver- Ram Naresh i.e. the respondent no.3 and release of the vehicle and the same were produced on the date of evidence itself, therefore the evidence of the owner is not reliable that the vehicle was in the workshop on the date of accident. Thereafter learned Tribunal also considered that in regard to the accident in question the charge sheet has been filed against the driver of the vehicle. This court does not find any illegality or error in the findings recorded by the tribunal because if the vehicle would have been in the workshop on the date and time of accident and aforesaid documents with the owner, he would have certainly intimated about it during investigation and placed before the court in bail and release application for taking benefit of it and it could have been the best material in the said proceeding and in favour of the owner and driver. Merely because the learned tribunal after arriving at conclusion on the basis of evidence before tribunal, considered filing of charge-sheet in the matter against the driver, the order can not be said to be vitiated because it could have been considered to strengthen the findings and conclusions recorded by the tribunal.

11. Mr.Haseeb, the D.W.-2 has also stated in his evidence that he had only signed the bill and the list of materials

required for repairing, which was given on the letter head of the workshop and he had not prepared the bill and list and failed to indicate as to who had prepared them. Perusal of the documents relating to repairs produced by the owner indicates that quotation has been given on 23.09.2013 for 8 items, but only three items have been purchased on 24.09.2013, whereas the labour charges have been taken for six works. Thus all the required items have not been purchased. This also indicates that the contention of the owner is not correct that the vehicle was in the workshop on the date of accident for repairing of steering and the evidence of the workshop owner is also not reliable for the reason that he could not state the complete and correct facts. Thus the plea of non involvement of vehicle in the accident in question is not tenable and accordingly rejected. The learned tribunal has rightly and in accordance with law after considering the pleadings, evidence and material on record has held that the accident had occurred on account of rash and negligent driving of bus No.DLIV-5126 by it's driver.

12. The plea of permit has been considered by the learned Tribunal in issue no.4 and held that the burden to prove the validity of permit rests upon the Insurance Company and it could not prove the same, therefore, it is not proved that the vehicle was plying without valid permit on the day and time of accident, whereas the permit on the date of accident i.e. 24.09.2013 was not placed on record and the owner of the vehicle Aftab Alam, who appeared as D.W.-1 categorically admitted in his cross examination that it is correct to say that there was no permit on the date of accident and also stated that it is wrong to say that since there was no permit of vehicle at the time of accident, therefore, he himself has

got prepared the papers of repairs. Thus it has been admitted that the vehicle had no permit on the date and time of accident and in this way he also appears to have admitted the accident.

13. The limitations as to use of vehicle on the policy schedule- cum-Certificate of Insurance of Vehicle No.DLIV-5126 as paper No.Ga71/1 and Ga71/2 provides that the policy covers use only under a permit within the meaning of the Motor Vehicles Act, 1988 or such a carriage falling under sub-section (3) of Section 66 of the Motor Vehicles Act, 1988 and the policy does not cover use for: a) Organized racing b) Speed testing. It is also mentioned at the bottom of the policy on the second page under the heading important notice that the insured is not indemnified, if the vehicle is used or driven otherwise than in accordance with this schedule and any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1988 is recoverable from the insured. Thus as per terms and conditions of the policy valid permit was required on the date and time of accident, failing which the insurer is not liable to indemnify.

14. The grounds on which the Insurance Company can deny the claims have been enumerated under un-amended Section 149 and the amended Section 150 of the Motor Vehicle Act, 1988. One of the grounds is the breach of specified condition of the policy, therefore, in case of breach of specified terms and conditions of policy, it can be set up as a defence by the Insurance Company and if proved, the Insurance Company cannot be held liable for payment of compensation awarded.

15. The Hon'ble Supreme court, in the case of *National Insurance Co. Ltd. v.*

Challa Upendra Rao (Supra), has held that a person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof and plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149 (2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication and the question of policy being operative had no relevance for the issue regarding liability of insurer and granted right of recovery to the Insurance Company. Relevant paragraphs 11 to 13 are extracted here-in-below:-

"11. As was observed in the said case the statutory defences which are available to the insurer to contest the claim are confined to those provided in sub-section (2) of Section 149.

12. The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed on a better pedestal vis-à-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. The High Court was, therefore, not justified in holding the insurer liable.

13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the

amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured.”

The aforesaid judgment has been relieved by this court in the case of **Chandresh Kumar Agarwal Versus Yogendra Kumar Srivastava and another (Supra)**.

16. The Hon'ble Supreme Court, in the case of **Amrit Paul Singh and another Versus TATA AIG General Insurance Company Limited and others (Supra)**, considered the issue in detail and after considering the unamended provisions of Section 149 (2) of the Motor Vehicles Act 1988 held that since the vehicle was not

having the permit at the time of accident and the exceptions that have been carved out under Section 66 of the Act have not been pleaded and proved, therefore the use of vehicle in a public place without permit is a fundamental statutory infraction, therefore the principles laid down in *National Insurance Co.Ltd. Versus Swarn Singh; (2004) 3 SCC 297 and Lakhmi Chand Versus Reliance General Insurance; (2016) 3 SCC 100* shall not be applicable and in such a situation, the onus cannot be cast on the insurer, therefore the insurer was required to pay the compensation to the claimant with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swarn Singh and other cases pertaining to pay and recover principal. The relevant paragraph 24 is extracted here-in-below:-

"24. In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of

carrying more number of passengers. Therefore, the principles laid down in Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and Lakhmi Chand [Lakhmi Chand v. Reliance General Insurance, (2016) 3 SCC 100 : (2016) 2 SCC (Civ) 45] in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the Tribunal as well as the High Court had directed that the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and other cases pertaining to pay and recover principle."

17. Adverting to the facts of the present case the respondent no.2 i.e. the owner of the offending vehicle has admitted in his evidence that it is correct to say that there was no permit on the date of accident. Thus in view of any contrary and cogent evidence no other inference could have been drawn, except that the vehicle was being plied without any permit on the date and time of the accident.

18. It is settled law that the admission is substantive and best evidence and no other evidence is required, therefore, since

there was clear admission by the owner of the vehicle in this case that the vehicle had no permit on the date and time of accident, no other evidence was required to be adduced by the Insurance Company in this regard. Even otherwise it was the burden of the owner first to prove that the vehicle was being plied in accordance with the terms and conditions of the insurance policy and with valid permit and it has been admitted by the owner that there was no permit on the date of accident.

19. Section 17 of the Indian Evidence Act, 1872 (here-in-after referred as Indian Evidence Act) defines the 'admission', which is extracted here-in-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."

20. Section 21 of the Indian Evidence Act provides that the admissions are relevant and may be proved as against the person who makes them, or his representative in interest. Section 58 of the Indian Evidence Act provides that the facts admitted need not be proved, which is extracted here-in-below:-

"58. Facts admitted need not be proved.-No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts

admitted to be proved otherwise than by such admission."

21. In view of above, once a fact is admitted by a party it need not be proved in any proceeding, therefore, the findings of the tribunal that burden to prove that the vehicle was being plied without valid permit was on the appellant-Insurance Company is misconceived and not tenable.

22. The Hon'ble Supreme Court, in the case of **Avtar Singh and others Versus Gurdial Singh and others; (2006) 12 SCC 552**, has held that admission forms the best evidence and Section 58 of the Evidence Act postulates that things admitted need not be proved.

23. A three Judges Bench of the Hon'ble Supreme court, in the case of **Bharat Singh and others Versus MST.Bhagirathi; 1965 SCC Online SC 57(AIR 1966 SC 405)**, has held that admissions have to be clear if they are to be used against the person making them and the admissions are substantive evidence by themselves, in view of Section 17 and 21 of the Indian Evidence Act. The relevant paragraph 19 is extracted here-in-below:-

"19. Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17, and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The

purpose of contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence."

24. In view of above, this court is of the view that in absence of permit of the vehicle on the date and time of the accident, the appellant-Insurance Company cannot be held liable to make the payment of the compensation and accordingly the impugned judgment and award 16.11.2016 passed in M.A.C.P.No.460 of 2013; Chhedana Versus Aftab Alam and others by the Motor Accident Claims Tribunal/District Judge, Barabanki is liable to be modified to the extent that the compensation shall be paid by the appellant-Insurance Company to the claimant-respondent no.1 and the Insurance Company will have right to recover the same from the owner and driver in accordance with law.

25. The First Appeal From Order is **partly allowed**. The impugned judgment and award is modified only to the extent that the compensation shall be paid by the appellant-Insurance Company to the claimant-respondent no.1 and the Insurance Company will have right to recover the same from the owner and driver in accordance with law and rest of the impugned judgment and award shall remain intact. No order as to costs.

26. The lower court record and the statutory deposit and any other deposit made before this court under any order in this appeal shall be remitted to the concerned tribunal forthwith and in any case within a period of four weeks from today for adjustment in the compensation to be paid to the claimant-respondent no.1 under the impugned award.

(2024) 12 ILRA 153
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 728 of 2024
 With
 Criminal Appeal U/S 372 CR.P.C. No. 1070 of
 2022

State of U.P. ...Appellant
Versus
Sajid S/O Ibnehasan ...Respondent

Counsel for the Appellant:
 Shiv Kumar Pal

Counsel for the Respondent:
 Subhash

**Criminal Law — Indian Penal Code, 1860 -
 Section 364, 376(3), 302 & 201 -
 The Protection of Children from Sexual
 Offences Act, 2012 - Section 5/6 Appeal
 against acquittal — Case under I.P.C. and
 of the - Power of appellate court —
 Limited interference — Presumption of
 innocence — "Last seen" theory —
 Circumstantial evidence — Acquittal not
 liable to be reversed unless judgment
 perverse or based on legally erroneous
 reasoning — No conclusive forensic
 evidence identifying skeletal remains as
 that of deceased victim — Time gap**

**between last seen and recovery of body
 held too wide — Prosecution failed to
 complete the chain of circumstances — No
 interference warranted-trial court
 judgement upheld-appeal dismissed.
 (Paras 14, 18, 24, 31 to 36)**

HELD:

Broadly speaking until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed miscarriage of justice to be meted by the parties, this Court should not in routine manner interfere with the judgment of acquittal as the accused is possessed with double presumption of innocence. (Para 14)

Applying the principles of law as laid down in the above noted decisions in the facts of the case an irresistible conclusion stands drawn that there is a huge time gap between the alleged accused lastly seen with the deceased victim and the recovery of the body (skeleton) which creates a doubt regarding involvement of the accused Sajid in the commission of crime. (Para 31)

Now another crucial question arises for consideration whether the skeleton which is being shown to have been recovered on 15.07.2018 was of the deceased victim or not. Admittedly as per the panchnama and the post mortem report only skeleton was found and there was no flesh. The deceased went missing from 22.05.2018 as per the prosecution story and the recovery of the body of the deceased dated 15.07.2018. The identification is St.d to have been made by P.W. 1, Sher Ali and his wife with the aid and assistance of clothes, slipper and hair (ponytail). The skeleton was also sent for DNA test, however, there is nothing on record that there is any conclusive report that the skeleton was of the deceased victim. (Para 31)

Interestingly, P.W. 1 and P.W. 5 Inspector Amar Pal Singh, first Investigating Officer who claims to have recovered the skeleton on cross examination by the defence could not point out the time when he along with his team had gone from the police station and further does not remember whether the same stands mentioned in the GD report. One further question being raised to him, he showed his inability to apprise

at what time the P.W. 1 and his wife were informed for identification of the skeleton. (Para 32)

The aforesaid circumstances itself creates a doubt upon the credibility of the prosecution story. Nonetheless, the entire prosecution story is based upon circumstantial evidence and it is not a case of eye witness testimony. Thus, an obligation stood cast upon the prosecution to complete the chain in all respect so as to indicate the guilt of the accused and exclude any other theory of the crime. (Para 33)

Plainly and simply, merely on the basis of the St.ments of two prosecution witnesses namely P.W. 2, Muddashir and P.W. 3 Junaid the accused Sajid cannot be said to have commissioned the crime particularly when the overall circumstances do not support the prosecution case. (Para 34)

Cumulatively giving anxious consideration to the judgment and the order passed by the learned trial court acquitting the accused, this Court finds that the learned trial court has not committed any palpable illegality or perversity as the learned trial court has appreciated each and every aspect of the matter from the four corners of law while acquitting the accused. The view taken by the trial court is a possible and plausible view based upon not only the appreciation of the testimony of the prosecution witnesses and the documents so adduced therein but also upon the cardinal principles of law which govern the subject in question. (Para 35)

Thus, this Court has no option but to concur that the judgment and order of the trial court whereby the accused herein has been acquitted. (Para 36)

Appeal dismissed. (E-14)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar (2022) 3 SCC (471)
2. Babu Sahebagoada Rudragoudar & ors. Vs St. of Karn. 2024 (8) SCC 129

3. Dharm Dev Yadav Vs St. of U.P. 2014 (5) SCC (509)

4. Dhan Raj @ Dhand Vs St. of Har. (2014) 6 SCC 745

5. Ashok Vs St. of Har. (2015) 4 SCC 393

6. Chandrapal Vs St. of Chhattisgarh AIR 2022 S.C. 2542

7. Jabir & ors. Vs St. of Uttarakhand AIR 2023 Supreme Court SC 488

8. Dinesh Kumar Vs St. of Har. AIR 2023 Supreme Court 2795

9. R. Sreenivasa Vs St. of Karn.AIR 2023 SC 4301

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings by way of Government Appeal No. 728 of 2024 at the instance of State of U.P. and Appeal under Section 372 of the Cr.P.C. No. 1070 of 2022 preferred by Sher Ali (informant) is the judgment and order dated 26.03.2022 passed by Additional Sessions Judge, Court No. 3, Ghaziabad in Session Trials No. 234 of 2018 (State of Uttar Pradesh Vs. Sajid) arising out of Case Crime No. 196 of 2018 under Section 364, 376(3), 302, 201 I.P.C. and Section 5/6 of the POCSO Act, P.S. Bhojpur, District Ghaziabad acquitting the accused respondents.

Facts

2. The prosecution story in brief is that on 25.05.2018, Sher Ali (P.W. 1), lodged a first information report in the Police Station Bhojpur, District Ghaziabad alleging that his daughter (victim) aged about 12 years had gone out of the house at about 7:00 P.M. on 22.05.2018 whereafter she went missing. Despite constant efforts her

whereabouts were not known, constraining Sher Ali (P.W. 1) to lodge first information report being Case Crime No. 196 of 2018 under Section 363 I.P.C. Post lodging of the first information report, Amar Pal Singh, Sub Inspector was appointed as the Investigating Officer on 25.05.2018. The statement of Sher Ali (P.W. 1) was taken on 06.07.2018 and he deposed that the whereabouts of the victim remained untraced since 22.05.2018 and P.W. 2 Muddashir, P.W. 3 Junaid along with Yunus and Rashid had seen the victim along with accused Sajid. Thereafter, on 09.07.2018 after disclosure of the said fact, the police officials raided the house of the accused Sajid. On 15.07.2018 on the basis of tip of an informer the accused Sajid was arrested and taken into police custody and after interrogation a confessional statement was made by accused Sajid that he had abducted the victim on 22.05.2018 at about 7-7:30 in the evening and since the victim who was a minor girl was demanding 5/10 rupees from the accused Sajid so the accused Sajid assured her to tender 5/10 rupees demanded by the victim and thereafter took her near the drain and proceeded to abduct her and outraged her modesty and after strangulating, she was done to death. On the basis of the confessional statement and on the pointing out of the accused Sajid, the police proceeded towards the place of incident while walking on the chak road and after proceeding ahead 8-10 steps, the skeleton (skull and bones) of the deceased was found along with the clothes, slippers, ponytail (hair) which was scattered therein. It is also alleged that inquest was prepared at the site and the body was sealed and thereafter in order to ascertain as to whether the skeleton was of the deceased victim or not, the residue of the dead body was sent to Forensic Laboratory. It is

further claimed that for the sake of accuracy DNA test was also performed. Since Amar Pal Singh Sub Inspector (P.W. 5), the first Investigating Officer stood transferred, thus, in his place the second Investigating Officer (P.W. 6) Sub Inspector Surendra Pal Singh was appointed to undertake the task of investigation, thereafter P.W. 7 Sub Inspector Gynandra Bodh was appointed as Investigating Officer. The Investigating Officer conducted the investigation and submitted the charge sheet in Case Crime No. 196 of 2018 against the accused Sajid accused-respondent under Section 364, 376, 302, 201 I.P.C. read with Section 5/6 of the POCSO Act. The case was committed to the Court of Sessions.

3. During the trial, the prosecution examined as many as 8 witnesses namely Sher Ali, informant (P.W. 1), P.W. 2, Muddashir and P.W. 3, Junaid (witness of facts). P.W. 4, Dr. Vikrant who conducted the post mortem, P.W. 5, Sub Inspector Amar Pal Singh, first Investigating Officer, P.W. 6, Sub Inspector Surendra Pal Singh, second Investigating Officer, P.W. 7, Gynandra Bodh, third Investigating Officer who submitted the charge sheet and P.W. 8 who proved the chik F.I.R. After prosecution evidence was closed the Trial Court recorded the statement of the accused Sajid under Section 313 of the Cr.P.C. The accused Sajid denied the allegations levelled against him and stated that he has been falsely implicated in the criminal case. The Trial Court found the accused Sajid innocent and acquitted him from the charges under Section 364, 376(3), 302 201 I.P.C. read with Section 5/6 of the POCSO Act.

4. In order to establish its case, prosecution had produced the documentary and oral evidence-

Documentary evidence

Inquest Report	Ka-1
Post Mortem Report	Ka-2
Site-Plan	Ka-3
Recovery Memo	Ka-4
Panchayatnama	Ka-5
Corpse-Photo	Ka-6
Corpse Challan	Ka-7
Seal Sample	Ka-8
Site-Plan	Ka-9
Final Report	Ka-10
First Information Report	Ka-11
General Diary	Ka-12

Testimony of the Prosecution Witnesses

5. **P.W. 1, Sher Ali** the informant has been examined as P.W. 1, he is the father of the deceased-victim. P.W. 1 in his examination-in-chief has deposed that the victim is 10 years of age and on 22.05.2018 she had proceeded from the house at about 7-8:00 in the evening and she was wearing salwar, kurti and was in hawai slippers. P.W. 1 further deposed that since 22.05.2018 he along with the family members were were constantly searching the whereabouts of the deceased but she was untraceable thereafter, on 25.05.2018 P.W. 1 through his brother Rashid who is scribe of the first information report got the written report submitted before the Police Station which transformed into first information report. P.W. 1 also gave a statement that after a period of 8-10 days from the date when the victim went missing i.e. 22.05.2018, Muddashir (P.W. 2) along with Yunus and Rashid who also belong to the same village apprised him that they saw the deceased victim with the accused Sajid and they are in a position to identify him also. He further deposed that the same was also apprised by the natives of the village

and the same was also a matter of discussion between the villagers. P.W. 1 also deposed that after a period about two months, the accused Sajid was arrested and thereafter the skeleton of the deceased victim along with the clothes and slippers were found. He further deposed that the accused Sajid had made a confessional statement that he had outraged the modesty of the deceased victim and thereafter murdered her and left the body. He along with his wife, his brother Gulsher and one Shahid Chaudhary who happens to be the Gram Pradhan of the village identified the skeleton to be of victim. He along with his wife had also identified the clothes and the slippers which belonged to his daughter and the police thereafter, the Panchnama was prepared in which there is a thumb impression of not only his wife along with him but also of the Gram Pradhan.

6. **P.W. 2 Muddashir** got himself examined as P.W. 2 and he in his examination-in-chief deposed that he knows the first informant (P.W. 1) Sher Ali. According to him the age of the deceased victim was about 9-10 years and on 22.05.2018 when he was standing outside his house then at about 7-7:30 in the evening he saw the accused Sajid talking with the deceased victim and he also heard that the deceased victim was demanding 5/10 rupees from the Sajid and Sajid assured her that he would give 5/10 rupees to the deceased victim if she accompanies him. The said fact has also been disclosed to the police. The body was found in the Jungle and the deceased is not alive. On 24/25.05.2018, P.W. 1-Sher Ali came to his house and he was apprised of the said fact.

7. **P.W. 3 Junaid** stepped in the witness box as P.W. 3. He in his

examination-in-chief deposed that he knows Sher Ali (P.W. 1) informant and also his daughter, deceased victim who have been murdered. He also stated that on 22.05.2018 at about 7-7:30 in the evening when he was returning from work to his house and when he just approached the shop of Buddhe @ Muzaffar, he recognized the accused Sajid and after the said incident, he did not see the accused Sajid.

8. P.W. 4 Dr. Vikrant had conducted the post mortem. According to him on 16.07.2018 he was posted as Consultant in CHC Modinagar. He conducted the post mortem at 4:20 hour wherein the following was found.- (a) external examination some bones and human skeleton 1- below the skull towards jaws 2- Scapula 3- ileum 4- Radius, ulna 5- Tibia both sides 6- Femur 7- Few Ribs 8- Few Separated Vertebrae 9- Humerus of both Upper limbs through digital X ray 2- Molar teeth 2- Ribs. According to him, the skeleton was sent for DNA examination. Medical examination was done with the assistance and the advice of his associate Dr. Rakesh Kumar. He proved the factum of post mortem.

9. P.W. 5 Sub Inspector Amar Pal Singh the first Investigating Officer, deposed that he was assigned the task of conducting investigation with respect to the subject F.I.R. According to him post lodging of the first information report entire formalities were completed as prescribed and in vogue. He prepared the spot inspection map (Exhibit 3). He also took the statements of the Gulsher and Tabid which stands recited in the GD. In his statement he further deposed that he took the statements of the P.W. 1 Sher Ali-informant who apprised him that since 22.05.2018 the whereabouts of the victim is unknown and according to him P.W. 1 Sher

Ali first informant apprised him that Yunus, P.W. 2 Muddashir, Rashid and Junaid, P.W. 3 had seen the accused Sajid along with the deceased victim, he further took the statements of the above noted witnesses. On the basis of the said statements on 09.07.2018, P.W. 5 along with the police officials raided the house of the accused Sajid. Thereafter on 15.07.2018 on the basis of a tip, accused Sajid was arrested and taken in police custody and he made a confessional statement that on 22.05.2018 at about 7-7:30 in the evening when the deceased victim was standing and demanding 5/10 rupees from him then he took her near the drain and thereafter proceeded to outrage her modesty and strangled her to death. On the said basis P.W. 1 along with the police officials went towards the chak road and after walking 50-60 steps and inside the agricultural field, 8-10 steps, the skeleton along with clothes and slippers and ponytail (hair) was found. However, there was no flesh available on the skeleton presumably due to the fact that the animals might have eaten it. P.W. 1 Sher Ali along with his wife and the Gram Pradhan who were present, had also identified that the skeleton was that of the deceased victim and thereafter Panchnama was prepared. The post mortem was conducted, body was sent for DNA test.

10. P.W. 6 Surendra Pal Singh , second Investigating Officer also got himself examined as a prosecution witness and according to him he was assigned the charge on 19.07.2018.

11. P.W. 7 Gynandra Bodh, third Investigating Officer deposed that he was assigned the charge of Investigating Officer, he conducted investigation and after thorough investigation, materials were

collected regarding the involvement of the accused Sajid and he submitted the charge sheet.

12. P.W. 8 Head Constable Raj Kumar is the Head Moharrir. According to him he had recorded the contents of written report and chik report. He is formal witness.

Legal Position:

13. Before pondering into the niceties of the judgment of acquittal under challenge in the proceedings under Section 378(3) Cr.P.C. at the instance of the State, this Court has to re-memoirise itself the fact that the present proceedings are in a form of appellate jurisdiction occasioning scrutiny of a judgment of acquittal wherein there are certain limitations provided therein which needs to be recognised before the delving in the issue.

14. Broadly speaking until and unless the judgment under challenge is perverse and there are substantial and compelling reasons followed by miscarriage of justice to be meted by the parties, this Court should not in routine manner interfere with the judgment of acquittal as the accused is possessed with double presumption of innocence.

15. To put it otherwise as a matter of right, this Court cannot at the instance of the appellant, who happens to be State exercise the jurisdiction while converting the judgment of acquittal into conviction.

16. The aforesaid principle of law has already been crystallized by Hon'ble Apex Court in plethora of decisions and just for the sake of illustration reference may be made to the judgment of **Rajesh Prasad**

Vs. State of Bihar (2022) 3 SCC (471) wherein the Hon'ble Apex Court wherein the following was observed.-

"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 CrPC deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup v. King Emperor² considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of a acquittal and observed as under: (SCC OnLine PC)

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

"..... But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4)

the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. *In Atley v. State of U.P.*³, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao, J. (as his Lordship then was) in *Sanwat Singh v. State of Rajasthan*: (*Sanwat Singh case*⁴, AIR pp. 719-20, para 9)

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in *Sheo Swarup*² afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its

arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

*The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khima v. State of Saurashtra*⁵ which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong".

23. *M.G. Agarwal v. State of Maharashtra* is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as his Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial".

24. *In Shivaji Sahabrao Bobade v. State of Maharashtra*, Krishna Iyer, J., observed as follows: (SCC p. 799, para 6).

"6. ... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in *Ramesh Babulal Doshi v. State of Gujarat*, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows: (SCC p. 229, para 7)

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question

whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can and then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed up to the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai] d Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. P.S.R. Sadhanantham]. An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal."

17. Recently, the Hon'ble Supreme Court in **Babu Sahebagouda Rudragoudar and others Vs. State of Karnataka 2024 (8) SCC 129** the Apex Court had flagged a note of caution in the matters of exercise of appellate jurisdiction when the Appellate Court is confronted with an order of acquittal, the following was observed:-

"38. First of all, we would like to reiterate the principles laid down by this Court governing the scope of interference by the High Court in an appeal filed by the State for challenging acquittal of the accused recorded by the trial court.

39. This Court in Rajesh Prasad Vs. State of Bihar encapsulated the legal position covering the field after considering various earlier judgments and held as below: (SCC pp. 482-83, para 29)

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case, SCC p. 432, para 42)

'42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may read its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

40. Further, in *H.D. Sundara Vs. State of Karnataka* this Court summarised the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 Cr.P.C. as follows: (SCC p. 584, para 8)

“8. ... 8.1. The acquittal of the accused further strengthen the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is

entitled to reappraise the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after reappraising the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”

18. Broadly speaking the same principles also stands applied to the appeals under Section 372 of the Cr.P.C. by the informant/complainant.

19. Bearing in mind the principles of law so laid down by the Hon’ble Apex Court as referred to above the present case is to be proceeded with while giving it a logical end.

Submissions advanced on behalf of the State appellants and counsel for the informant

20. Sri Jay Prakash Tripathi, learned AGA along with Sri Anand Ji Mishra who appear for the informant have made the manifold submissions namely:

(a) the accused herein has committed offence which stood proved beyond doubt as the chain and sequence of

the events consistently points out towards commission of offences beyond reasonable doubt;

(b) the accused were seen with the deceased lastly wherefrom she disappeared, thus, the last seen theory comes into play;

(c) once the prosecution witnesses had proved beyond shadow of doubts that the accused was lastly seen with the deceased victim then the onus stood shifted to the accused and in absence of proving otherwise, by no stretch of imagination, it can be said that the accused were innocent;

(d) it was only on the pointing out of the accused, the skeleton of the deceased victim stood recovered and once on the basis of the clothes and the slippers and the piece of hair (ponytail) which stood identified by the first informant and his wife to be of their own daughter (deceased victim), there is no element of doubt that the accused had not committed the offence;

(e) once P.W. 2 Muddashir and P.W. 3 Junaid happen to be a non-interested witness who had lastly seen the deceased victim with the accused Sajid then their deposition ought to have been given much weightage particularly when the defence has not discharged its burden of proving that the accused was not lastly seen with the deceased victim.

Analysis

21. We have given thoughtful consideration to the arguments advanced by the learned AGA and the counsel for the informant and perused the record carefully including the trial court records.

22. The first information report was lodged on 25.05.2018 at 12:35 hours alleging that the P.W. 1 Sher Ali's minor daughter

(deceased victim) had gone out from his house at 7:00 in the evening wherefrom her whereabouts became untraceable. It is also alleged by the P.W. 1 Sher Ali that for 3/4 days there was rigorous search but in failing to know the whereabouts of the deceased victim, F.I.R. came to be lodged on 25.05.2018. According to the prosecution, P.W. 1 Sher Ali deposed that after a period of 8-10 days from the date of incident i.e. 22.05.2018 Yunus, Rashid and Muddashir, P.W. 2 apprised P.W. 1 that they had seen accused Sajid along with the deceased victim and the said fact was also apprised by the villagers and it was the matter of discussion between them. In a nutshell the prosecution story is that the deceased victim was lastly seen with the accused Sajid. Notably, as per the prosecution case in particular P.W. 5, Sub Inspector Amar Pal Singh, the first Investigating Officer on 06.07.2018 had approached the P.W. 1 Sher Ali for recording of the statement under Section 161 Cr.P.C. and he was apprised by the P.W. 1 Sher Ali that P.W. 2 Muddashir, P.W. 3 Junaid, Yunus and Rashid had apprised him about the fact that the deceased victim was lastly seen with the accused Sajid. Apparently, P.W. 2 Muddashir, in his cross examination by the defence stated that he saw the accused Sajid with the deceased victim on 22.05.2018 and on the same day he had apprised the said fact to his brother Rustom. He further deposed that his brother Rustom also apprised the said fact to the parents and family members of the deceased victim. He stated that the father of the deceased victim P.W. 1 Sher Ali had come to their house on 24/25.05.2018 at about 8:00 A.M. the said fact was also informed to him.

23. The aforesaid deposition of P.W. 1 Sher Ali, P.W. 3 Junaid itself shows that there are major contradictions which demolishes the prosecution theory. On one

hand, according to the deposition of the P.W. 1 he was informed after a period of 8/10 days of the incident which occurred on 22.05.2018 regarding the fact that the deceased victim was lastly seen with the accused Sajid by Yunus, Rashid and Muddashir, P.W. 2, however, P.W. 2 Muddashir himself deposed that P.W. 1 had come to his house on 24/25.05.2018 at 8:00 A.M. whereupon the said fact was apprised. Further what is more interesting is that the first information report was lodged against un-named accused on 25.05.2018, thus, the possibility cannot be ruled out that the present case is of false implication. Nonetheless P.W. 3-Junaid further deposed that he had not seen the deceased with the accused Sajid and he did not apprise the said fact to the friends or any body.

24. Pertinently, as per the prosecution case the deceased victim went missing from 22.05.2018 and the skeleton was recovered on 15.07.2018. The deceased victim was lastly seen with the accused on 22.05.2018, thus, what is relevant is the time gap when the deceased-victim was last seen with the accused and the time of the commission of the offence/the date when the skeleton was discovered. Admittedly, the time gap in the present case is over and above one and a half month.

25. The impact and the effect of time gap in the cases of circumstantial evidence has been explained in **Dharm Dev Yadav Vs. State of U.P. 2014 (5) SCC (509)** where it was observed as under:-

“19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based

on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.”

26. In **Dhan Raj @ Dhand Vs. State of Haryana (2014) 6 SCC 745**, the Hon'ble Apex Court observed as under:-

“15. The above mentioned circumstantial evidence was supported with the statement of Raj Singh (PW 15), that when he was visiting his brother the deceased on 24-1-1997 after the deceased had left, the three accused came to the

deceased's house and enquired about him after disclosing their names. Before discussing the admissibility of the said statement, we would refer to the landmark decision of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* regarding circumstantial evidence, where this Court held regarding the question of the accused last seen with the deceased, that where it is natural for the deceased to be with the accused at the material time, other possibilities must be excluded before an adverse inference can be drawn. It is evident from the above that this Court refrains from drawing adverse inferences in a factual matrix which points towards the guilt of the accused. Thus, we will consider the statement of Raj Singh also in the same light.

16. As per the statement of Raj Singh, the three accused had come asking for the deceased but in the absence of other corroborating evidence and independent evidence, it is not established that the appellant-accused had abetted the co-accused Sanjay in the commission of the crime. Also it can be the defence case that the said statement has been added as an afterthought to strengthen the case of the prosecution. We have found no material on record which corroborated the statement of Raj Singh who is an interested witness. Furthermore, there is no other evidence which indicates or establishes the presence of the appellant-accused near the place of commission of crime. Also, as noted by the trial court in the trial of Badal, no footprints were found in the surrounding kutchra area where the body of the deceased was found.

17. We have noticed in *Madhu v. State of Kerala*, facts of which were discussed earlier, that this Court in spite of the factum that the accused were sighted close to the place of occurrence at around

the time of occurrence reversed the conviction as guilt was not established. In the present factual matrix, it is only an interested witness stating that the accused had come asking for the deceased. This factum alone does not establish guilt as no other evidence is found that they were near the Bizdipur area where the crime was committed or had visited the house of the deceased."

27. In the case of **Ashok Vs. State of Haryana (2015) 4 SCC 393**, Hon'ble Apex Court had discussed the theory of last seen together while holding as under:-

"8. The "last seen together" theory has been elucidated by this Court in 9 **Trimukh Maroti Kirkan v. State of Maharashtra**, in the following words:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

9. In *Ram Gulam Chaudhary v. State of Bihar*, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor

was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every c justification for drawing an inference that they had murdered the boy.

10. In *Nika Ram v. State of H.P.*⁴, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is *Kanhaiya Lal v. State of d Rajasthan*⁵. In this case this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused."

28. Further in **Chandrapal Vs. State of Chhattisgarh AIR 2022 S.C. 2542**, the issue of last seen was discussed as under:-

"14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

15. In case of *Bodhraj and Ors. v. State of Jammu and Kashmir*', this court held in para 31 that:

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that

possibility of any person other than the accused being the author of the crime becomes impossible...."

16. In *Jaswant Gir v. State of Punjab*', this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

17. In *Arjun Marik and Ors. v. State of Bihar*, It was observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded."

29. The Hon'ble Apex Court in **Jabir and others Vs. State of Uttarakhand AIR 2023 Supreme Court SC 488** had laid down the parameters in the cases sustaining conviction on the basis of circumstantial evidence, it was observed as under:-

"21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused, and such evidence should

not only be consistent with the guilt of the accused but should be inconsistent with his innocence.⁵ These were so stated in *Sarad Birdichand Sarada* (supra) where the court, after quoting from *Hanumant*, observed that:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* (1973) 2 SCC 793 where the following observations were made: [SCC para 19, p. 807: SCC (Cri.) p. 1047] Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the Accused and must show that in all human probability the act must have been

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

These panchsheel precepts, so to say, are now fundamental rules, iterated time and again, and require adherence not only for their precedential weight, but as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest.

22. This court is of the opinion that given the testimonies of two sets of witnesses (PWs2 &3 and PW-4 &5) who deposed to seeing the deceased with Husn Jahan and the first two accused, on 8th October 1999 and 9th October 1999, respectively, and also given the serious flaws in their testimonies, with respect to the knowledge of PW-1, the flaws in their testimonies regarding their presence at the place and time, deposed to by them, as well as other glaring inconsistencies, the prosecution cannot be said to have proved its case. If benefit were to be given to PW-1's statement, and he were to be believed that the police did not take any action, till he applied under Section 156 (3) his conduct, in not stating anything during inquest proceedings, despite being informed about the facts, by PW-2, PW-3 and PW-4, that about seeing the boy in the company of A-3 Husn Jahan, on 08-10-1999, and later, on the early morning of 09-10-1999, undermines the prosecution story. Likewise, if the prosecution version that there was a previous enmity or grudge on the part of the accused, which constituted a motive to kill the child, is correct, the conduct of PW-4 and PW-5 in not taking any steps to ensure the safety of the child, when they saw him in the company of the accused, is unnatural. This is more so, because PW-5 is admittedly related to PW-1. As discussed previously,

the testimony of PW-5 with respect to the circumstances under which he saw the deceased early morning of 09-10-1999, renders it untrustworthy and unbelievable.

23. This court is also of the opinion that apart from the above serious infirmities, there is no evidence, oral or any material object, which connects the appellant-accused with the crime. It has been repeatedly emphasized by this court, that the “last seen” doctrine has limited application, where the time lag between the time the deceased was seen last with the accused, and the time of murder, is narrow; furthermore, the court should not convict an accused only on the basis of the “last seen” circumstance.

24. Recently, in *Rambraksh vs. State of Chhattisgarh*,⁷ this court after reviewing previous decisions, stated as follows: “10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.¹¹ In a similar fact situation this Court in the case of *Krishnan v. State of Tamil (2014) 12 SCC 279*, held as follows: “21. The conviction cannot be based only on circumstance of last seen together with the deceased. In *Arjun Marik v. State of Bihar (1994) Supp (2) SCC 372* : (AIR Online 1994 SC 65). “31. Thus the

evidence that the Appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the Appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

22. This Court in *Bodhraj v. State of (2002) 8 SCC 45* held that:

“31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.” It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.

24. In *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438): AIR Online 2005 SC 387), this Court held that in the absence of any other links in the chain of circumstantial evidence, the Appellant cannot be convicted solely on the basis of "last seen together" even if version of the prosecution witness in this regard is believed."

Again, in *Nizam & Ors. v State of Rajasthan*,⁸ it was held as follows:

"Courts below convicted the Appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the Appellants on 23.01.2001. Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."

25. In the present case, save the "last seen" theory, there is no other circumstance or evidence. Importantly, the time gap between when the deceased was seen in the company of the accused on 09-10-1999 and the probable time of his death, based on the post mortem report, which was conducted two days later, but was silent about the probable time of death, though it stated that death occurred approximately two days before the post mortem, is not narrow. Given this fact, and the serious inconsistencies in the depositions of the witnesses, as well as the fact that the FIR was lodged almost 6

weeks after the incident, the sole reliance on the "last seen" circumstance (even if it were to be assumed to have been proved) to convict the accused-appellants is not justified."

30. The aforesaid principle of law came to be followed in the case of **Dinesh Kumar Vs. State of Haryana AIR 2023 Supreme Court 2795** and **R. Sreenivasa Vs. State of Karnataka AIR 2023 SC 4301**.

31. Applying the principles of law as laid down in the above noted decisions in the facts of the case an irresistible conclusion stands drawn that there is a huge time gap between the alleged accused lastly seen with the deceased victim and the recovery of the body (skeleton) which creates a doubt regarding involvement of the accused Sajid in the commission of crime.

31. Now another crucial question arises for consideration whether the skeleton which is being shown to have been recovered on 15.07.2018 was of the deceased victim or not. Admittedly as per the panchnama and the post mortem report only skeleton was found and there was no flesh. The deceased went missing from 22.05.2018 as per the prosecution story and the recovery of the body of the deceased dated 15.07.2018. The identification is stated to have been made by P.W. 1, Sher Ali and his wife with the aid and assistance of clothes, slipper and hair (ponytail). The skeleton was also sent for DNA test, however, there is nothing on record that there is any conclusive report that the skeleton was of the deceased victim.

32. Interestingly, P.W. 1 and P.W. 5 Inspector Amar Pal Singh, first

Investigating Officer who claims to have recovered the skeleton on cross examination by the defence could not point out the time when he along with his team had gone from the police station and further does not remember whether the same stands mentioned in the GD report. One further question being raised to him, he showed his inability to apprise at what time the P.W. 1 and his wife were informed for identification of the skeleton.

33. The aforesaid circumstances itself creates a doubt upon the credibility of the prosecution story. Nonetheless, the entire prosecution story is based upon circumstantial evidence and it is not a case of eye witness testimony. Thus, an obligation stood cast upon the prosecution to complete the chain in all respect so as to indicate the guilt of the accused and exclude any other theory of the crime.

34. Plainly and simply, merely on the basis of the statements of two prosecution witnesses namely P.W. 2, Muddashir and P.W. 3 Junaid the accused Sajid cannot be said to have commissioned the crime particularly when the overall circumstances do not support the prosecution case.

35. Cumulatively giving anxious consideration to the judgment and the order passed by the learned trial court acquitting the accused, this Court finds that the learned trial court has not committed any palpable illegality or perversity as the learned trial court has appreciated each and every aspect of the matter from the four corners of law while acquitting the accused. The view taken by the trial court is a possible and plausible view based upon not only the appreciation of the testimony of the prosecution witnesses and the documents so adduced therein but also

upon the cardinal principles of law which govern the subject in question.

36. Thus, this Court has no option but to concur that the judgment and order of the trial court whereby the accused herein has been acquitted.

37. Resultantly, no ground is made so as to accord leave to appeal. Accordingly, leave to appeal is rejected. As the leave to appeal stands rejected, thus, the Government Appeal instituted by the appellant under Section 378(3) of the Cr.P.C. and the appeal of the informant under Section 372 of the Cr.P.C. also stands rejected.

38. The records be sent back to the court below.

(2024) 12 ILRA 169
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

Matters Under Article 227 No. 4852 of 2022

Prabhu Narayan Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Abhishek Ankur Chaurasia, Ayush Mishra,
 Diwan Saifullah Khan, Sunil Kumar Misra

Counsel for the Respondents:

Anant Prakash Mishra, G.A.

**Civil Law-The Constitution of India,1950-
 Article 227-** When ownership of disputed property has been determined by a competent revenue court, the revisionist cannot claim possession over it against wishes of its real

owner---The disputed land was purchased by mother of respondent nos.2 to 5 through registered sale deed and the names of respondent nos.2 to 5 have already been recorded in the revenue record---Petitioners have failed to prove their ownership or title in respect of the disputed property---Petitioners have no right or claim in respect of disputed property in absence of any registered sale deed in their favour---No ground for interference is made out.

Petition dismissed. (E-15)

List of Cases cited:

1. Criminal Revision No.140 of 1990 (Mohammad Hasen & ors.Vs Nazir Hasan & ors.) decided on 10.4.2000

2. Criminal Revision (Defective) No.342 of 2010 (Smt. Shakuntala Devi Vs St. of U.P. & anr.) decided on 4.9.2015

(Delivered by Hon'ble Vipin Chandra
Dixit, J.)

1. This petition under Article 227 of the Constitution of India has been filed on behalf of petitioners for quashing the judgment and order dated 04.05.2022 passed by Additional Sessions Judge / Special Judge (Anti Corruption Act) Court No. 1, Varanasi in Criminal Revision No. 257 of 2018 and impugned order dated 29.09.2018 passed by Sub Divisional Magistrate, Pindra, District Varanasi in Case No. 5/5/6/7/11/2012 (Lilawati Devi vs. Prabhu Narayan Singh) by which disputed land was released in favour of private respondents.

2. Brief facts of the case are that the mother of respondent nos. 2 to 5 namely Lilawati had purchased 1.77 acer land of Arazi No. 726 situated at Mauja Jathi, Police Station Phoolpur, District Varanasi through registered sale deed dated

24.04.2000 from Sabhajeet Singh on sale consideration of Rs. 3,42,000/-. Smt. Lilawati has applied mutation under section 34 of Land Revenue Act in the court of Tehsildar, Pindra which was registered as Case No. 417/74/1235 of 2000. The name of Lilawati was mutated on 08.09.2005 and the appeal preferred by the petitioners against the order of mutation dated 08.09.2005 was also dismissed on 10.06.2008. Smt. Lilawati had moved an application under Section 145 Cr.P.C. with the allegation that the opposite parties/petitioners herein are interfering in the peaceful possession and they may be restrained not to cut Arhar crops and the police protection be provided to the applicant for cutting the crops.

3. Sub Divisional Magistrate, Pindra, Varanasi had called upon a report from Police Chowki Sindhaura, Police Station Phoolpur, District Varanasi and on relying the police report had issued notices to both the parties to adduce evidence regarding possession, vide order dated 15.04.2005. The order of attachment under Section 146 Cr.P.C. was also passed attaching the crops standing on the disputed land and the SHO, Phoolpur was directed to handover the possession of land as well as crops to any independent person and also submit report.

4. Both the parties appeared before the learned Magistrate and filed their reply. The mother of respondent nos. 2 to 5 has stated in her reply that the land in dispute was purchased by her from Sabhajeet Singh through registered sale deed dated 24.04.2000 and since then she is in possession over the same. The opposite parties have no concern with the disputed land but being nephew of previous owner, they are interfering in the possession of applicant.

5. The opposite parties/petitioners herein had also filed reply stating therein that they are nephew of Sabhajeet Singh who died issue less. Sabhajeet Singh had executed an agreement on 07.01.2000 in favour of opposite parties on payment of Rs. 75,000/- and they are in possession over the disputed property. The possession of applicant Lilawati on the disputed land had been denied. It is further submitted that the police had also submitted report in their favour that they are in possession.

6. The Sub Divisional Magistrate after considering the evidence adduced by the parties had recorded the finding that the mother of respondent nos. 2 to 5 namely Lilawati had purchased the disputed land on 24.04.2000 from Sabhajeet Singh through registered sale deed. The Original Suit 497 of 2000 filed by opposite parties for cancellation of sale deed was dismissed on 17.02.2001 and the appeal filed against the order dated 17.02.2001 was also dismissed by order dated 28.02.2001. The suit filed by petitioner no.1 Prabhu Narayan Singh under Section 229B of U.P.Z.A. & L.R. Act was also dismissed for want of prosecution on 28.01.2003. The learned Magistrate further has recorded the finding that on the basis of registered sale deed, the name of Smt. Lilawati was got mutated on 08.09.2005 and the appeal preferred against the order dated 08.09.2005 was dismissed on 10.06.2008. After the death of Smt. Lilawati, the names of private respondents being legal heirs of Smt. Lilawati were also recorded in the revenue records. The learned Magistrate has also recorded the finding that previous owner of disputed land Sabhajeet Singh had denied the execution of any agreement in favour of petitioners and the sale deed dated 24.04.2018 executed in favour of Smt. Lilawati was accepted. It was also admitted

that possession was delivered to Smt. Lilawati at the time of execution of sale deed. The learned Magistrate after found that the mother of respondent nos. 2 to 5 was in possession on the basis of registered sale deed executed prior to preliminary order passed under Section 145 Cr.P.C., and as such, the order of attachment dated 16.04.2005 was withdrawn by order dated 29.9.2018 and land was released in favour of private respondents.

7. Being aggrieved with the order of Sub Divisional Magistrate dated 29.09.2018, the petitioners have preferred criminal revision before the Additional Sessions Judge / Special Judge (Anti Corruption Act), Court No. 1, Varanasi which was registered as Criminal Revision No. 257 of 2018.

8. The revisional court after considering the entire evidence and materials which are available on record has recorded the finding that the private respondents are in possession over the disputed property on the basis of registered sale deed. The mother of private respondents was bona-fide purchasers of land in question and sale deed as well as possession was admitted by the previous owner of disputed land. The revisional court has further recorded the finding that even it is assumed that petitioners were in possession as per police report and report of Advocate Commissioner, the possession of petitioners was unlawful. The revisional court has also recorded the finding that the mother of respondent nos. 2 to 5 was bona-fide purchaser of land in dispute and was in possession over the same. The petitioners have no right or title over the disputed land. The criminal revision filed by petitioners was dismissed by the revisional court by

judgment and order dated 04.05.2022, which is impugned in the present petition.

9. Heard Sri D.S. Khan and Sri S.K. Mishra, learned counsel for the petitioners, learned Standing Counsel for respondent no. 1 State of U.P., Sri Anant Prakash Mishra, learned counsel appearing on behalf of private respondents and perused the record.

10. It is submitted by learned counsel for the petitioners that the petitioners are in possession over the property in dispute. The property in question was belonging to uncle of petitioner nos. 1 and 2 namely Sabhajeet Singh who died issue less and the petitioners are cultivating the crops from the life time of Sabhajeet Singh and even after his death they are continuously cultivating the disputed land and are in possession over the same. The uncle had also executed an agreement in favour of petitioners after receiving payment of Rs.75,000/-. The Police Chowki, Sindhaura, Police Station Phoolpur has submitted report on 03.04.2005 in the proceedings under Section 145 Cr.P.C. stating therein that petitioner nos. 1 and 2 are in possession over the disputed land and they cultivating over the same. The possession of petitioners was established from the police report.

11. It is further submitted that the mother of respondent nos. 2 to 5 was never in possession. In the suit filed by petitioners being Original Suit No. 497 of 2000 for cancellation of sale deed, the Advocate Commissioner was visited at the spot and has also submitted the report that the petitioners are in possession. The learned Magistrate without considering the report of concerned police station as well as Advocate Commissioner regarding

possession of petitioners had released the disputed land in favour of private respondents. The learned Magistrate has failed to consider that the petitioners were in possession at the time of proceedings under Section 145 Cr.P.C. Both the courts below have failed to appreciate the evidence regarding possession which are in favour of petitioners, have passed the impugned orders which are liable to be set aside by this Hon'ble Court.

12. On the other hand, learned counsel appearing on behalf of private respondents submits that the mother of respondent nos. 2 to 5 namely Smt. Lilawati is bona-fide purchaser of disputed land from Sri Sabhajeet Singh through registered sale deed and she was in possession over the same from the date of purchase. After the death of Smt. Lilawati, the respondent nos. 2 to 5 being legal heirs are in possession. The names of respondent nos. 2 to 5 are also recorded in revenue records. The suit filed by petitioners for cancellation of sale deed was dismissed by the competent civil court and appeal preferred by petitioners was also dismissed by the lower appellate court. The suit filed by petitioners under Section 229B of U.P.Z.A. & L.R. Act was also dismissed. Lastly, it is submitted that both the courts below after found that the land was purchased by Smt. Lilawati, mother of respondent nos. 2 to 5 and her name was got mutated in revenue record, her possession was admitted by previous owner and as such has rightly passed the orders in favour of respondent nos. 2 to 5. The petitioners have failed to make out any case in their favour and no ground for interference is made out. The criminal revision is devoid of merits and is liable to be dismissed with cost.

13. Considered the rival submissions of learned counsel for the parties and perused the record.

14. Admittedly, the mother of respondent nos. 2 to 5 had purchased the piece of land of Arazi No. 726 area 1.77 acres through registered sale deed dated 24.04.2000 from Sabhajeet Singh, the uncle of petitioner nos.1 and 2. The name of Smt. Lilawati was got mutated in revenue record. The previous owner of land/executor of sale deed was also admitted the possession of Smt. Lilawati. The Original Suit No. 497 of 2000 filed by petitioners for cancellation of sale deed was dismissed on 17.02.2001 and the Civil Appeal filed by the petitioners was also dismissed. After the death of Smt. Lilawati, the names of respondents nos. 2 to 5 being legal heirs were also recorded in the revenue record. The uncle of petitioner nos. 1 and 2 namely Sabhajeet Singh had denied the agreement dated 07.01.2000 alleged to be executed in favour of petitioners. The orders of civil court are also in favour of respondent nos. 2 to 5. The petitioners have no right or title over the disputed land and the police as well as Advocate Commissioner have submitted incorrect report in favour of petitioners. The petitioners have failed to adduce any evidence in respect of ownership of disputed land. The law has been settled by Hon'ble Apex Court as well as this Court in series of cases that right of bona-fide purchaser cannot be disturbed by any stranger.

15. The similar and identical issue has been decided by this Court in Criminal Revision No.140 of 1990 (Mohammad Hasen and others Vs. Nazir Hasan and others) decided on 10.4.2000. The relevant para 6 is reproduced herein below:-

“In the present case admittedly a sale deed has been executed in favour of opposite party Nos.1 to 3 by Sultan. There

was only an agreement to sale in favour of the revisionist by Sultan. It is not denied that on the basis of the said agreement the revisionists filed a suit for specific performance of contract of sale which have been dismissed and the appeal filed by the revisionists have also been dismissed. If it is so, it can not be said that the revisionists are in possession of the disputed property and the finding of the learned Magistrate was perverse and against the evidence and was rightly set aside by the learned Additional Sessions Judge.”

16. This Court in the case of Criminal Revision (Defective) No.342 of 2010 (Smt. Shakuntala Devi Vs. State of U.P. and another) decided on 4.9.2015, has held that when ownership of disputed property has been determined by a competent revenue court, the revisionist cannot claim possession over it against wishes of its real owner. The relevant paras 7 and 8 are quoted herein below:-

“7. It is admitted fact that revisionist (Shakuntala Devi, wife of Ram Shabd) is not owner and the disputed plot. According to her own version she had been promised by original owners that sale-deed of said property would be executed in her favour, but the same was never executed. It is settled legal position that without registered transfer-deed she cannot be the owner of the said property; and such deed was never executed. It is also not disputed that previous owners of disputed property had executed registered sale-deed of said property in favour of Vikas, whose name has been mutated over said disputed agricultural property by competent revenue court. When ownership of disputed property has been determined by a competent revenue court, then revisionist cannot claim possession over it against

wishes of its real owner, i.e. opposite party no. 2 Vikas. Proceeding u/s 145 Cr.P.C. is initiated as interim measure for maintaining peace till decision of right and title relating to subject matter. In present competent court had already decided the ownership right and title of respondent no.- 2 (Vikas) over disputed property. As discussed above claim of revisionist over disputed property is proved baseless and without any right. Therefore he had no right to assert any claim over disputed property.

8. Apart from it, record reveals that after obtaining report and considering facts and circumstance relating to the matter in question, and also after application of mind, the SDM, Bansi had come to conclusion that there is no likelihood of breach of peace in respect of disputed property. This finding of the court below is based on facts, before the Court below and appears to be proper and correct. Such finding cannot be interfered with in exercise of revisional jurisdiction. In absence of any likelihood or apprehension of breach of peace, the court below was perfectly justified in dropping and ending the proceedings under section 145 Cr.P.C. by the impugned order. There is no illegality, impropriety or error in the impugned order that may require interference through exercise of revisional jurisdictional.”

17. In the present case also the disputed land was purchased by mother of respondent nos. 2 to 5 through registered sale deed and the names of respondent nos. 2 to 5 have already been recorded in the revenue record. The petitioners have failed to prove their ownership or title in respect of the disputed property. The petitioners have no right or claim in respect of disputed property in absence of any

registered sale deed in their favour. Both the courts below after considering the evidence and materials which are available on record, has rightly passed the orders in favour of private respondents and there is no illegality in any manner.

18. No ground for interference is made out. The matter under Article 227 of the Constitution of India is devoid of merit and is liable to be dismissed.

19. The petition is dismissed, accordingly.

20. Interim order, if any, stands discharged.

(2024) 12 ILRA 174

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Matters Under Article 227 No. 7549 of 2022

Connected with

Application U/S 482 No. 29958 of 2019

Smt. Rashmi Sundrani

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Mohd. Aslam Azhar Khan, Sri Rajeev Ratan Shukla, Sri R.P. Chauhan (Sr. Advocate)

Counsel for the Respondents:

Sri Aman Kumar, Sri Ayush Mishra, Sri Chandra Shekhar Dwivedi, G.A., Sri Gaurav Tiwari, Sri Prabha Shanker Mishra, Sri Udai Chandani

Criminal Law-The Code of Criminal Procedure, 1973 - Section 173 & 190 - The investigating agency has ample power with

regard to the further investigation into a criminal case, even after the cognizance was taken in the matter and till the framing of the charges in the matter---Once the Magistrate has taken cognizance in the matter it is not open for him to direct the matter to be treated as a complaint case. The material collected during the further investigation is the material available before the Magistrate for the offence of which the cognizance has already been taken by the Magistrate, which can be considered for summoning of the other accused persons as well if the Magistrate is satisfied that there is sufficient material against them and also at the time of framing of charges against the accused persons---The Magistrate is not bound by the conclusions drawn by the Investigating Agency in its report under Section 173(2) or 173(8). Therefore, subsequent supplementary reports submitted under garb of further investigation by the Investigation Agency can be considered as a material available before the Magistrate and once the cognizance which was taken on the basis of the initial report submitted by the Investigation Agency, Magistrate cannot direct the matter to be treated as a complaint case---Impugned order directing the matter to be treated as a complaint case is hereby set aside and quashed. **(Para 42 & 45) (E-15)**

List of Cases cited:

1. Ram Lal Narang Vs St. (Delhi Administration) : (1979) 2 SCC 322
2. St. of Bihar & anr.Vs J.A.C. Saldanha & ors.: (1980) 1 SCC 554
3. K.Chandrashekhar Vs St. of Kerala : (1998) 5 SCC 223
4. Vinay Tyagi Vs Irshad Ali @ Deepak & ors. : (2013) 5 SCC 762
5. Anant Thanur Karmuse Vs St. of Mah. : 2023 (5) SCC 802
6. Bohatie Devi (Dead) through LRs Vs St. of U.P. : AIRONLINE 2023 SC 362
7. St. through Central Bureau of Investigation Vs Hemendra Reddy & anr.: 2023 SCC OnLine SC 515

8. Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj, 1999 (5) SCC 740

9. Criminal Misc. Writ Petition No. 11257 of 2023 (Smt. Preety Verma Vs St. of U.P. & ors.

10. Application under Section 482 Cr.P.C. No. 1784 of 2013 (Babu Lal Jaiswal & ors.Vs St. of U.P. & anr.

11. Vinubhai Haribhai Malaviya & ors. Vs St. of Guj. & anr.2020 (3) JIC 192 (SC)

12. Bikash Ranjan Rout Vs State Government of N.C.T. of Delhi, (2019) (108) ACC 327

13. Athul Rao Vs St. of Karn. & anr., (2019)1 SCC (Cri) 594

14. Sonu Gupta Vs Deepak Gupta & ors., (2015) 3 SCC 424

15. Luckose Zacharia @ Zak Nedumchira Luke & ors.Vs Joseph Joseph & ors., 2022 (120) ACC 299

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

1. Heard Sri R.P. Chauhan, learned Senior Advocate and Sri Rajeev Ratan Shukla, learned Senior Advocate assisted by Sri Mohd. Aslam Azhar Khan, learned counsels for the applicant, Sri Gaurav Tiwari, learned counsel for the opposite party nos.2 and Sri Sandeep Choudhary, learned A.G.A. for the State.

2. The petition under Article 227 has been filed by petitioner seeking quashing of the impugned order dated 03.08.2022 in Criminal Revision No. 145 of 2021 (Smt. Rashmi Sundrani vs. State of U.P. and Others) arising out of order dated 27.11.2019 and subsequent order dated 20.02.2020 passed by the Special Chief Judicial Magistrate.

3. The aforesaid application under Section 482 Cr.P.C. has been filed by the complainant seeking quashing of the order dated 09.04.2019, passed by Special Chief Judicial Magistrate, Allahabad in Criminal Case No. 139 of 2016 (State vs. Mukesh Kumar Singh & Others) arising out of Case Crime No. 369 of 2015 under Sections 419, 420, 467, 468, 504, 506 I.P.C., P.S.-Colonel Ganj, Allahabad, whereby the learned Magistrate has directed the matter to be treated as a complaint case on protest petition filed by the applicant against the final order dated 21.03.2018 submitted by the Investigation Agency.

4. Since the facts of both the matters are common as both the cases are arising out of the same F.I.R., therefore, the entire facts and circumstances are being taken from the petition under Article 227 filed by the petitioner- Smt. Rashmi Sundrani.

5. The brief facts of the case are that an F.I.R. being F.I.R. No. 0369 of 2015 was lodged by the respondent no. 2 on 21.05.2015 against Mukesh Kumar Singh, Rashmi Sundrani, S.K. Sundrani and Sanjeev Trivedi, alleging therein that he was a businessman situated at Allahabad. The accused no.1, Mukesh Kumar Singh, approached him and said that he is having some connection with the Jan Jagran Samiti, which helps in the distribution and preparation of the Mid Day Meal in different schools and on persuasion of said Mukesh Kumar Singh, the informant had gone to Raipur, where an agreement dated 29.12.2012 was executed between the Jan Jagran Samiti represented through the petitioner herein and said Mukesh Kumar Singh as well as the informant, Hari Kishan. Thereupon, they further executed some Memorandum of Understanding and also opened various bank accounts and they

started jointly supplying the materials after an agreement with the District Basic Education Officer, Allahabad. Thereupon some dispute arose between the parties with regard to siphoning of the amounts, received from the District Basic Education Officer, Allahabad.

6. The allegations with regard to siphoning of amount is against the petitioner as well as one S.K. Sundarani and Sanjeev Trivedi. Being aggrieved, the informant Hari Kishan has lodged the F.I.R. being Case Crime No. 369 of 2015. Aggrieved by the registration of the said F.I.R., the petitioner as well as one Sudesh Kumar Sundarani approached this Court by filing Criminal Miscellaneous Writ Petition No. 24754 of 2015 and interim protection was granted to the petitioner as well as the said Sudesh Kumar Sundrani during the investigation of the case. Similarly, Mukesh Kumar Singh has also approached by filing Criminal Miscellaneous Writ Petition No. 25927 of 2015 and he was also granted interim protection vide order dated 28.10.2015, till the submission of the report under Section 173(2) Cr.PC. Subsequent thereto, after concluding the investigation the charge-sheet was filed against the petitioner as well as the said Mukesh Kumar Singh and so far as other two persons are concerned further investigation was kept pending.

7. The first charge-sheet was filed on 01.01.2016 and after filing of the charge-sheet, the cognizance was taken against the petitioner and Mukesh Kumar Singh, by the Magistrate vide order dated 28.01.2016 and after concluding the further investigation against the remaining two accused, namely S.K. Sundrani and Sanjeev Dwivedi, a Closure Report dated 02.02.2017 was filed, which was protested by the respondent

no.2/informant vide his protest application dated 20.04.2017, which was disposed of by the trial court and the said closure report against the two of the accused person, namely Sudesh Kumar Sundarani, was rejected and matter was directed to be further investigated vide order dated 19.07.2017.

8. With regard to the further investigation, as directed by learned Magistrate vide order dated 19.07.2017. The informant has approached this Court by filing Criminal Miscellaneous Writ Petition No. 1974 of 2018, wherein the respondent no.9/Sudesh Kumar Sundrani, appeared before this Court and this Court directed the further investigation to be carried out and the respondent no.9 therein, Sri Sudesh Kumar Sundrani, was directed to cooperate with the investigation vide order dated 08.02.2018. Subsequently, on 21.03.2018 the Investigation Officer has submitted a final report negating the entire allegations in the F.I.R. against all the accused persons. Against this Final Report/ Closure Report dated 21.03.2018, the respondent/informant herein has again filed a protest petition on 18.06.2018 and therefore vide dated 09.04.2019 the trial court has rejected the said Closure Report dated 21.03.2018 and directed the matter to be treated as a complaint case against which an Application under section 482 no. 29958 of 2019, which is a connected matter to the instant writ petition was filed by the informant/Harikishan, wherein vide order dated 05.08.2019, the following order was passed:

"Upon a First Information Report being lodged as Criminal Case no. 369 of 2015 investigation followed and while chargesheets were submitted against Rashmi Sundrani and Mukesh Kumar

Singh, a final report was submitted vis-a-vis S.K. Sundari and Sanjay Dwivedi.

Thereafter, the Magistrate took cognizance of the case and framed charges against the Rashmi Sundrani and Mukesh Kumar Singh. However, when a protest petition was filed with regard to the final report, the Magistrate has now treated the whole case as a complaint case.

It has been reported that Mukesh Kumar Singh has died.

Learned counsel for the applicant submitted that when once the cognizance was taken against Rashmi Sundarani and Mukesh Kumar Singh this step of treating the whole case as a complaint case could not have been taken by the Magistrate.

There appears to be substance in the submission made by the learned counsel for the Applicant.

Issue notice to the respondents no. 2 to 4.

The respondents may file their counter affidavits within four weeks. Rejoinder affidavit, if any, may be filed within two weeks, thereafter.

List on the date indicated in the notice.

It is directed that so far as it has been ordered that the case against the Rashmi Sundrani shall also be treated as a complaint case, the impugned order dated 9.4.2019 shall remain stayed.

This case shall not be treated as tied up or part heard to this case."

9. Therefore, from the aforesaid order it is clear that this Court has directed that so far as the order dated 09.04.2019 with regard to a direction treating it as a complaint case against the petitioner herein shall remain stayed, meaning thereby, this Court has directed that the charge-sheet and the cognizance taken against the petitioner herein shall remain effective and the trial

court shall proceed against the petitioner herein. In the mean time, it has been reported that the said Mukesh Kumar Singh has died. In terms of the aforesaid order 05.08.2019, passed by this Court, the trial court has passed an order on 27.11.2019, whereby it was directed that the proceedings against the accused petitioner, Rashmi Sundrani, shall continue. Subsequent thereto, against the order dated 27.11.2019, the petitioner has filed a recall application, which was rejected vide order dated 20.02.2020 by the Special Chief Judicial Magistrate, with the following observation:

"IN THE COURT OF SPECIAL CHIEF JUDICIAL MAGISTRATE, ALLAHABAD,

Harikishan Vs. Mukesh Kumar Singh Other 20.02.2020-

File is fixed for order. Heard parties on application dated both the 2/12/19 and objection on previous date applicant/ accused No. 2 has filed recall application for recall of order Hated 27/11/19 on the ground that the complainant/informant has filed the protest petition to include the extraneous matters is such that the protest application has been treated as complaint case no 1916 of 2016 by order dated 9/4/19 which has been challenged before hon'ble High Court under sec 482 CrPC to allege that the charge has been framed against accused no 2 in which the Hon'ble High Court has stayed the order dated 9/4/19 on alleging the framing of charge from complainant the magistrate has to power to treat the complaint against that accused against whom charge is framed but no order has been passed to proceed the criminal case no 139/16 and still pending before Hon'ble High Court while no charge is

framed and arrest having stayed in Cri RIT no. 24749 OF 2015 While the police report has been submitted, closure report 3/s 169 CrPC power to as such the court has only summon the alleged accused by executing power under sec 190(1)(b) of CrPC to reject the police closure report u/s 169, but this court did not reject the closure report dated 21/03/18 and has proceeded the prior order of the closure report by order dated 27/11/19, which is not sustainable in eye of law. The applicant has also stated what alleged accused no 2 has already appeared through her counsel after the court has taken cognizance and has locus to raise the objection.

The complainant has filed objection that the alleged accused no 2 has neither appeared nor has applied for bail, hence has no locus of being heard. application dated 2/12/19 has been filed only to delay the proceeding and application is liable to be rejected.

Heard and perused the record. since order, dated 27/11/19 of this court is passed in compliance of order of Hon'ble High Court dated 05/08/19 in application U/S 482 No. 29958 of 2019. In abovementioned order the Hon'ble High Court has merely stayed the order dated 9/4/19 and there is no specific order stay for proceedings against accused no. 2. of entire Moreover the accused no 2 has not appeared in person before court and the application through counsel is not maintainable.

Hence the recall application is liable to be rejected. Issue previous process. Put up on 20/03/2020 for appearance.

SPECIAL CHIEF JUDICIAL MAGISTRATE ALLAHABAD"

10. Against the aforesaid order dated 27.11.2019 as well as against the order dated 20.02.2022, the petitioner herein had

filed a Criminal Revision Petition No. 145 of 2021 (Rashmi Sundarani vs. State of U.P.), which was also rejected vide order dated 03.08.2022, by the Additional Sessions Judge, Court No. 13, Allahabad. Against the orders dated 27.11.2019, 20.02.2022 & 03.08.2022 the instant writ petition has been filed by the petitioner.

11. While entertaining the petition, this Court vide order dated 12.10.2022, has passed the following order, whereby the interim protection was granted to the petitioner which was subsequently extended on 10.11.2022:

Shri Udai Chandani, learned counsel for the respondent no.2 filed short counter affidavit today itself, taken on record.

Connect this petition with Application u/s 482 No.29958 of 2019 (Hari Kishan vs State of U.P. and 3 others).

After hearing the rival submissions the Court has gathered an impression that the issue involved in the present controversy is with regard to Section 173(8) Cr.P.C., its applicability and modalities, which requires deeper judicial scrutiny.

Shri I.K. Chaturvedi, learned Senior Advocate assisted by Shri R.R. Shukla and Mohd. Aslam Azhar Khan are directed to file detailed counter affidavit in Application u/s 482 No.29958 of 2019.

Shri Uday Chandani, learned counsel for respondent no.2 may also file detailed counter affidavit in this case within a week (if any). Ten days thereafter is granted to file rejoinder affidavit.

Put up as fresh on 3rd November 2022 along with record of Application u/s 482 No.29958 of 2019 (Hari Kishan vs State of U.P. and 3 others) before appropriate Court.

In the larger interest of justice where there is serious judicial issue is involved, the interest of the applicant should also be protected for time being and accordingly till next of listing coercive action against the applicant shall not be given effect.

A mutual understanding has been arrived between the learned counsel for the parties that none of the advocates would seek unreasonable adjournment on the next date.

12. Against the order dated 12.10.2022, a Special Leave Petition No. 3050-3051 of 2023, was filed by the informant/ Hari Kishan, before the Apex Court, which was disposed of vide order 30.08.2024, in the following terms :

"The Special Leave Petitions have been preferred against the interim orders dated 12.10.2022 and 12.01.2023 passed by the High Court whereby the interim protection granted on 12.10.2022 has been extended till the next date of listing. The interim order provides for not taking any coercive action against respondent No.2-Rashmi Sundrani.

The submission of learned senior counsel appearing for the petitioner is that the respondent No.2--Rashmi Sundrani has been declared to be a proclaimed offender and as such is not entitled to any such protection.

Learned senior counsel Sri S.R.Singh appearing for the State of U.P. has pointed out that there are orders dated 16.08.2022 and 09.09.2022 wherein the Special Chief Judicial Magistrate, Allahabad had noted that the respondent No.2- Rashmi Sundrani has already been declared to be a proclaimed offender. The declaration of the respondent No.2-Rashmi

Sundrani as proclaimed offender is disputed by her counsel.

Without going into the merits of the matter as the petition is directed against the interim orders extending the interim protection we consider it appropriate to dispose of the petition with the direction that the interim protection granted by the High Court shall continue for the limited period if any, stipulated by the High Court provided that the Respondent No.2- Rashmi Sundrani cooperates and appears before the Court.

It will be open for the respondent No.2- Rashmi Sundrani to move appropriate application if for some reason she is unable to attend the proceedings and the same may be considered in accordance with law by the concerned Court.

The High Court is free to proceed and decide the pending petitions under Article 227 of the Constitution of India and section 482 of Cr.P.C. most expeditiously in accordance with law.

With the above observations, the Special Leave Petitions are disposed of.

Pending application (s) shall stand disposed of."

13. Learned Senior Counsel appearing for the petitioner submits that the agreement dated 29.12.2012, is a forged document, on the basis of which the said Mukesh Kumar Singh and the informant in the instant case has also executed some Memorandum of Understanding between themselves with other two persons namely Om Prakash Gupta and Shankar Lal. Shankar Lal was the brother of the informant, wherein they have settled how the supply of the Mid Day Meal is to be done and how they will get benefit out of the said supply. In the said Memorandum of Understanding, dated 08.04.2013 neither the petitioner nor the other accused persons

were the party. The informant in collusion with the said Mukesh Kumar Singh and others have also got fabricated or forged a document with regard to the renewal of the registration of the said Jan Jagran Samiti at the address of Allahabad. Thereafter, they have conducted the business and in conduct of such business, the petitioner had no control or any share in the said business and had no connection with the said business. Subsequent thereto, a dispute arose between the said Mukesh Kumar Singh, the informant and the other two persons, who had executed the Memorandum of Understanding. Being aggrieved by the same, the informant had lodged an F.I.R. being Case Crime No. 537 of 2013 against one Mukesh Kumar Singh, who was ultimately charge-sheeted. Subsequent to the registration of the F.I.R. against the said Mukesh Kumar Singh, the informant has also lodged a Complaint Case No. 7479 of 2014, which was rejected for want of prosecution as there being no sufficient evidence against the accused persons, vide order dated 26.11.2016. Subsequently, by concealing the aforesaid facts of registration of the initial F.I.R. against Mukesh Kumar Singh and lodging of the complaint Case No. 7479 of 2014 and its rejection dated 26.11.2016, the instant F.I.R. has been lodged.

14. Learned counsel for the petitioner submits the applicant herein has no connection with any of the dealing with said Mukesh Kumar Singh, his brother and one Om Prakash and the agreement dated 29.12.2012 is a forged document, for which an F.I.R. being Case Crime No. 1514 of 2018 has also been lodged by the petitioner herein against Hari Kishan, Om Prakash and Shankar Lal. Therefore, learned counsel for the applicant submits that since the Final Report has already been

submitted, it is not open for the learned Magistrate to proceed in the case on the basis of the earlier report submitted by the police against the petitioner herein.

15. *Per Contra*, learned counsel for the opposite party no.2 supporting the allegations made in the F.I.R. submits that after agreement dated 29.12.2012, which was executed by the petitioner herein, the respondent no. 2 has invested huge amount in the business, of which a certain percentage was to be given to the petitioner but the said Mukesh Kumar Singh in collusion with the petitioner as well as the other accused persons have siphoned away the amount, which was to be shared by all the persons concerned, namely Om Prakash and his brother Shankar Lal. Thereby, they have defrauded the informant and in the initial charge-sheet sufficient evidence was found against the petitioner herein, and once the cognizance has been taken against the petitioner, the clock cannot be set back and the scope of further investigation was limited only with regard to the Closure Report filed against the two accused persons, namely S.K. Sundarani and Sanjeev Trivedi. Therefore, subsequent further investigation was limited with regard to only those two persons because the charge-sheet was already filed against the petitioner and said Mukesh Kumar Singh, for which cognizance was already taken and in view of the order dated 05.08.2019 of this Court, the trial court was directed to proceed against the petitioner herein without being affected by the order 09.04.2019. In view thereof the trial is already proceeding against the petitioner herein and subsequently on an application under Section 319 Cr.P.C. filed by the respondent no.2, the other co-accused persons, namely S.K. Sundarani and

Sanjeev Trivedi has also been summoned vide order dated 07.06.2024.

16. Learned counsel for the opposite party no.2 submits that since the scope of the further investigation was very limited with regard to the investigation against the other co-accused persons, namely S.K. Sundrani and Sanjeev Trivedi, it was not open for the Investigation Agency to file a Closure Report against all the accused persons, against whom the cognizance was already taken and trial in the matter has already been proceeded in accordance with law in pursuance of the order dated 05.08.2019 passed by this Court in Application u/S 482 Cr.P.C.

17. The sole question involved in the instant proceedings is whether the Magistrate, who has already taken cognizance against some of the accused persons on the basis of earlier report can direct the case to be proceeded as complaint case, against those accused persons as well on the basis of subsequent police report?

18. To appreciate the controversy involved in the case, it would be relevant to take note of the provisions of Sections 173 and 190 of Cr.P.C., which are being reproduced herein:

“173. Report of Police Officer on Completion of Investigation-(1)Every investigation under this Chapter shall be completed without unnecessary delay.[(1-A) The investigation in relation to [an offence under sections 376, 376A, 376AB, 376B, 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code shall be completed within two months.] [Inserted by the Code of Criminal Procedure (Amendment) Act,

2008 (5 of 2009), Section 16 (a).] from the date on which the information was recorded by the officer-in-charge of the police station.]

As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating –

- (a) the names of the parties;
- (b) the nature of the information;
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;
- (d) whether any offence appears to have been committed and, if so, by whom;
- (e) whether the accused has been arrested;
- (f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) [Whether the report of medical examination of the woman has been attached where investigation relates to an offence under [Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] [Inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 16 (b).]] [or section 376E of the Indian Penal Code of the Indian Penal Code, 1860.] [Substituted for the words "or 376D of the Indian Penal Code" by Criminal Law (Amendment) Act, 2013]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

190. Cognizance of offences by Magistrates.- (1) Subject to the provisions

of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –

(a) upon receiving a complaint of facts which constitute such offence.

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

19. Section 173(1) of the Code provides that every investigation under this chapter shall be completed by the investigation agency without unnecessary delay. Section 173(2) of the Code, provides that as soon as the investigation is completed, the officer in-charge of the concerned police station is obliged to submit the police report to the Magistrate in a prescribed format. It further mandates the officer in-charge of the police station to inform the action taken by him to the informant of the said case. Section 173(3) of the Code, provides that wherever the superior officer of the police station has been appointed, the report shall be submitted through that officer and the pending orders of Magistrate, the such officer is competent to direct the officer in-charge of the police station to make further investigation in the matter. Sub-section (5) of Section 173 of the Code provides that the documents which should be forwarded to the Magistrate alongwith the report under Section 173(2) of the Code. Section 173(7) of the Code mandates that the

copies of the report and the documents be provided to the accused. Sub-section (8) of Section 173 of the Code provides that nothing in this section shall preclude further investigation in respect of an offence after a report under sub-section (2) of Section 173 is forwarded to the Magistrate, and if on such further investigation, if the officer in-charge of the police station obtains further evidence, oral or documents, he shall forward the same to the Magistrate along with a further report regarding such evidence in the prescribed format. There is nothing in Sub-section (8) of Section 173 of the Code, which mandates that before taking up the further investigation in the matter, the officer in-charge or the investigation officer is obliged to seek any permission from the Magistrate. Rather, it recognises the right of the investigation agency to conduct the further investigation in the matter and collect further evidence and forward it to the learned Magistrate. Section 190 of the Code provides how the Magistrate shall take cognizance of any offences. He can take the cognizance of the matter on receiving a complaint of facts which constitute such offences or upon a police report of such acts or upon information received from any person other than the police officer or upon his own knowledge that such offence shall be committed. Therefore, there is nothing in Section 190 or 173(8) of the Code, which limits the powers of the investigation agency with regard to further investigation in the matter.

20. In ***Ram Lal Narang vs. State (Delhi Administration)*** : (1979) 2 SCC 322, the Apex Court has noted all the previous judgements including those of different High Courts and has considered the diverse views taken by the different High Courts and has also noted the

developments and inclusion of new provisions as Section 173(8) in the Criminal Procedure Code, 1973, on the basis of the 41st report of the Law Commission. The Law Commission, in its 41st report, has recognized the well settled position and recommended that the right of the police to make further investigation should be statutorily affirmed in following words:

"14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused."

(emphasis supplied)

21. On the basis of the aforesaid report of the Law Commission, in the Code (Cr.P.C. 1973), the aforesaid report was implemented and Section 173(8), was introduced, which provides as under:

"173(8). Nothing in this section shall be deemed to preclude further

investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, under sub-section (2) the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

22. In Paragraph '15', '20' and '21' of the aforesaid judgement in **Ram Lal Narang (supra)**, the Hon'ble Apex Court has observed as under:

"15. The police thus had the statutory right and duty to "register" every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well-established. In King Emperor v. Khwaja Nazir Ahmad [AIR 1945 PC 18 : 71 IA 203 : 46 Cri LJ 413] the Privy Council observed as follows:

"Just as it is essential that everyone accused of a crime should have free access to a Court of justice, so that he

*may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. **The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Courts to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of Habeas Corpus.** In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then ... In the present case, the police have under Sections 154 and 156 of the Criminal Procedure Code, a statutory right to investigate a cognizable offence without requiring the sanction of the Court"*

Ordinarily, the right and duty of the police would end with the submission of a report under Section 173(1) CrPC upon receipt of which it was up to the Magistrate to take or not to take cognizance of the offence. There was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after the submission of a report under Section 173(1) CrPC and after the Magistrate had

taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after the submission of the report under Section 173(1) or after the Magistrate had taken cognizance of the offence. As we shall presently point out, it was generally thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Section 173(1) had already been submitted and a Magistrate had already taken cognizance of the offence.

20. *Anyone acquainted with the day-to-day working of the criminal courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplemental report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either*

case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the CrPC in such situations is a matter best left to the discretion of the Magistrate. The criticism that a further investigation by the police would trench upon the proceeding before the court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the court and seek formal permission to make further

investigation when fresh facts come to light.

21. As observed by us earlier, there was no provision in the CrPC, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation."

(emphasis supplied)

23. From the aforesaid observations, the Apex Court has categorically recognized the right of the police to further investigate in the matter even after submission of the charge-sheet and held that the right of police to further investigate is not exhausted after submissions of the charge-sheet and the police could exercise such right as and when it is necessary when fresh information came to the knowledge of the police/investigation agency.

24. From the reading of the aforesaid judgments as well as the new provisions of Section 173(8) of the Code, the position of

law as per the Old Code was that though there were no fetters on the right of further investigation by the police but it was the normal practice that the police used to seek formal permission to make further investigation. However, in the present Code, the right of police to further investigate and further submit the supplementary charge sheet has been statutorily recognized. For such further investigation, even in the Criminal Procedure Code, 1973 there is no specific requirement to seek any permission from the learned Magistrate.

25. In *State of Bihar and Another vs. J.A.C. Saldanha and Others : (1980) 1 SCC 554*, the Constitution Bench of the Apex Court, dealing with the powers of the senior police officers of superintendence under the Police Act of State of Bihar and the powers under Section 173(8) of the Code, has held that there is no conflict between the powers under the Police Act as well as Section 173(8) of the Code, to carry on the further investigation without any permission of the learned Magistrate. Paragraphs '18' & '19' of the aforesaid judgment are as under:

"18. There is no warrant for invoking this principle because Section 5 of the Code provides that nothing in the Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. Section 3 of the Act does not prescribe any special procedure for investigation contrary to one prescribed in the Code. It merely provides for conferment of certain power which, when exercised, would project into the provisions of the

Code which confers power on the officer in charge of a police station to carry on further investigation under Section 173(8) after submission of a report and that too without any permission of the Magistrate. There is no conflict between the two provisions. Power to direct investigation or further investigation is entirely different from the method and procedure of investigation and the competence of the person to investigate. Section 3 of the Act as interpreted by us deals with the powers of the State Government to direct further investigation into the case. Undoubtedly, such direction will be given to a person competent to investigate the offence and as has been pointed out, the police officer in rank superior to the police officer in charge of the police station, to wit, Inspector General, Vigilance, has been directed to carry on further investigation. An officer superior in rank to an officer in charge of a police station could as well exercise the power of further investigation under Section 173(8) in view of the provision embodied in Section 36 of the Code. If that be so, such superior officer could as well undertake further investigation on his own and it is immaterial and irrelevant that he does it at the instance or on the direction of the State Government. Such a direction in no way corrodes his power to further investigate on his own.

19. The power of the Magistrate under Section 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate under Section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating

officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after submission of the report as provided in Section 173(8). Therefore, the High Court was in error in holding that the State Government in exercise of the power of superintendence under Section 3 of the Act lacked the power to direct further investigation into the case. In reaching this conclusion we have kept out of consideration the provision contained in Section 156(2) that an investigation by an officer in charge of a police station, which expression includes police officer superior in rank to such officer, cannot be questioned on the ground that such investigating officer had no jurisdiction to carry on the investigation; otherwise that provision would have been a short answer to the contention raised on behalf of Respondent 1."

(emphasis supplied)

26. In *K.Chandrashekhar vs. State of Kerala : (1998) 5 SCC 223*, the Hon'ble Apex Court has recognized the right of further investigation by the Police under Section 173(8) of the Code. Relevant paragraph '24' is as under:

"24. From a plain reading of the above section it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right of "further" investigation under sub-section (8) but not "fresh investigation" or "reinvestigation". That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated 27-6-1996 (quoted earlier) that the consent was being

withdrawn in public interest to order a "reinvestigation" of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a "further investigation of the case" instead of "reinvestigation of the case". **The dictionary meaning of "further" (when used as an adjective) is "additional; more; supplemental". "Further" investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.** In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a "further" report or reports — and not fresh report or reports — regarding the "further" evidence obtained during such investigation. Once it is accepted — and it has got to be accepted in view of the judgment in *Kazi Lhendup Dorji* [1994 Supp (2) SCC 116 : 1994 SCC (Cri) 873] — that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that "further investigation" is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State Police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the CBI alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and

unsustainable in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No. 246 of 1994 was redundant in view of the general consent earlier given by the State of Kerala."

(emphasis supplied)

27. In *Rama Chaudhary (supra)*, the Apex Court has further confirmed the statutory right of the police to further investigate the matter even after filing of the charge-sheet in following words:

"15. Among the other sub-sections, we are very much concerned about sub-section (8) of Section 173 which reads as under:

"173. (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

A mere reading of the above provision makes it clear that irrespective of the report under sub-section (2) forwarded to the Magistrate, if the officer in charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. The

abovesaid provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

*17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "further" is additional, more, or supplemental. **"Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.***

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

19. As observed in Hasanbhai Valibhai Qureshi v. State of Gujarat [(2004) 5 SCC 347: 2004 SCC (Cri) 1603] the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of the investigating agency for further investigation should not be tied down on the ground of mere delay. In other words

"[t]he mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice." (SCC p. 351, para 13)

22. The law does not mandate taking prior permission from the Magistrate for further investigation. It is settled law that carrying out further investigation even after filing of the charge-sheet is a statutory right of the police (vide K. Chandrasekhar v. State of Kerala [(1998) 5 SCC 223 : 1998 SCC (Cri) 1291]). The material collected in further investigation cannot be rejected only because it has been filed at the stage of the trial. The facts and circumstances show that the trial court is fully justified to summon witnesses examined in the course of further investigation. It is also clear from Section 231 CrPC that the prosecution is entitled to produce any person as witness even though such person is not named in the earlier charge-sheet." (emphasis supplied)

28. In Vinay Tyagi vs Irshad Ali @ Deepak & Ors. : (2013) 5 SCC 762, the Apex Court has categorically noted that there is no specific requirement in the provisions of Section 173(8) of the Code, to conduct further investigation or file supplementary report with the leave of the Court. The Apex Court, while recognizing the aforesaid position of law applying the doctrine of "contemporanea expositio" has observed that though there is no requirement of seeking prior leave of the learned Magistrate to conduct further investigation and to file supplementary report, however, as a matter of practice, which was understood and implemented for long time that normally the permission of

the learned Magistrate was formally sought for further investigation, it should be ideally observed. The Apex Court further held that so far as the further investigation is concerned, no permission is required. However, for the purposes of fresh, de novo or re-investigation, the permission of the learned Magistrate is mandatory. It will be relevant to note paragraphs '40', '49', '50', '51', '52', '53' & '54' of the aforesaid judgment, which are as under:-

"40. Having analysed the provisions of the Code and the various judgments as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

40.1. The Magistrate has no power to direct "reinvestigation" or "fresh investigation" (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in Sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case [Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] by a three-Judge Bench and thus in conformity with the doctrine of precedent.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

*40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, **the court can still not direct the investigating agency to conduct further investigation which it could do on its own.***

40.6. It has been a procedure of propriety that the police has to seek permission of the court to continue "further investigation" and file supplementary charge-sheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

*49. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. **It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct "further investigation" or file supplementary report with the leave of the court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct "further investigation" and file "supplementary report" with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the court to conduct "further investigation" and/or to file a "supplementary report" will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea***

expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.

50. Such a view can be supported from two different points of view: firstly, through the doctrine of precedent, as aforementioned, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea expositio. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.

51. We have already noticed that there is no specific embargo upon the power of the learned Magistrate to direct "further investigation" on presentation of a report in terms of Section 173(2) of the Code. Any other approach or interpretation would be in contradiction to the very language of Section 173(8) and the scheme of the Code for giving precedence to proper administration of criminal justice. The settled principles of criminal jurisprudence would support such approach, particularly when in terms of Section 190 of the Code, the Magistrate is the competent authority to take cognizance of an offence. It is the Magistrate who has to decide whether on the basis of the record and documents produced, an offence is made out or not, and if made out, what course of law should be adopted in relation to committal of the case to the court of competent jurisdiction or to proceed with the trial himself. In

other words, it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to the appropriate conclusion in consonance with the principles of law. It will be a travesty of justice, if the court cannot be permitted to direct "further investigation" to clear its doubt and to order the investigating agency to further substantiate its charge-sheet. The satisfaction of the learned Magistrate is a condition precedent to commencement of further proceedings before the court of competent jurisdiction. Whether the Magistrate should direct "further investigation" or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct "further investigation" or "reinvestigation" as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation. In this regard, we may refer to the observations made by this Court in *Sivanmoorthy v. State* [(2010) 12 SCC 29 : (2011) 1 SCC (Cri) 295].

52. In light of the above discussion, we answer the questions formulated at the opening of this judgment as follows.

53. The court of competent jurisdiction is duty-bound to consider all reports, entire records and documents submitted therewith by the investigating agency as its report in terms of Section 173(2) of the Code. This rule is subject to only the following exceptions:

(a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

(b) Where an order is passed by the higher courts in exercise of its extraordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on "fresh investigation" or "reinvestigation" or any part of it be excluded, struck off the court record and be treated as non est.

54. No investigating agency is empowered to conduct a "fresh", "de novo" or "reinvestigation" in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned Magistrate." (emphasis supplied)

29. In **Anant Thanur Karmuse vs. State of Maharashtra : 2023 (5) SCC 802**, the Apex Court has observed the Constitutional Courts has power to order further investigation, re-investigation, de-novo investigation, even after the charge-sheet is filed, charges are framed in the concerned case. Relevant paragraphs '32', '41' & '42' of the aforesaid judgment are quoted as under:-

"32. Therefore, the short question, which is posed for the consideration of this Court is:

"Whether in the facts and circumstances of the case, the High Court

is justified in denying the relief of transfer of the investigation to CBI and refusing to order further investigation/reinvestigation/de novo investigation?"

41. Now, so far as the reliance placed upon the decision of this Court in *Rama Chaudhary* [*Rama Chaudhary v. State of Bihar*, (2009) 6 SCC 346 : (2009) 2 SCC (Cri) 1059] relied upon on behalf of the respondent-accused is concerned, it is required to be noted that in the said decision, this Court was considering the scope of Sections 173(8) CrPC and the right of the police to "further investigation". It is observed that the police has no right for "fresh investigation" or "reinvestigation". However, this Court had no occasion to consider the powers of the constitutional courts, which are dealt with and considered in *Bharati Tamang* [*Bharati Tamang v. Union of India*, (2013) 15 SCC 578 : (2014) 6 SCC (Cri) 566] and *Dharam Pal* [*Dharam Pal v. State of Haryana*, (2016) 4 SCC 160 : (2016) 2 SCC (Cri) 259].

42. Applying the law laid down by this Court in *Dharam Pal* and to do the complete justice and in furtherance of fair investigation and fair trial, the constitutional courts may order further investigation/reinvestigation/de novo investigation even after the charge-sheet is filed and the charges are framed. If the submission on behalf of the accused and even as observed by the High Court that once the charge-sheet is filed and the charges are framed, there may not be any order for further investigation/reinvestigation/de novo investigation is accepted, in that case, the accused may see to it that the charges are framed to avoid any fair investigation/fair trial. It would lead to travesty of justice."

30. Clearly in the aforesaid case, the Apex Court was more concerned with the powers of the Higher Courts and not with the permission of the Magistrate before proceeding for further investigation in exercise of powers under Section 173(8) Cr.P.C.

31. In *Bohatie Devi (Dead) through LRs vs. State of U.P. : AIR ONLINE 2023 SC 362*, the Apex Court has recognized the right of the Investigating Officer to further investigate in respect of the offence, even after a report under sub-section (2) of Section 173 of the Code was forwarded to the learned Magistrate and it was held that no prior approval of Magistrate is required before taking up the further investigation. In paragraph '7.1' of the aforesaid judgment the Apex Court has observed as under:

"7.1 There cannot be any dispute that even after the chargesheet is filed, it is the right of the investigating officer to further investigate in respect of offence even after a report under sub-section (2) of Section 173 of Cr.PC forwarded to a Magistrate and as observed and held by this Court the prior approval of the Magistrate is not required. However, as per the settled position of law, so far as the reinvestigation is concerned, the prior permission/approval of the Magistrate is required.

(emphasis supplied)

32. In *Peethambaran (supra)* relied on by learned counsel in the petitioners, decided on 03.05.2023, relying upon judgments in *Vinay Tyagi (supra)*, which was based on doctrine of "contemporanea expositio", the Apex Court has observed the requirement of permission from learned Magistrate for further investigation and file

supplementary report. Paragraph 20 of the aforesaid judgement is quoted as under:

"20. The Chief Police Officer of a district is the Superintendent of Police who is an officer of the Indian Police Service. Needless to state, an order from the District Police Chief is not the same as an order issued by the concerned Magistrate. Referring to Vinay Tyagi (supra), this Court in Devendra Nath Singh v. State of Bihar noted that there is no specific requirement to seek leave of the court for further investigation or to file a supplementary report but investigation agencies, have not only understood it to be so but have also adopted the same as a legal requirement. The doctrine of contemporanea exposito aids such an interpretation of matters which have been long understood and implemented in a particular manner to be accepted into the interpretive process. In other words, the requirement of permission for further investigation or to file a supplementary report is accepted within law and is therefore required to be complied with."

(emphasis supplied)

33. In *State through Central Bureau of Investigation vs. Hemendra Reddy and Another : 2023 SCC OnLine SC 515*, the Apex Court has held as under:

"83. We may summarise our final conclusion as under:

(i) Even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Section 173(8) of the CrPC after the final report submitted under Section 173(2) of the CrPC has been accepted.

(ii) *Prior to carrying out further investigation under Section 173(8) of the CrPC it is not necessary that the order accepting the final report should be reviewed, recalled or quashed.*

(iv) ***Further investigation is merely a continuation of the earlier investigation, hence it cannot be said that the accused are being subjected to investigation twice over. Moreover, investigation cannot be put at par with prosecution and punishment so as to fall within the ambit of Clause (2) of Article 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.***

(v) ***There is nothing in the CrPC to suggest that the court is obliged to hear the accused while considering an application for further investigation under Section 173(8) of the CrPC."***

(emphasis supplied)

34. In ***Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj, 1999 (5) SCC 740***, the Hon'ble Apex Court in paragraphs 10 and 11 has held as under:-

"10. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal Procedure. Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in Ram Lal Narang v. State (Delhi (Admn.) (AIR 1979 SC 1791). The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.

11. In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As law does not require it, we would not burden the magistrate with such an obligation."

(emphasis supplied)

35. In the judgment of this Court dated 17.8.2023 passed in ***Criminal Misc. Writ Petition No. 11257 of 2023 (Smt. Preety Verma vs. State of U.P. and others)***, identical questions were raised and rejecting the same the petition was dismissed.

36. This Court in the judgment dated 11.12.2023 passed in Application under Section 482 Cr.P.C. No. 1784 of 2013 (Babu Lal Jaiswal and others vs. State of U.P. and another) held as under :

"34. Therefore, it is settled principles of law that the police has a right to further investigate the matter even after the submissions of the charge sheet/report before the learned Magistrate and even after the Magistrate had taken cognizance of the report/charge sheet. In exercise of power u/s 173 (8) of the Code, it has been statutorily recognized that there is no statutory requirement that before initiating further investigation, investigation agency must take permission of the concerned Magistrate. Further, investigation is very distinct from the re-investigation/de novo investigation or fresh investigation. Further

investigation is the continuance of the investigation, which has already been done and on discovery of new facts or the facts which were left out during the investigation. Whereas in the case of the fresh, De-novo or reinvestigation, the investigation already done is required to be wiped out and investigation is required to begun from its inception. Further investigation can be carried out even without any permission from the concerned Magistrate. However, fresh, de-novo or reinvestigation cannot be done without the specific orders by the competent Court.”

(emphasis supplied)

37. The *Apex Court in Vinubhai Haribhai Malaviya & Ors. vs. State of Gujarat and Anr. 2020 (3) JIC 192 (SC)* has held that the Magistrate has power to direct further investigation even at the post cognizance stage and such power would continue at all stages of criminal proceedings until the trial commenced i.e., till framing of charges. The relevant observations of the Apex Court are as under :

“19. With the introduction of Section 173(8) in the Cr.P.C., the police department has been armed with the power to further investigate an offence even after a police report has been forwarded to the Magistrate. Quite obviously, this power continues until the trial can be said to commence in a criminal case. The vexed question before us is as to whether the Magistrate can order further investigation after a police report has been forwarded to him under Section 173.

23. It is thus clear that the Magistrate’s power under Section 156(3) of the CrPC is very wide, for it is this judicial authority that must be satisfied that a

proper investigation by the police takes place. To ensure that a “proper investigation” takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise – Article 21 the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the “investigation” referred to in Section 156 (1) of the CrPC would, as per the definition of “investigation” under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) of the CrPC.

26. Section 2(h) is not noticed by the aforesaid judgment at all, resulting in the erroneous finding in law that the power under Section 156(3) can only be exercised at the pre-cognizance stage. The “investigation” spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun. For these reasons, the statement of the law contained in paragraph 17 in Devarapalli Lakshminarayana Reddy (supra) cannot be relied upon.”

(emphasis supplied)

38. In *Bikash Ranjan Rout vs. State Government of N.C.T. of Delhi, (2019 (108) ACC 327*, the Apex Court has held that the

the Magistrate has power to direct the investigation in the matter before framing of the charges. However, once the Magistrate has discharged the accused on the basis of the previous investigation and the material placed before him, the Magistrate has no jurisdiction to direct the further investigation in the case. The relevant observation of the Apex Court are as under:

“7. Considering the law laid down by this Court in the aforesaid decisions and even considering the relevant provisions of the CrPC, namely Sections 167(2), 173, 227 and 228 of the CrPC, what is emerging is that after the investigation is concluded and the report is forwarded by the police to the Magistrate under Section 173(2)(i) of the CrPC, the learned Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceedings, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. If the Magistrate disagrees with the report and drops the proceedings, the informant is required to be given an opportunity to submit the protest application and thereafter, after giving an opportunity to the informant, the Magistrate may take a further decision whether to drop the proceedings against the accused or not. If the learned Magistrate accepts the objections, in that case, he may issue process and/or even frame the charges against the accused. As observed hereinabove, having not satisfied with the investigation on considering the report forwarded by the police under Section 173(2)(i) of the CrPC, the Magistrate may, at that stage, direct further investigation and require the police to make a further

report. However, it is required to be noted that all the aforesaid is required to be done at the precognizance stage.

*Once the learned Magistrate takes the cognizance and, considering the materials on record submitted along with the report forwarded by the police under Section 173(2)(i) of the CrPC, learned Magistrate in exercise of the powers under Section 227 of the CrPC discharges the accused, thereafter, it will not be open for the Magistrate to suo moto order for further investigation and direct the investigating officer to submit the report. Such an order after discharging the accused can be said to be made at the post-cognizance stage. **There is a distinction and/or difference between the pre-cognizance stage and postcognizance stage and the powers to be exercised by the Magistrate for further investigation at the precognizance stage and post-cognizance stage. The power to order further investigation which may be available to the Magistrate at the pre-cognizance stage may not be available to the Magistrate at the postcognizance stage, more particularly, when the accused is discharged by him. As observed hereinabove, if the Magistrate was not satisfied with the investigation carried out by the investigating officer and the report submitted by the investigating officer under Section 173(2)***

(i) of the CrPC, as observed by this Court in catena of decisions and as observed hereinabove, it was always open/permissible for the Magistrate to direct the investigating agency for further investigation and may postpone even the framing of the charge and/or taking any final decision on the report at that stage. However, once the learned Magistrate, on the basis of the report and the materials placed along with the report, discharges

the accused, we are afraid that thereafter the Magistrate can suo moto order the further investigation by the investigating agency. Once the order of discharge is passed, thereafter the Magistrate has no jurisdiction to suo moto direct the investigating officer for further investigation and submit the report. In such a situation, only two remedies are available: (i) a revision application can be filed against the discharge or (ii) the Court has to wait till the stage of Section 319 of the CrPC. However, at the same time, considering the provisions of Section 173(8) of the CrPC, it is always open for the investigating agency to file an application for further investigation and thereafter to submit the fresh report and the Court may, on the application submitted by the investigating agency, permit further investigation and permit the investigating officer to file a fresh report and the same may be considered by the learned Magistrate thereafter in accordance with law. The Magistrate cannot suo moto direct for further investigation under Section 173(8) of the CrPC or direct the re investigation into a case at the post-cognizance stage, more particularly when, in exercise of powers under Section 227 of the CrPC, the Magistrate discharges the accused. However, Section 173(8) of the CrPC confers power upon the officer-in-charge of the police station to further investigate and submit evidence, oral or documentary, after forwarding the report under subsection (2) of Section 173 of the CrPC. Therefore, it is always open for the investigating officer to apply for further investigation, even after forwarding the report under subsection (2) of Section 173 and even after the discharge of the accused. However, the aforesaid shall be at the instance of the investigating

officer/police officer incharge and the Magistrate has no jurisdiction to suo moto pass an order for further investigation/reinvestigation after he discharges the accused.

7.1 In the instant case, the investigating authority did not apply for further investigation and that the learned Magistrate suo moto passed an order for further investigation and directed the investigating officer to further investigate and submit the report, which is impermissible under the law. Such a course of action is beyond the jurisdictional competence of the Magistrate. Therefore, that part of the order passed by the learned Magistrate ordering further investigation after he discharges the accused, cannot be sustained and the same deserves to be quashed and set aside. Consequently, the impugned judgment and order passed by the High Court confirming such an order passed by the learned Magistrate also deserves to be quashed and set aside. At the same time, it will always be open for the investigating officer to file an appropriate application for further investigation and undertake further investigation and submit a further report in exercise of powers under Section 173(8) of the CrPC.

8. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order dated 20.08.2014 as well as that part of the order dated 05.02.2013 passed by the learned Magistrate directing the investigating officer for further investigation and submit the report, is hereby quashed and set aside.

8.1 However, considering the observations made by the learned Magistrate and the deficiency in the investigation pointed out by the learned Magistrate and the ultimate goal is to book

and/or punish the real culprit, it will be open for the investigating officer to submit a proper application before the learned Magistrate for further investigation and conduct fresh investigation and submit the further report in exercise of powers under Section 173(8) of the CrPC and thereafter the learned Magistrate to consider the same in accordance with law and on its own merits.”

(emphasis supplied)

39. In *Athul Rao vs. State of Karnataka and another*, (2019)1 SCC (Cri) 594, the Apex Court has held that once the charges are framed and once the cognizance is taken, the Magistrate can further direct the investigation in the matter. The relevant part of the aforesaid judgment reads as under:

*“8. The question as to whether, after framing of charges and taking cognizance, it is open to the Magistrate to direct further investigation either suo motu or on an application filed by the complainant/informant is no more res integra. In a recent decision of this Court (to which one of us, Justice Dipak Misra was party) in the case of Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel and others³, after analysing earlier decisions on the point, it has been held that **neither the Magistrate suo motu nor on an application filed by the complainant/informant can direct further investigation.** Further investigation in a given case may be ordered only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand. It will be apposite to*

advert to the dictum in Paragraphs 48 to 51 of the said decision which (2017) 4 SCC 177 read thus:- (SCC pp.200-01)

“48. As adverted to hereinabove, whereas Section 311 of the Code empowers a Court at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if construed to be essential to be just decision of the case, Section 319 authorizes a Court to proceed against any person, who though not made an accused appears, in course of the inquiry or trial, to have committed the same and can be tried together. These two provisions of the Code explicitly accoutre a Court to summon a material witness or examine a person present at any stage of any inquiry, trial or other proceeding, if it considers it to be essential to the just decision of the case and even proceed against any person, though not an accused in such enquiry or trial, if it appears from the evidence available that he had committed an offence and that he can be tried together with the other accused persons.

*49. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold **that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefore to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto.***

At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

50. The unamended and the amended sub-Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.

51. In contradistinction, Sections 156, 190, 200, 202 and 204 of the Cr.P.C. clearly outline the powers of the Magistrate and the courses open for him to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. ***Though the Magistrate has the power to direct investigation under Section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant. The direction for investigation by the***

Magistrate under Section 202, while dealing with a complaint, though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under Section 173(8) of the Code. If the power of the Magistrate, in such a scheme envisaged by the Cr.P.C. to order further investigation even after the cognizance is taken, accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of the Cr.P.C. adumbrated hereinabove. Additionally had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) of the Cr.P.C. would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in Bhagwant Singh (supra), the Magistrate, in both the contingencies, namely; ***when he takes cognizance of the offence or discharges the accused, would be committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his permission to conduct further investigation, he suo motu cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant. Not only such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is taken and the accused person***

appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of **Sections 311 and 319 Cr.P.C.**, whereunder any witness can be summoned by a Court and a person can be issued notice to stand trial at any stage, in a way redundant. Axiomatically, thus the impugned decision annulling the direction of the learned Magistrate for further investigation is unexceptional and does not merit any interference. Even otherwise on facts, having regard to the progression of the developments in the trial, and more particularly, the delay on the part of the informant in making the request for further investigation, it was otherwise not entertainable as has been rightly held by the High Court.”

(emphasis supplied)

40. In **Sonu Gupta vs. Deepak Gupta and others**, (2015) 3 SCC 424, the Apex Court has observed as under:

“8....At the stage of cognizance and summoning the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence, or, in other words, to find out whether prima facie case has been made out for summoning the accused persons. At this stage, the learned Magistrate is not required to consider the defence version or materials or arguments nor he is required to evaluate the merits of the materials or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the materials will lead to conviction or not.

9. It is also well settled **that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused**

may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.”

(emphasis supplied)

41. In **Luckose Zacharia @ Zak Nedumchira Luke and others vs. Joseph Joseph and others**, 2022 (120) ACC 299, the Apex Court has held as under:

“15 The Sessions Judge was justified in setting aside the order of the Magistrate for the simple reason that after the supplementary report submitted by the investigating officer, the Magistrate was duty bound in terms of the dictum in paragraph 42 of the decision in Vinay Tyagi (supra), as well as the subsequent three-Judge Bench decision in Vinubhai Haribhai Malaviya (supra) to consider both the original report and the supplementary report before determining the steps that have to be taken further in accordance with law. The Magistrate not

having done so, it was necessary to restore the proceedings back to the Magistrate so that both the reports could be read conjointly by analyzing the cumulative effect of the reports and the documents annexed thereto, if any, while determining whether there existed grounds to presume that the appellants have committed the offence. The order of the Sessions Judge restoring the proceedings back to the Magistrate was correct to that extent. However, the Sessions Judge proceeded to rely upon the decision of a Single Judge of the Kerala High Court in Joseph (supra), where it was held that:

“7. [...] When a positive report under Section 173(2) of Cr.P.C. is followed by a negative report under Section 173(8) of Cr.P.C. and cognizance has been taken upon the former report, the magistrate shall proceed with the case ignoring the latter report. But the supplementary report and the papers connected therewith shall form part of the record of the case and can be used at the trial. What I should do is to dispose of the CrI.M.C. making this position clear.”

16 In view of the clear position of law which has been enunciated in the judgments of this Court, both in Vinay Tyagi (supra) and Vinubhai Haribhai Malaviya (supra), it is necessary for the Magistrate, to have due regard to both the reports, the initial report which was submitted under Section 173(2) as well as the supplementary report which was submitted after further investigation in terms of Section 173(8). It is thereafter that the Magistrate would have to take a considered view in accordance with law as to whether there is ground for presuming that the persons named as accused have committed an offence. While the High Court has relied upon the decision in Vinay Tyagi (supra), it becomes necessary for this

Court to set the matter beyond any controversy having due regard to the fact that the Sessions Judge in the present case had while remitting the proceedings back to the Magistrate relied on the judgment of the Single Judge of the Kerala High Court in Joseph (supra) which is contrary to the position set out in Vinay Tyagi. Hence, the JFCM – I Alappuzha shall reexamine both the reports in terms of the decisions of this Court in Vinay Tyagi vs Irshad Ali alias Deepak and Vinubhai Haribhai Malaviya vs State of Gujarat as noted above and in terms of the observations contained in the present judgment. The Magistrate shall take a considered decision expeditiously within a period of one month from the date of the present order.”

(emphasis supplied)

42. Thus from the aforesaid judgments, it is settled position of law that the investigating agency has ample power with regard to the further investigation into a criminal case, even after the cognizance was taken in the matter and till the framing of the charges in the matter.

43. Once, the Magistrate takes cognizance in the matter as held by the Apex Court in ***Bikash Ranjan Rout (supra)***, a Magistrate cannot direct suo motu for further investigation in the matter unless requested by the investigation agency. The power of Magistrate seeking further investigation can be exercised at the pre-cognizance stage as held by the Apex Court in ***Sonu Gupta (supra)***, once a Magistrate takes cognizance in the matter he takes cognizance of the offence and not of the offender. Thus, after taking cognizance in the matter if any further report submitted by the Investigation Agency, the same is the material available before the Magistrate for evaluation as to

who are the accused persons required to be summoned in the case and against whom charges can be framed on the basis of the supplementary report filed by the Investigation Agency. The Magistrate did not have power to review its own order of taking cognizance in the matter. Any other view would render the provisions of Section 311 and 319 Cr.P.C. ineffective as has been held in *Athul Rao (supra)* by the Apex Court.

44. In the instant case, on the initial charge-sheet submitted by the Investigation Agency against the petitioners, Smt. Rashmi Sundrani and one Mukesh Kumar Singh (deceased), the cognizance was taken by the learned Magistrate vide order dated 28.01.2016. Since, the investigation with regard to the other two accused persons were pending subsequently a closure report was submitted against the remaining two accused persons. On protest being filed by the complaint, further investigation was directed by learned Magistrate which was beyond the scope of powers of learned Magistrate after the cognizance was taken in the matter as further investigation was not sought by the Investigation Agency. On subsequent further investigation, the Final Report has been submitted by the Investigation Agency against all the accused persons including the petitioners herein against which a protest was filed and the Magistrate has directed the the entire matter to be treated as a complaint case, vide order dated 09.04.2019, which is impugned in the application under Section 482 Cr.P.C. filed by the complainant.

45. Once, the Magistrate has taken cognizance in the matter it is not open for him to direct the matter to be treated as a complaint case. The material collected during the further investigation is the

material available before the Magistrate for the offence of which the cognizance has already been taken by the Magistrate, which can be considered for summoning of the other accused persons as well if the Magistrate is satisfied that there is sufficient material against them and also at the time of framing of charges against the accused persons. It is settled position of law the Magistrate is not bound by the conclusions drawn by the Investigating Agency in its report under Section 173(2) or 173(8). Therefore, subsequent supplementary reports submitted under garb of further investigation by the Investigation Agency can be considered as a material available before the Magistrate and once the cognizance which was taken on the basis of the initial report submitted by the Investigation Agency, Magistrate cannot direct the matter to be treated as a complaint case. As since the Magistrate has already taken cognizance of the offence, it would not be open for the Magistrate to take cognizance of the same offence again on the basis of the complaint case. Thus, the order dated 09.04.2019 impugned in the Application under Section 482 No. 29958 of 2019, directing the matter to be treated as a complaint case is hereby *set aside* and *quashed*. The application u/S 482 is *disposed of* accordingly.

46. Since, the magistrate has already taken cognizance in the matter and has also proceeded in the matter on the basis of the interim order dated 05.08.2019 passed by Co-ordinate Bench of this Court while entertaining the application under Section 482 Cr.P.C. filed by the complainant and the Magistrate has already proceeded in the matter against the petitioner herein and has passed the orders dated 27.11.2019 and 20.02.2020 passed in the matter.

47. In view of the aforesaid settled position of law and specifically in view of the interim order dated 05.08.2019 passed by this Court whereby the order dated 09.04.2019 was directed to be stayed qua the petitioner herein, therefore, there is no illegality on the subsequent orders dated 27.11.2019 and 20.02.2020 passed by the learned Special Chief Judicial Magistrate and also the impugned order dated 03.08.2022 passed by the Revisional Court in Criminal Revision No. 145 of 2021.

48. Therefore, writ petition under Article 227 No. 7549 of 2022 is hereby ***dismissed*** and the trial court is directed to proceed in the matter on the basis of the cognizance already taken against the petitioner herein and all subsequent orders passed by learned Additional Chief Judicial Magistrate on 07.06.2024, the other accused persons have already been summoned.

49. Therefore, under Section 319 Cr.P.C., the trial court is directed to proceed in the accordance with law.

(2024) 12 ILRA 203
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2024
BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 9910 of 2023

Vijay Kalra ...Petitioner
Versus
Anuj Kumar & Anr. ...Respondents

Counsel for the Petitioner:

Gulrez Khan, Javed Husain Khan, Sr.
Advocate

Counsel for the Respondents:

Ajay Kumar Sharma

Civil Law-The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 3(2) & 21(1)(a)- Tenancy inherited by heirs in succession--- If one of the tenant in common is impleaded by landlord for release other cannot question maintainability of release application--- Petitioner decided to contest the matter setting up a claim of tenancy, it would be, therefore, not lie in the mouth of tenant to suggest that release order could not have been passed against him just for his admission to be a tenant--- Application for release against one is maintainable against all these heirs who inherited tenancy. **(Para 19, 22 & 24)** (E-15)

List of Cases cited:

1. Hajra Begum Vs Mansoor Ali & ors., passed in Writ A No. 43707 of 2003 decided on 23.1.21012
2. Suresh Kumar Kohli Vs Rakesh jain & anr., (2018) 6 SCC 708

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

1. Heard Sri W.H.Khan, learned Senior Advocate assisted by Sri Gulrez Khan, learned counsel for the petitioner and Sri M.D.Singh Sekhar, learned Senior Advocate assisted by Sri Ajay Kumar Sharma, learned counsel for the respondent.

2. Petitioner Vijay Kalra has questioned the order passed by Rent Appellate Court in Rent Control Appeal No. 21 of 2022 allowing release application qua tenanted premises in favour of landlord respondent-Anuj Kumar, even though the land lord respondent never admitted petitioner to be tenant and even after his impleadment being ordered in the release application by amendment in release application, it was made specific to opposite party no. 1 therein. It is argued that since release was filed against opposite

party no. 1, the release of denied premises could not have been ordered against present petitioner. He claimed to have entered into a partnership firm with his father, Hansraj Kalra in 1984 and after death of his father in the year 1992, he became proprietor of the firm, namely, M/s Hemraj and he having not been treated as tenant by the land landlord, the application could not have been granted taking him to have succeeded the tenancy being one of the heirs of Hemraj for alleged succession of tenancy.

3. In support of his above arguments, so advanced, Sri W.H.Khan learned Senior Advocate assisted by Sri Gulrez Khan, learned counsel for the petitioner placed before the Court the order of High Court allowing impleadment application passed in Writ A No. 16410 of 2015. It is submitted that after impleadment was allowed on 18.5.2015 when it became necessary for the landlord to amend release application and he impleaded petitioner only as defendant no. 2 on account of order being passed by the High Court but then proceeded to further amend paragraphs 2, 8,9 and 10 of release application to make release application specific to respondent no. 1 Vinod Kalra only. He also took the Court to the written statement filed by present petitioner in the release application wherein he claimed himself to be the tenant of the landlord as a proprietorship firm of which he was sole proprietor, but the landlord refused to recognize him as tenant as he had made specific pleadings in paragraph 17 of the reply that for mere signing the receipts issued against payment of rent, Vijay Kalra would not become his tenant. He further pleaded before the Court that in paragraph 17 of the said affidavit in reply, the landlord admitted that M/s Hansraj Vinod Kalra tenant.

4. It is further argued that in written statement, it was specifically pleaded by the present petitioner that he was helping his father Hansraj and became a partner with him in 1984 forming a partnership firm, copy whereof has also been brought on record as annexure 8 to the petition. Thus, it is submitted that when petitioner himself was a tenant being partners of the firm and with the dissolution thereof in 1992, petitioner formed a proprietorship firm and was admitted as tenant in individual and independent capacity, the landlord having not maintained the release application against petitioner by amending it to the extent that relief was being claimed as only against Vinod Kalra, namely, defendant no. 1 impleaded in the application, merely because petitioner was a party would not have rendered the release application maintainable against him under Section 21(1)(a) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

5. In support of above argument, he has placed reliance upon the authority of Supreme Court in the case of **Om Prakash and Others v. Ram Kumar and Others, (1991) 1 SCC 441** and **Maqboolunnisa v. Mohd. Saleha Quaraishi, Allahabad Rent Cases, 1998 (2)**.

6. Another argument was sought to be advanced by Mr. Khan that there was no sufficient service of notice upon defendant no. 1 to maintain release as against him and has relied upon judgment of coordinate bench of this Court in the case case of **Aayal Das v. Shelendra Agrawal and Others (2015) (113) ALR 28** and **another judgment in the case of Shrawaan @ Sarvan Gupta v. Smt. Renu Kushwaha 2020 (138) ALR 660**.

7. Meeting the submissions so advanced above on behalf, the petitioner, Mr. M.D.Singh Shekhar, learned Senior Advocate assisted by Ajay Kumar Sharma, learned counsel for the respondents submitted that petitioner having admitted himself to be tenant, succeeding the tenancy from his father Hansraj, would have made him automatically a tenant by succession and once he had been impleaded in the release application, release application could have been granted on merits against him as well. He argues that admission being the best piece of evidence even if landlord did not amend the entire plaint of release application but having amended the relief clause, it should be taken to be release application as against present petitioner as well.

8. He has further argued that petitioner having succeeded tenancy from his father alongwith his brother and other heirs and tenancy being commercial in nature in respect of non residential building, in view of Section 3(2) of Act No. 13 of 1972, he automatically became a joint tenant. The petitioner and his brother and other heirs of Hansraj have to be taken as joint tenants for having inherited tenancy rights from their deceased father together and so release application under Section 21(1)(a) was maintainable.

9. Sri Singh has further defended the order passed by the appellate authority on this count by referring to the relevant paragraph of the judgment in which he has been taken to be heir of the erstwhile landlord Hansraj and hence release application deserved to be allowed as against him. Mr. Singh has further argued that on the point of *bonafide* need there are concurrent findings of fact which has not been assailed. He submits that once the

petitioner has come to be impleaded as tenant in the release application and he himself admits to have succeeded tenancy from his father as his natural heir, the Court of appeal cannot be said to have manifestly erred in allowing release application as against him as well. Mr. Singh has further argued that there was no tenancy with the partnership firm as has come in the written statement of the contesting petitioner that tenancy was created in 1951 when Hansraj, his father was inducted. He submits that in 1984 partnership firm was formed between him and his father and later on when father died in 1992, the partnership firm got dissolved and upon its dissolution, a new proprietorship firm came into existence but there is no averment to the effect that there was any tenancy ever created in favour of either partnership firm or in favour of proprietorship firm and hence release was maintainable against heirs of Hansraj.

10. In his rejoinder affidavit, Mr. Khan argued that sufficient evidence was placed on record that in 1984, a partnership firm was formed and the landlord respondent having admitted in affidavit that he used to issue receipts in the name of M/s Hansraj Vinod Kalra, he would be taken to have admitted that there was firm created in 1984 and that firm was paying rent. Thus according to Mr. Khan this admission itself was indicative of tenancy created in favour of firm.

11. Having heard learned counsel for the respective parties and having perused the records, the only point that arose for consideration before the Court was whether release could have been granted against petitioner once he stood impleaded in the release application as one of the respondents upon his own admission that

he was tenant of the landlord. Even though release application did not contain recitals admitting him to be tenant and rather making it more respondent no. 1 specific and yet it has been allowed upon admission of petitioner to be tenant for his succeeding tenancy from his father Hansraj.

12. In order to find answer to this above point in issue, it is to be first determined as to whether there was ever a tenancy in favour of firm or it was in favour of an individual. If tenancy was in favour of firm, it would be taken to have terminated upon death of partner with the dissolution of partnership firm and continuation thereof with one of the partners after he formed a proprietorship firm would be taken to be a tenancy in favour of firm alone. However, if it comes to be established that it was tenancy in favour of individual then all successors of the individual would become heirs to inherit tenancy and would be to be joint tenants and then release application against one would be taken to be release application competent against the other who is a party, even though not much pleadings have been raised admitting other heir to be tenant, in view of legal fiction created under Section 3(2) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

13. The question whether there was a tenancy with partnership firm or not, since respondent no. 1 has not contested the pleadings raised by respondent no. 2, it becomes relevant as he has admitted himself to be tenant. In the written statement filed by the respondent no. 2, present petitioner vide paragraph 18 has admitted to be paying rent @ Rs. 450/- as a tenant and respondent no. 1, namely his brother was not tenant. So there is no quarrel as to jural relationship of landlord

between respondent and petitioner. In paragraph 23 of the release application, the applicant denied respondent no. 2 therein to be tenant, and therefore, any request by landlord to respondent no. 1 to release premises in question was absolutely ill founded. In paragraph 25 of the written statement (verified on 29th July, 2016) he claimed that 51 years ago, the shop in question was taken on rent by his father Hansraj kalra from Bhagwandas and ever since then his father continued to be tenant of the shop in question. He claimed to be born in 1962 and after getting admitted, he started sitting with his father and since petitioner was not interested in pursuing studies further and was taking interest in business of Standard Auto Electrics, he became partner of his father in a partnership firm for which agreement was executed on 2nd July, 1984 in writing and ever since then he was paying rent. In paragraph 27, he claimed that on 6th January, 1992 his father died leaving behind widow Smt. Shila, daughter Smt. Kailashrani and four sons, namely Om Prakash, Vinod Kalra, Ashok Kalra, and opposite party Vijay Kalra as his legal heirs.

14. It is further claimed that petitioner Vinod Kalra shifted to Dehradun and was doing business there only and this was in full knowledge and notice of respondent. In paragraph 28, it is stated that after death of Hansraj, petitioner succeeded tenancy as heir as per law. In paragraph 29, it is stated that after death of his father, petitioner was running partnership firm and this was in full knowledge of Anuj Kumar and his father. The relevant paragraphs 25, 26, 27, 28 and 29 are reproduced hereunder:

“25. यह कि वास्तविकता यह है कि प्रारम्भ में यानि लगभग 51 साल पूर्व विवादित दुकान विपक्षी उत्तरदाता के पिता हंसराज कालडा ने लाला भगवानदास से किराये पर ली थी तथा वे लगातार दुकान विवादित में किरायेदार चले आते रहे। विपक्षी

उत्तरदाता का जन्म सन 1962 में हुआ तथा विपक्षी उत्तरदाता अपनी शिक्षा ग्रहण करने के दौरान अपने पिता के साथ विवादित दुकान पर बैठता चला आता था। विपक्षी उत्तरदाता ने हालांकि एम०एस०सी० मैथ से शिक्षा प्राप्त की थी परन्तु विपक्षी उत्तरदाता की रूचि प्रश्रगत दुकान पर हो रहे ऑटो इलैक्ट्रिक व्यवसाय में थी तथा विपक्षी उत्तरदाता वर्ष 1984 में विधिवत रूप से प्रश्रगत दुकान पर हो रहे कारोबार में अपने पिता के साथ भागीदार शामिल हो गया। इस सम्बन्ध में दिनांक 2-7-1984 को एक भागीदारी विलेख भी विपक्षी उत्तरदाता व उसके पिता के मध्य लिखा गया था जो मूल रूप से आयकर विभाग में दाखिल है।

26. यह कि विपक्षी उत्तरदाता वर्ष 1984 से निरन्तर प्रश्रगत दुकान पर व्यवसाय करता चला आ रहा है इस सम्बन्ध में नियमित रूप से प्रति वर्ष विपक्षी उत्तरदाता द्वारा आयकर रिटर्न दाखिल की जाती रही है।

27. यह कि विपक्षी उत्तरदाता के पिता श्री हंसराज का निधन दिनांक 6-1-1992 में हो गया। विपक्षी उत्तरदाता के पिता श्री हंसराज द्वारा अपने मरने पर अपनी पत्नि श्रीमती शीला एक पुत्री श्रीमती कैलाशरानी व 4 पुत्र ओमप्रकाश, विनोद कालडा, अशोक कालडा व विपक्षी उत्तरदाता बतौर अपने कानूनी वारिस छोड़े। विपक्षी उत्तरदाता का भाई विनोद कालडा अरसा दराज पूर्व देहरादून शिफ्ट हो गया था और वहीं पर रहकर अपना व्यवसाय करता चला आता रहा। यह तथ्य आवेदक अनुज कुमार व उनके पिता के भी व्यक्तिगत ज्ञान में रहे व है।

28. यह कि विपक्षी उत्तरदाता के पिता स्व० श्री हंसराज के मरने के उपरान्त उनके सभी वारसान को हकूक किरायेदारी हस्ब मंशा कानून विवादित सम्पत्ति के विषय में प्राप्त हो गये।

29. यह कि प्रश्रगत दुकान पर विपक्षी उत्तरदाता अपने पिता के निधन के पश्चात बहैसियत प्रोपराईटर कार्य करता चला आ रहा है। इस तथ्य का ज्ञान भी आवेदक अनुज कुमार व उनके पिता को व्यक्तिगत रूप से रहा।"

15. Reply to above has been submitted by Anuj Kumar, the landlord in which vide paragraph 16 he denied about partnership firm and claimed that shop was constructed sometimes in 1975 only. In his affidavit, the landlord vide paragraph 17, it was stated that tenancy was with M/s Hansraj Vinod Kalra and tenancy continued as such. In paragraph 21, it is stated that merely because receipts used to be signed by Vijay Kalra, it cannot be said that there

was any tenancy with Vijay Kalra. Paragraphs 17 and 21 of the affidavit of Anuj Kumar are reproduced hereunder:

"17. यह कि शपथ पत्र-वी के पैरा नम्बर-13 में कहे गये कथन गलत है और स्वीकार नहीं है। उसके प्रतिउत्तर में मैं अपने पूर्व शपथ पत्र के कथनो को पुनः दोहराता हूँ जैसा कि ऊपर कथन किया गया है कि किरायेदारी फर्म मैसर्स हंसराज विनोद कालडा के नाम से थी। हंसराज की मृत्यु के बाद फर्म की किरायेदारी चली आती रही तथा विनोद कालडा के द्वारा ही किराया अदा किया जाता रहा। इसके विपरीत पैरा नम्बर-13 में कहे गये कथन गलत है और स्वीकार नहीं है।

21. यह कि शपथ पत्र-वी के पैरा नम्बर 17 में कहे गये कथन गलत है और स्वीकार नहीं है। जहाँ तक रसीद मुसन्ना पर विजय कालडा के हस्ताक्षर की बाबत कथन है, इस बाबत यह स्पष्ट किया जाता है कि कभी कभी आवेदक शपथकर्ता की ओर से उनका कर्मचारी किराया प्राप्त करने जाता था तो किराये की अदायगी की रसीद के काउन्टर फाईल पर विजय कालडा के हस्ताक्षर करा लेता था लेकिन रसीद मैसर्स हंसराज विनोद कुमार के नाम से ही काटी गयी। केवल विपक्षी नम्बर-2 के काउन्टर फाईल पर हस्ताक्षर मात्र से यह सिद्ध नहीं होता है कि वह प्रश्रगत सम्पत्ति में किरायेदार है।"

16. From the perusal of the above pleadings, this much becomes clear that tenancy continued with Hansraj since prior to 1984 as he was admittedly inducted by the father of the landlord respondent but when the partnership firm came to be formed in 1984 by the Hansraj with his son Vijay Kumar, there was no fresh tenancy agreement entered between the parties. The partnership deed, which has been brought on record does not contain any recital to the effect that this partnership firm acknowledges its address with concurrence of the landlord to provide a place for the firm to run its business. The partnership deed only acknowledges the business and partnership with Hansraj kalra having 25 per cent share and vijay Kalra having 75 per cent share. Even in 1992 when the partnership firm got dissolved with the death of Hansraj Kalra, it has not come to be established on record that partnership

firm entered into some agreement of tenancy between respondent landlord and present petitioner.

17. The pleadings as I have reproduced hereinabove raised by petitioner in written statement fully demonstrate that it was tenancy inherited by heirs in succession and that petitioner has succeeded tenancy on account of being heirs of Hansraj. The affidavit of Anuj Kumar has simply states that receipts to be used issued in the name of M/s Hansraj Vinod Kalra having signed receipts, he would not become his tenant.

18. The denial established two things are very clear and that while Vijay Kalra, present petitioner claimed to be proprietorship firm having tenancy with landlord respondent whereas landlord respondent totally denied any such tenancy rights ever created in favour of partnership firm and still further there is no such document brought on record which may demonstrate that any jural relationship by landlord and tenant was created either first time in 1984 or 1992.

19. In the circumstances, therefore, tenancy rights came to be inherited by heirs and since other heirs left or get settled somewhere else as is case of the petitioner in his written statement, he succeeded tenancy. Since tenancy was in favour of individual with his death all the heirs came to be succeeded the tenancy, they become tenancy in common. The settled legal position is that if one of the tenant in common is impleaded by landlord for release other cannot question maintainability of release application. Thus, even though no release application was filed against Vijay kalra, the release application against Vinod Kalra as heirs of Hansraj was

fully maintainable and Vijay Kalra having subsequently joined the release application as a party his release could have equally been ordered. I have already held that since there was no tenancy agreement with partnership firm merely because a tenant has formed partnership firm, the firm will not become tenant that is for individual business purpose of the tenant and to make liability of tax that tenant might have formed firm that is son, but this duration partnership would not change character of partnership and would not change the character of tenancy.

20. Now Section 3(2) of the Act is reproduced hereunder:

“In the case of a non-residential building, his heirs;

Explanation- An occupant of a room in a hotel or a lodging house shall not be deemed to be a tenant.”

21. From a bare reading of the aforesaid provision it becomes clear that since building in question was non-residential, the petitioner being heir of Late Hansraj and having admittedly succeeded tenancy from his father, was to be equally bound by release application. It was fair admission on the part of the petitioner that he was tenant, he having succeeded tenancy from his father and after having admitted to be tenant even if certain amendments made to release application making specific to respondent no. 1, in the event ultimately relief was sought in the relief clause against present petitioner, petitioner could not have maintained a plea that release being not directed against him, it could not have been granted against him.

22. It is worth interesting to notice that petitioner was not party to release application and he could have remained as such to question the order of release for

non joinder of necessary party but since he was aware that he had succeeded tenancy from his father and release application had rightly been filed against of the heirs who were joint tenants and since petitioner was in possession in such capacity of a tenant, order of release would certainly bind him. Since petitioner had decided to contest the matter setting up a claim of tenancy, it would be, therefore, not lie in the mouth of tenant to suggest that release order could not have been passed against him just for his admission to be a tenant. In the affidavits that have been filed by parties, I find that landlord did, of course, show that tenancy was succeeded by Vinod Kalra but he impleaded petitioner also and prayed for relief in the release application against him, so it should be taken that release application was also directed against him.

23. The judgment of the court that has been cited before him refer to Section 13 of the Tenancy Act of State of Haryana, namely, Haryana Urban (Control of Rent and Eviction) Act, of 1973. The Court has held that merely because tenant was a party, he would not be liable to be evicted unless landlord takes specific stand in view of Sub section 2 of Section 13 of said Act. From the judgment, it is not inferable as to whether there was any provision in the statute of the other state as contained under Section 3(2) of the Act No. 13 of 1972 applicable in the State of U.P. Section 3(2) very clearly stipulates that rent is payable by person upon death of tenant :

1. who is normally residing in the building at the time of his death but;
2. in the case of non residential building, his heirs.

24. This Court has interpreted the heirs to be joint tenant and has held that

application for release against one is maintainable against all these heirs who inherited tenancy.

25. In the case **Hajra Begum v. Mansoor Ali and Others**, passed in Writ A No. 43707 of 2003 decided on 23.1.21012, the Court has held vide paragraph 21,22,23 and 24 thus:

“21. What would be the position in the context of tenant? Can a similar principle be applied in the context of joint-tenancy/co-tenancy as also in the case of tenancy in common or there are some other principles. The concept and consequences of joint-tenancy and co-tenancy and tenancy in common have been considered in various authorities. In the case of tenant in common, each one shall be an individual tenant in his own rights and tenancy will have that much of units of tenancy as the number of tenants in common. In such a case neither one tenant can represent all others nor any proceeding can be validly prosecuted without impleading all the tenants. In such a case all the tenants, i.e., tenants in common, would constitute necessary parties and without impleading anyone of them the proceedings by landlord would not be maintainable for want of necessary parties.

22. The position, however, would be different in the case of joint-tenancy/co-tenancy. Such rights come into existence as a result of devolution of certain rights to enjoy immoveable property by virtue of certain incident, natural or otherwise. For example if 'A', a tenant has 'B' wife and 'C' and 'D' sons or 'C' son and 'D' daughter; after death of 'A', tenancy rights shall devolve on all the legal heirs i.e., 'B', 'C' and 'D' without multiplying tenancy to number of legal heirs vis a vis landlord. It would continue to be a single tenancy

though the legal heirs, if more than one, all shall become joint-tenant/co-tenant but continue to maintain a single unit of tenancy.

23. *The concept of joint-tenancy/co-tenancy has been considered in H.C. Pandey Vs. G.C. Paul 1989 (2) ARC 26. The Apex Court said that on the death of original tenant, subject to any provision to the contrary, either negating or limiting succession, tenancy rights devolve on the heirs of the deceased tenant. The incidence of tenancy is the same as those enjoyed by the original tenant. Thus in other words, the heirs succeed the tenancy as "joint tenants".*

24. *The above legal exposition was reiterated and approved by a three-Judge Bench of Apex Court in Harish Tandon Vs. Addl. District Magistrate, Allahabad and others 1991 (1) ARC 220. In para 23 and 24 of judgment, the Court said, it is difficult to hold that after the death of original tenant, his heirs become tenant in common and each one of the heirs shall be deemed to be an independent tenant in his own right. On the contrary, it is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefor, and, the heirs succeed the tenancy as joint tenants. The Court also referred and followed an earlier Constitution Bench Judgment in Smt. Gian Devi Anand Vs. Jeevan Kumar and others 1985 SCFBRC 229 SC. The Bench also referred to a contrary decision in Mohd. Azeem Vs. District Judge, Aligarh 1985 (2) ARC 85 (SC), and, having considered the same in para 27, held that decision in Mohd. Azeem (surpa) does not lay down correct law. The decision in H.C. Pandey (supra) is however affirmed."*

26. **The Supreme Court in the case of Suresh Kumar Kohli v. Rakesh jain and**

Another, (2018)6 SCC 708 has distinguished co-tenancy and joint tenancy and has held that where the tenancy has jointly inherited and then it becomes joint tenancy. Vide paragraph 14 and 15 the Court has held thus:

"14. The issue at hand is what would be the status of the succeeding legal representatives after the death of the statutory tenant. In this regard, it would be worthy to discuss the two capacities viz. tenancy-in-common and joint tenancy, and the rights that one holds in these two different capacities. Fundamentally, the concepts of joint tenancy and tenancy-in-common are different and distinct in form and substance. The incidents regarding the co-tenancy and joint tenancy are different : joint tenants have unity of title, unity of commencement of title, unity of interest, unity of equal shares in the joint estate, unity of possession and right of survivorship.

15. Tenancy-in-common is a different concept. There is unity of possession but no unity of title i.e. the interests are differently held and each co-tenant has different shares over the estate. Thus, the tenancy rights, being proprietary rights, by applying the principle of inheritance, the shares of heirs are different and ownership of leasehold rights would be confined to the respective shares of each heir and none will have title to the entire leasehold property. Therefore, the estate shall be divided among the co-tenants and each tenant in common has an estate in the whole of single tenancy. Consequently, the privity exists between the landlord and the tenant in common in respect of such estate."

27. In view of above, therefore, the points stands answered in favour of

landlord respondent that release was maintainable against respondent no. 2 as well, being heir of Late Hansraj as no independent tenancy could be established in favour of partnership firm or proprietorship firm.

28. In so far as question of notice is concerned, since petitioner's own admission is that respondent no. 2 was not residing and he did not receive notice, respondent no. 2 would have been best person to deny the same. Petitioner has himself admitted that Vijay Kalra, his brother was not tenant and he was tenant and had contested the matter through out, now he could not be permitted to take plea of no notice. The order to proceed *ex parte* after acknowledgement of notice and service at the end of landlord by the Prescribed authority was never put to challenge by either Vinod Kalra respondent no. 1 impleaded in release application, nor even by present petitioner. Hence, this Court would not go into question of service of notice upon respondent no. 1 at this stage.

29. In view of above, the petition lacks merit and is accordingly dismissed with no order as to cost.

(2024) 12 ILRA 211
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 13677 of 2024

Khem Chandra Rajvanshi **...Petitioner**
Versus
Satish Chandra & Ors. **...Respondents**

Counsel for the Petitioner:

Abhinav Gaur, Vibhu Rai

Counsel for the Respondents:

Rahul Sahai

Civil Law-The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 2(2)-The Code of Civil Procedure, 1908-Section 21-

In case of pecuniary jurisdiction, a question raised that higher court could not have decided the matter because the court in lower rank had the jurisdiction, would not be maintainable as such exercise would not amount to such failure of justice so as to suggest that if he if such irregularity is not arrested, it will lead to a miscarriage of justice---Explanation to second proviso to Section 2(2) makes it absolutely clear that qua completion of a building, the first assessment thereof by concerned municipality would be the most relevant of the documents, if otherwise there is no other document to the contrary.

Petition partly allowed. (E-15)

List of Cases cited:

1. M/s Pankaj Hotel & anr.Vs Bal mukund and 18 others: SCC Revision No.171 of 2017 decided on 30 August 2017
2. Om Prakash Agarwal Since Deceased thr. LRs. & ors. Vs Vishan Dayal Rajpoot & anr.:2018(3)ARC 652.
3. Shekhar Vs Harishankar Azad (Since deceased) & ors.:2019(3) AWC 2500.

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Vibhu Rai, learned counsel for the petitioner and Sri Rahul Sahai, learned counsel for the landlord-respondent.

2. The petitioner before this Court has questioned the order passed by the Judge,

Small Causes (Civil Judge, Senior Division, Mathura) in Small Causes Case No.4 of 2006 on the ground of it being nullity for want of requisite pecuniary jurisdiction to try the suit. The judgment of the District Judge, Mathura in SCC Revision No.14 of 2022 is also challenged for affirming the order of the trial judge.

3. It transpires from the record that while the SCC Suit came to be filed in the year 2006 and remained pending disposal, an amendment was brought in vide notification of the State Government dated 07.12.2015 by the State raising pecuniary jurisdiction of the Civil Judge (Junior Division) to Rs.25,000/-. While the petitioner did not question the continuance of the suit proceedings before Civil Judge (Senior Division) in a capacity of Judge, Small Causes, he suddenly filed a misc. application before the Judge, Small Causes that pecuniary jurisdiction of the Civil Judge (Junior Division) having being raised, the matter was rendered triable only by that Court and, therefore, the matter be transmitted. The respective parties were heard upon the said application and that came to be rejected on the ground that amendment raising pecuniary limit being prospective in nature, would not be applicable to the pending suits. The said order was further challenged in revision unsuccessfully as the revision was dismissed on 09.11.2021 affirming the order of the trial judge.

4. These two above orders rejecting preliminary objection as to maintainability of the suit proceedings before the Civil Judge (Senior Division) were not challenged any further and became final between the parties. The parties thereafter contested the suit on merits and agreed to the points framed for determination which

were seven in number but no such issue was framed as to the maintainability of suit for want of pecuniary jurisdiction, and it appears obviously so, because in the misc. case preliminary objection was already rejected by the trial court and that was affirmed in revision. After the suit was decreed holding the petitioner to be in default of payment of rent and resultantly recovery of arrears of rent and eviction was ordered, while challenging the same in a SCC Revision, this point of pecuniary jurisdiction was raised again and the only plea taken was that the court had passed the decree traveling beyond its jurisdiction. No such point was addressed to as no such point was framed again and the court proceeded to examine the judgment of the trial court only upon the points framed by that trial judge. Now this petition has been filed questioning the judgment and decree on the ground that it has rendered nullity for want of pecuniary jurisdiction of the court passing it.

5. In support of his submission learned Senior Advocate for the petitioner has argued that if the court was not having pecuniary jurisdiction to try a suit, then the very judgment of it was liable to be rendered a nullity. In support of his submission he has placed reliance upon a coordinate bench judgment of this court in the case of *M/s Pankaj Hotel and another versus Bal mukund and 18 others: SCC Revision No.171 of 2017* decided on 30 August 2017 and also the judgment of the Supreme Court in the case of *Om Prakash Agarwal Since Deceased thr. LRs. and others v. Vishan Dayal Rajpoot and another:2018(3)ARC 652*.

6. Mr. Trivedi, learned Senior Advocate has sought to urge further that if there is inherent lack of jurisdiction then a

judgment cannot be clothed with validity and, therefore, the judgment and decree passed by the trial judge as well as order passed in revision deserve to be set aside.

7. Yet another argument has been advanced by Learned Senior Advocate that regarding arrears of rent, the findings arrived at by the trial the judge is not based upon any cogent material so as to be sustained inasmuch as there being already a deposit of Rs.70,000/- in advance towards the security, the same could have been adjusted against the arrears and despite the fact that this plea was taken in revision, yet the court sitting in revision did not consider this aspect of the matter and so manifestly erred in affirming the judgment of the trial court.

8. On the plea of applicability of Act No.13 of 1972 the finding of the trial court has also been questioned and the plea taken is that it was a specific stand taken in the written statement that construction of the shop had taken place prior to 1984 and the tenant were already there, but the court proceeded to record its finding only on the basis of the assessment by Municipal Corporation.

9. Meeting the arguments advanced as above by Mr. Rahul Sahai, learned Advocate appearing for landlord/respondent has submitted that in view of the provisions as contained under Section 21 of the CPC, the jurisdiction of a Court could be questioned only at the earliest possible opportunity and if not taken or even if upon being raised is rejected, then if the judgment on merit has come up, it will not be a nullity. However, in the event if for coram non iudice a judgment rendered leads to any failure of justice, then it is then it is liable to be held

as nullity. Mr. Sahai argued that the notification enhancing pecuniary jurisdiction of the Civil Judge (Junior Division) took place on 07.12.2015 and yet for a pretty long two and half years no objection was raised questioning the trial of the suit by Civil Judge (Senior Division) and it was only in July 2008, that a miscellaneous application came to be filed questioning the jurisdiction of Civil Judge (Senior Division). So According to him even after the notification was brought in U.P. Civil Laws Amendment Act 1972, petitioner sat idle for two and half years and contested the suit on its own merits. He further submits that except for pecuniary jurisdiction, a technical aspect of the matter in trying the suit, the entire writ petition is silent as to what kind of failure of justice has taken place. He submitted that failure of justice means that if the court did not have the jurisdiction to try the subject matter of the suit, then ofcourse, the judgment would be beyond jurisdiction whatsoever and would result in a nullity. But in the instant case, as he argues, but for this pecuniary jurisdiction a Civil Judge (Senior Division) was competent enough to try the suit as Judge, Small Causes. Still further, as he submits, the Civil Judge (Senior Division) was being higher court in rank with larger pecuniary jurisdiction could have adjudicated lis of lesser jurisdiction having territorial jurisdiction in the matter however, Civil Judge (Junior Division) could not have tried a suit maintainable in the court of Civil Judge (Senior Division). Sri Sahai, has also relied upon a judgment of the Supreme Court in the case of Om Prakash Agrawal (supra).

10. On the point of non applicability of Act No.13 of 1972, Sri Sahai submits that no evidence was led by tenant-defendant to prove that the building was an

old construction and that too raised prior to 1985. He argued that it was the landlord who had taken the plea that construction was new one made after 1985 and had the initial burden to discharge by leading material in support thereof and it is the first assessment in the year 1987 by the municipality that became the relevant factor which could not be disputed. He submitted that there was no evidence in rebuttal and, therefore, in view of the relevant provisions of Act No.13 of 1972 it became the relevant material to be relied upon. He submitted that there are concurrent findings of fact regarding applicability of Act No.13 of 1972 and so this court may not interfere with the same, more especially in the absence of any material placed by the petitioner before the courts below in support of the argument advanced on his behalf. He submitted that since the Act No.13 of 1972 was not applicable, the tenancy stood terminated with the issuance of notice under section 106 of the Transfer of Property Act, 1872 and service thereof, and, therefore, tenant deserved eviction.

11. Insofar as the argument regarding arrears of rent is concerned, he submitted that the answering respondent-landlord is ready to forego arrears.

12. Having heard learned counsel for the parties and having perused the record, in my considered view once the trial court had rejected miscellaneous application filed by the petitioner raising objection as to the maintainability of the suit before the Civil Judge (Senior Division) and that order having been affirmed in revision with no further challenge, the controversy stood concluded between the parties and, therefore, there was no opportunity left any further with the petitioner to raise this

objection further before trial court and in revision as well.

13. I also find that there was no such issue/point framed by the Judge, Small Causes, nor any point had been framed to be considered by the court sitting in revision. Insofar as the Division Bench judgment in the case of M/s Pankaj Hotel (supra) is concerned, it has been categorically held therein that jurisdictional issue has to be raised at the very first available opportunity in view of provisions contained under Section 21 of the Code of Civil Procedure and if no question as to pecuniary jurisdiction could be raised successfully, no such plea could be entertained at the stage of appeal. The court had observed that the court lacking pecuniary jurisdiction would not render the proceeding a nullity and that is why the conditions laid down under Section 21 are to be satisfied. Vide paragraph 49(v) the Court observed thus:

"(v) The Code of Civil Procedure has made a distinction between law of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make the decree passed by that court to be one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best, it is voidable in the sense that it can be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied. No objection to the pecuniary jurisdiction of the court could be raised successfully in an appeal against the decree unless it had been raised at the earliest opportunity and failure of justice or prejudice was shown. The proceeding in a court lacking

pecuniary jurisdiction is not a nullity and therefore to annul the proceeding the conditions laid out in Section 21 of the Code are to be satisfied. The party aggrieved will have to demonstrate that on account of the proceeding in a court having no pecuniary jurisdiction there had been a consequent failure of justice."

14. Applying the above principle to the facts of the case, I find that the petitioners having already raised objections as to the jurisdiction of the Civil Judge (Senior Division) and having failed to succeed at the stage of trial court and revision, and they having not further challenged it before this Court, could not have raised this point any further either before the trial judge or in revision while questioning the judgment and decree passed by the trial court. Since the Court observes that the proceeding would not get automatically rendered nullity if preliminary objection is not raised or raised but rejected and not questioned any further by getting a point framed in suit would render the jurisdiction of the trial court to try a suit valid and the judgment and decree shall be taken to have been lawfully passed.

15. One of the points argued before the Court was that principle of res judicata would not apply and if the judgment is nullity for want of jurisdiction, the judgment and decree can still be challenged before this court raising the issue. The argument is based upon the principle that the jurisdiction goes to the root of the matter.

16. In my considered view, the question of jurisdiction would go to the root of the matter provided the court hearing the suit could not have tried the subject matter for being barred by any law

or for the reason that it had no jurisdiction at all or for the reason that the jurisdiction would vest in a higher court, may be for higher pecuniary jurisdiction or otherwise under any special Act but there is no such case in hand. The higher court has decided the case having a jurisdiction to try an SCC case maybe of a lesser evaluation. This is a settled legal position that higher court can try a suit of lesser valuation but not vice versa. Vide paragraph 53 in Om Prakash Agarwal (supra), the court has held thus:

"53. This Court in (1993) 2 SCC130, R.S.D.V. Finance Company Private Limited vs. Shree Vallabh Glass Works Ltd. had again considered Section 21 of the Code of Civil Procedure. In paragraphs 7 and 8, following has been laid down:-

????It may be further noted that the learned Single Judge trying the suit had recorded a finding that the Bombay Court had jurisdiction to entertain and decide the suit. Sub-section (1) of Section 21 of the Code of Civil Procedure provides that no objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been consequent failure of justice. The above provision clearly lays down that such objection as to the place of suing shall be allowed by the appellate or revisional court subject to the following conditions:

(i) That such objection was taken in the court of first instance at the earliest possible opportunity;

(ii) in all cases where issues are settled then at or before such settlement of issues;

(iii) *there has been a consequent failure of justice.*

8. *In the present case though the first two conditions are satisfied but the third condition of □ failure of justice is not fulfilled. As already mentioned above there was no dispute regarding the merits of the claim. The defendant has admitted the deposit of Rs 10,00,000 by the plaintiff, as well as the issuing of the five cheques. We are thus clearly of the view that there is no failure of justice to the defendant by decreeing of the suit by the learned Single Judge of the Bombay High Court, on the contrary it would be totally unjust and failure of justice to the plaintiff in case such objection relating to jurisdiction is to be maintained as allowed by the Division Bench of the High Court in its appellate jurisdiction.?*

17. Thus, it is to be kept in mind while proceeding is barred before a court of law, an order would, therefore, be a nullity whether point of jurisdiction is raised or not raised at the initial stage and, therefore, it can be said that it can be raised at any stage as it goes to the root of the matter. But in case of pecuniary jurisdiction, a question raised that higher court could not have decided the matter because the court in lower rank had the jurisdiction, would not be maintainable as such exercise would not amount to such failure of justice so as to suggest that if he if such irregularity is not arrested, it will lead to a miscarriage of justice.

18. Coming to non applicability of Act No.13 of 1972, I find explanation to second proviso to Section 2(2) makes it absolutely clear that qua completion of a building, the first assessment thereof by concerned municipality would be the most relevant of the documents, if otherwise

there is no other document to the contrary, like sanctioned map etc. (***Shekhar v. Harishankar Azad (Since deceased) and others:2019(3) AWC 2500***). It has come to be returned as a finding of fact that the municipal assessment of the year 1987 was brought on record and there was no counter evidence led by the petitioner in rebuttal so as to disbelieve the municipal assessment and reject the pleadings raised that construction was new one. The concurrent findings have come to be returned and I do not see any perversity in those findings.

19. Now since the Act No.13 of 1972 has been held to be not-applicable, the tenancy stood terminated with the service of notice issued under Section 106 of Transfer of Property Act 1872 and the petitioner, therefore, was liable to eviction.

20. Insofar as the advance security amount is claimed to be deposited by the petitioner, which could have been adjusted against the arrears of rent and, therefore, the findings are perverse, since Sri Rahul Sahai has submitted that the landlord respondent is ready to forgo, the amount of arrears of recovery of rent, I do not want to go into that question on merits and on the basis of concession by Sri Sahai, in my view the judgment and decree for arrears of rent deserve to be set aside.

21. In view of the above, this petition partly succeeds and is ***allowed***. While the judgment and decree for eviction is upheld but insofar as recovery of arrears of rent has been directed, to that extent it is set aside.

22. There will, however, be no order as to cost.

(2024) 12 ILRA 217
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 15798 of 2024

Smt. Munni Devi ...Petitioner
Versus
Smt. Shashikala Pandey ...Respondents

Counsel for the Petitioner:
Prakhar Tandon

Counsel for the Respondents:
Shiv Kumar Yadav

**Civil Law-The Constitution of India,1950-
Article 227-**The revisional court did not apply its mind at all to the argument advanced by respective parties before it and after recording their argument simply concluded in paragraph 11 of the judgment that he did not find any error or illegality in the order assailed hence the revision-petition was liable to be dismissed--- Every judge who has to adjudicate the points on the issue raised in the matter, is not only required to refer to the arguments advanced on behalf of respective parties but also to deal with the same to arrive at a conclusion as to whether the judgment assailed is suffering from any error of law or facts or there is some gross error in assessment and analysis of the evidence by the court whose order has been challenged--- Matter remitted.

Petition allowed. (E-15)

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

1. Heard Sri Prakhar Tandon, learned counsel for the petitioner and Sri Utpal Chatterjee and Sri Shiv Kumar Yadav, learned counsel for the respondent-landlord.

2. By means of this petition filed under Article 227 of Constitution of India, petitioner has assailed the judgment and decree passed by the Judge, Small Cause dated 29.02.2024 in SCC Suit No.190 of 2013 as well as the order dated 07.11.2024 dismissing his revision-petition.

3. The sole argument advanced by learned counsel for the petitioner for assailing the order passed in revision is that the revisional court did not apply its mind at all to the argument advanced by respective parties before it and after recording their argument simply concluded in paragraph 11 of the judgment that he did not find any error or illegality in the order assailed and hence the revision-petition was liable to be dismissed.

4. Upon a pointed query made to learned counsel appearing for the landlord-respondent, as to how he could be defending the order passed in revision-petition, Sri Utpal Chatterjee, one of the learned Advocates for the respondent very fairly concedes that the recital as contained in paragraph 11 of the judgment cannot be said to be an adjudication as a result of application of mind by the presiding judge and therefore, requested that this order may be set aside and matter may be remitted to the court below for a decision afresh on merits.

5. Having heard learned counsel for the respective parties and having perused the order passed by the Judge, Small Causes, namely, Dr. Amit Verma, the Additional District and Sessions Judge, Court No.16, Kanpur Nagar, I find that the concerned judge has not rendered at all due application of his mind which was very much required by a judge adjudicating a lis. A mere reference to the arguments of the

respective parties does not suffice the need required, for proper adjudication of a lis.

6. The manner and method in which the revision has been dealt with cannot be approved of by this Court. Paragraph No. 11 of the judgment is reproduced as under:-

11. "पत्रावली के अवलोकन और विपक्षी के तर्कों को सुनने के उपरांत इस न्यायालय का यह अभिमत है कि अवर न्यायालय के आलोच्य आदेश में कोई विधिक असंगतता या कुटि प्रतीत नहीं होती है। अतः पुनरीक्षण स्वीकार किये जाने योग्य नहीं है। तदनुसार निस्तारित किया जाता है।"

7. No prudent man would be arriving at such above conclusion just after referring the arguments of the respective parties and certain authority that were cited with by the respective parties.

8. Every judge who has to adjudicate the points on the issue raised in the matter, is not only required to refer to the arguments advanced on behalf of respective parties but also to deal with the same to arrive at a conclusion as to whether the judgment assailed is suffering from any error of law or facts or there is some gross error in assessment and analysis of the evidence by the court whose order has been challenged.

9. It is well settled principle that revision has facets of an appeal and therefore, when the revision petition is preferred for there is no appeal available under the relevant statute, it is a duty cast upon the judge to look into all aspects of the matter from both the points of view of the revision applicant as well as respondents in whose favour the decree has been passed. From a judge in the rank of Addl. District and Sessions Judge it is expected that

he would not only apply his judicial mind to issues raised but also be dealing with the arguments advanced on behalf of the respective parties very meticulously to arrive at findings which would be reflecting a sound judicial approach of a varied and wide experience of such a judicial officer.

10. In view of the above, the judgment and order dated 07.11.2024 is hereby set aside. The matter is remitted to the court of revision to be decided afresh within a maximum period of two months from the date of production of certified copy of this order.

11. District Judge, Kanpur Nagar, is directed to assign this revision petition again to the same Additional District and Sessions Judge, Court No.16, Kanpur Nagar, if still posted in his judgeship. In the meanwhile and until decision afresh is taken in revision petition, the judgment and decree dated 07.11.2024 passed by the court concerned in SCC Revision No.130 of 2024 shall remain stayed.

12. The writ petition succeeds and is *allowed* as above.

13. Registrar General is directed to circulate this order to all judgeships of the State.

(2024) 12 ILRA 218
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2024

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

Writ A No. 16814 of 2024

Vijay Kumar Yadav	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Ajeet Kumar, Mahendra Kumar Yadav

falling under the Electricity Distribution Division-I, Pratapgarh.

Counsel for the Respondents:

Abhishek Srivastava, Adarsh Bhushan, C.S.C., Manoj Kumar Srivastava

Service Law – Transfer – Malice in Law – Petitioner, an Assistant Engineer in U.P. Power Corporation Ltd., was transferred to Prayagraj on his own request on the ground that his wife was posted there as a government lecturer, but was again transferred within four months to another district (Pratapgarh). Although the transfer order cited “administrative grounds,” the counter affidavit filed by the Chief Engineer, who passed the order, disclosed reasons, including complaints and inquiry against the petitioner. Transfer order was passed on the same day as submission of the preliminary inquiry report – Held, such transfer was not in administrative exigency but in lieu of punishment – Exercise of power of transfer as a substitute for disciplinary action is impermissible – Principle of malice in law attracted – Transfer order quashed – Reliance placed on Somesh Tiwari v. Union of India, (2009) 2 SCC 592. (Para 10, 11)

Allowed. (E-5)

List of Cases cited:

Somesh Tiwari Vs U.O.I. & ors., (2009) 2 SCC 592.

(Delivered by Hon’ble J.J. Munir, J.)

1. This writ petition is directed against the transfer order dated 09.10.2024 passed by the Chief Engineer, Distribution Division-II, Prayagraj, transferring the petitioner, an Assistant Engineer, from the Electricity Distribution Sub-Division Katehara, Electricity Distribution Division, Handia, Prayagraj to the Electricity Distribution Sub-Division-City, Pratapgarh,

2. The facts of this case would show that the petitioner has been in the employ of the Uttar Pradesh Power Corporation Limited, Lucknow (for short, 'the Corporation') since the year 2008. He was posted at Prayagraj (then called Allahabad) from the year 2008 to April, 2013 in different establishments. In April, 2013, he was transferred to Ghazipur, but in November, 2015, he was back at Prayagraj, where again he served in different positions in varying establishments, up to the month July, 2019. In July, 2019, he was transferred to the Gorakhpur Zone and then posted at Bhatpaarrani, Deoria. He remained posted in the Gorakhpur Zone up to 28.06.2024, when on his request that his wife was serving as a Lecturer with a Government Institution, to wit, the Gauri Pathshala Inter College, Malviya Nagar, Prayagraj. he was transferred to Prayagraj once again.

3. A perusal of the transfer order dated 28.06.2024 passed by the Managing Director, Purvanchal Vidyut Vitaran Nigam Limited, Varanasi, would show that the petitioner was transferred from the Electricity Test Division-I, Gorakhpur to Prayagraj under the control of the Chief Engineer (Distribution), Prayagraj Region-II. In Column No.5 of the said order, there is a remark, which reads: “swayam ke anurodh par pati-patni sarkari sewa me karyarat”.

4. The Chief Engineer (Distribution)-II vide order dated 30.06.2024 posted the petitioner to the Electricity Distribution Sub-Division, Katehara, Prayagraj, falling under the Electricity Distribution Division, Handia,

Prayagraj. This posting was given to the petitioner on administrative grounds, bearing in mind the interest of the Corporation. This is what is said in the remarks column carried in the order dated 30.06.2024. Now, by the impugned order dated 09.10.2024, the Chief Engineer (Distribution)-II, Prayagraj has transferred the petitioner from the Electricity Distribution Sub-Division, Katahara, Prayagraj, falling under Electricity Distribution Division, Handia, Prayagraj to the Electricity Distribution Sub-Division-City, Pratapgarh, falling under the Electricity Distribution Division-I, Pratapgarh.

5. This Court issued a notice of motion vide order dated 08.11.2024 in the following terms:

“The petitioner says that he was transferred from Gorakhpur to Prayagraj on his own request vide order dated 28.06.2024 because his wife is in government service posted at Prayagraj. Now, by the impugned order dated 19.10.2024, he has been transferred from Prayagraj to Pratapgarh.

Prima facie once an employee is transferred on his request to a particular station on ground that his wife is posted there, a swift transfer to another station within four months may give rise to an inference of mala fide exercise of power.

Issue notice.

Let the Chief Engineer, Distribution-II, Prayagraj file a counter affidavit, which shall be his own affidavit, showing cause why on an inference of mala fide exercise of power, the impugned order be not quashed.

Looking to the short point involved, lay this matter as fresh on 21.11.2024, by which time, the required

counter affidavit shall be positively filed by the Chief Engineer.

Let this order be communicated to the Chief Engineer, Distribution-II, Prayagraj through the Chief Judicial Magistrate, Allahabad by the Registrar (Compliance) within 24 hours.”

6. A counter affidavit has been filed on behalf of respondent No.9.

7. Heard Mr. Shivdutt Yadav, Advocate holding brief of Mr. Mahendra Kumar Yadav, learned Counsel for the petitioner, Mr. Manoj Kumar Srivastava, learned Counsel appearing on behalf of respondent Nos. 6, 7 and 9, Mr. Ajay Kumar Patel, Advocate holding brief of Mr. Adarsh Bhushan, appearing for respondent Nos. 4 and 5, Ms. Kritika Sinha, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent nos. 2,3 and 8 and Ms. Amrita Singh, learned Additional Chief Standing Counsel appearing on behalf of respondent No.7.

8. In paragraph No.8 of the counter affidavit filed on behalf of respondent No.9, the Chief Engineer (Distribution) has put forward a rather benign stance and said that the petitioner has been transferred from Electricity Distribution Sub-Division Katahara, Prayagraj to Electricity Distribution Division-I, Pratapgarh. He has averred that both places are almost equidistant from the petitioner's house in Prayagraj with the result that the transfer would not cause any difficulty to the petitioner in taking care of his family. If this were the consideration, on the foot of which the impugned order of transfer from Katahara, Handia, Prayagraj to Pratapgarh has been passed, possibly there would be no case for interference. The order

indicates that it has been passed in view of administrative need bearing in mind the interest of the Corporation. If the order and the stand in paragraph No.8 of the counter affidavit were all that was there to it, the very narrow scope for judicial interference with a transfer order would not entitle the petitioner to relief. But, the counter affidavit, which is a personal affidavit of the Chief Engineer, who passed the transfer order, betrays the real nature of the impugned order. In the paragraphs that follow, to be precise, in paragraph No.13 of the counter affidavit, it is said on a rather low sounding note that there were several complaints against the petitioner and an inquiry was also conducted into the allegations against him. There is then a reference in the same paragraph to a true copy of the inquiry report No.6071 dated 09.10.2024. This inquiry report, which is apparently some kind of a preliminary inquiry, is required to be quoted for every word of it. It reads:

“एतद्वारा मुख्य अभियंता (वि0), प्रयागराज क्षेत्र, द्वितीय, प्रयागराज के कार्यालय ज्ञाप संख्या-4755/मु0अ0 (वि0) प्र0क्षे0द्वि0प्र0/ जांच / दिनांक: 28.09.2024 एवं कार्यालय ज्ञाप संख्या-4787/मु0अ0 (वि0) प्र0क्षे0द्वि0प्र0/ जांच/ दिनांक: 30.09.2024 के माध्यम से शिकायतकर्ता श्री रामललित तिवारी, दिनेश चन्द्र पाण्डेय, हिरायती देवी, मालती देवी आदि एवं श्री वीरेन्द्र मौर्य (वीरू), मण्डल महामंत्री धनुपुर, हण्डिया जनपद प्रयागराज के पत्रांक-002/ एसडपी/ 3 दिनांक: 30.09.2024 (छायाप्रति संलग्न) के द्वारा श्री विजय कुमार यादव उपखण्ड अधिकारी, विद्युत वितरण उपखण्ड कटहरा के विरुद्ध प्राप्त शिकायती पत्रों की जांच करने हेतु निर्देशित किया गया है।

उक्त सम्बन्ध में शिकायतकर्ता श्री रामललित तिवारी, श्री दिनेश चन्द्र पाण्डेय, हिरायती देवी, मालती देवी, श्री रामचन्द्र आदि शिकायतकर्ताओं से दूरभाष पर बात की गयी तो उनके द्वारा अवगत कराया गया है कि उनके द्वारा श्री विजय कुमार यादव के विरुद्ध कोई भी शिकायत नहीं की गयी है। (फोन की स्क्रीनशॉट संलग्न)

अधोहस्ताक्षरी द्वारा श्री विजय कुमार यादव उपखण्ड अधिकारी विद्युत वितरण उपखण्ड कटहरा को अपना बयान दर्ज कराने हेतु दिनांक - 05.10.2024 को दूरभाष के माध्यम से निर्देशित किया गया, जिस पर उपखण्ड अधिकारी द्वारा अपना बयान दर्ज करने हेतु आश्वस्त किया गया था, परन्तु श्री विजय कुमार यादव उपखण्ड अधिकारी द्वारा बयान दर्ज नहीं कराया गया। जिसके लिए श्री विजय कुमार यादव उपखण्ड अधिकारी से दूरभाष पर पुनः सम्पर्क करने का प्रयास किया गया परन्तु लगातार कई बार फोन करने के बावजूद श्री विजय कुमार यादव द्वारा फोन नहीं उठाया गया और न ही अधोहस्ताक्षरी को वापस फोन कर सम्पर्क करने का प्रयास किया गया। (फोन की स्क्रीनशॉट संलग्न)

जिसके उपरान्त अधिशासी अभियंता, विद्युत वितरण खण्ड हण्डिया प्रयागराज को दूरभाष के माध्यम से श्री विजय कुमार यादव उपखण्ड अधिकारी विद्युत वितरण उपखण्ड कटहरा को जांच समिति के समक्ष अपना बयान दर्ज कराने के लिए निर्देशित करने हेतु अनुरोध किया गया। जिस पर उनके द्वारा श्री विजय कुमार यादव उपखण्ड अधिकारी को निर्देशित किया गया। परन्तु श्री विजय कुमार उपखण्ड अधिकारी ने अधोहस्ताक्षरी एवं उच्चाधिकारियों द्वारा निर्देशित करने के बावजूद अपना बयान दर्ज नहीं कराया तथा उनको सी0यू0जी0 नम्बर पर कई कॉल किये जाने के बावजूद कॉल को रिसीव नहीं किया गया। जिससे स्पष्ट होता है कि श्री विजय कुमार उपखण्ड अधिकारी द्वारा अपने उच्चाधिकारियों के विभागीय कार्यों से सम्बन्धित कॉल रिसीव नहीं की जाती है। इनका यह कृत्य अनुशासनहीनता को प्रदर्शित करता है तथा इनकी कार्यशैली उत्तर प्रदेश राज्य कर्मचारी आचरण नियमावली 1956 के संगत नियमों के विरुद्ध है। उपरोक्त तथ्यों से स्पष्ट हो रहा है कि श्री विजय कुमार यादव उपखण्ड अधिकारी, विद्युत वितरण उपखण्ड कटहरा प्रयागराज का उपभोक्ताओं के प्रति आचरण एवं व्यवहार ठीक नहीं होगा। जिसके लिए श्री विजय कुमार यादव उपखण्ड अधिकारी विद्युत वितरण उपखण्ड कटहरा को अपने आचरण एवं व्यवहार में सुधार लाने की आवश्यकता है।”

9. This report was submitted by an Inquiry Committee, comprising a Superintending Engineer and an Executive Engineer. Putting aside the wisdom of the conclusions drawn by the Inquiry Committee, doing the preliminary inquiry, what is noteworthy here is the fact that this inquiry report was submitted by the Inquiry Committee on 09.10.2024 and on the same day, the impugned order of transfer was passed. It is difficult, therefore, not to think

that the petitioner was transferred from Electricity Distribution Sub-Division, Katahara, Handia, Prayagraj to Electricity Distribution Sub-Division-City, Pratapgarh, as a measure of penalty, utilizing the employer's power to transfer. If the employer thought that the petitioner was an inconvenient man at Katahara, he could very well be transferred to whichever place the Chief Engineer thought fit, on administrative grounds, in the exercise of the employer's purely administrative power of transfer, and which for the employee is an exigency of service.

10. The matter, however, assumes a different complexion altogether, if it is evident that the employer has utilized the power of transfer to punish the employee. This is precisely what the Chief Engineer has done here. He has betrayed through his counter affidavit, what went behind scenes, in passing the order of transfer. There were some complaints against the petitioner by certain named persons mentioned in the inquiry report dated 09.10.2024. These appear to be written complaints. When these complainants were contacted over telephone by the Inquiry Committee, they denied having complained against the petitioner. It is queer that after the complainants disowned the complaints, the Inquiry Committee were after the petitioner, calling him up to record his statements. There was no occasion to do that. Nevertheless, that was the Inquiry Committee's wisdom and the petitioner did behave oddly in not responding to the Inquiry Committee's communications and appearing before them. The non-response of the petitioner to the various messages from higher officials seems to have been regarded as disrespectful behaviour and insubordination, about which there is a remark in the Inquiry Committee's report

that the petitioner should improve his conduct and behaviour. It is also remarked that the petitioner's behaviour with consumers is not appreciable.

11. Now, the fact that on the day that this inquiry report was submitted, as already remarked, the impugned order of transfer was passed, would show that it is just not an administrative exigency, considering the petitioner's conduct in general that animates the exercise of power of transfer by the Chief Engineer. Rather, the impugned transfer order has been passed unmistakably as a substitute for the exercise of his disciplinary jurisdiction by the Chief Engineer, or so to speak, the respondents, where they could penalize the petitioner, if they so thought for whatever misconduct, the Inquiry Committee reported. This would, however, not in any way justify the Chief Engineer, or for that matter, the respondents, exercising their power of transfer to punish or penalize the petitioner. The exercise of the power of transfer as a substitute for the infliction of lawful punishment in exercise of the employer's disciplinary jurisdiction, is verily an instance of malice in law. This is precisely the case here.

12. In this connection, reference may be made to principal laid down in **Somesh Tiwari v. Union of India and others, (2009) 2 SCC 592**. In **Somesh Tiwari** (*supra*) too, the facts before their Lordships of the Supreme Court would show that anonymous complaints had been laid against the petitioner, an officer of the Indian Revenue Service, alleging a caste bias against him, because he had undertaken re-assessment of certain files with him. The preliminary or the discrete inquiry into complaints by an Assistant Commissioner, Directorate of Vigilance,

did not find the allegations true. Still, the petitioner, Somesh Tiwari, was transferred from Bhopal to Shillong. There are then very detailed facts, which may not be of much relevance, but the principle, on which the event turned before their Lordships in Somesh Tiwari, is expressed in the following words:

“16. Indisputably an order of transfer is an administrative order. There cannot be any doubt whatsoever that transfer, which is ordinarily an incident of service should not be interfered with, save in cases where inter alia mala fide on the part of the authority is proved. Mala fide is of two kinds-one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

17. An enquiry was initiated against the appellant in terms of the allegations contained in an anonymous letter. Having regard to the directives of the Central Vigilance Commission, no enquiry could have been initiated against him but it is beyond any doubt or dispute that in the said enquiry, the allegations were found to be untrue. Despite the same not only an order of transfer was passed but to a station, which, according to the respondents themselves, was “harsh”.

13. In view of what we have held hereinabove, the impugned transfer order cannot be sustained.

14. In the result, this writ petition succeeds and is **allowed**. The impugned transfer order dated 09.10.2024 passed by the Chief Engineer, District Division-II, Purvanchal Vidyut Vitaran Nigam Limited, Varanasi is hereby **quashed**. The petitioner shall be permitted to join at the station where he was serving immediately before the order impugned dated 09.10.2024 forthwith and paid salary regularly.

15. There shall be no order as to costs.

16. Let this order be communicated to the Chief Engineer, District Division-II, Purvanchal Vidyut Vitaran Nigam Limited, Varanasi through the learned Civil Judge (Sr. Div.), Varanasi by the Registrar (Compliance).

(2024) 12 ILRA 223
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

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

Writ A No. 17213 of 2024

Rakesh Chandra Jauhari **...Petitioner**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Amit Kumar, Ashutosh Tripathi

Counsel for the Respondents:
Ganesh Datt Mishra, C.S.C.

A. Service Law – UP Cooperative Dairy Federation Employees Service Regulations, 2010 – Regs. 85 & 86 – Disciplinary proceeding – Major penalty – Reduction to the basic pay scale in perpetuity – No enquiry was conducted – Admittedly no witnesses were examined by the Establishment and the Inquiry Officer opined merely on the basis of idle papers – Effect – Held, the entire approach of the respondents is one of regarding the charges as proof of themselves with burden upon the petitioner, the charge-sheeted employee, to dispel the charge. This approach of the respondents is fundamentally flawed and vitiates the findings of the Inquiry Officer. (Para 10 and 11)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of Uttar Pradesh & 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 Uttaranchal & ors. Vs Kharak Singh; (2008) 8 SCC 236
4. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)
5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)
6. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB) (LB)
7. Satyendra Singh Vs St. of U.P. & anr.; 2024 SCC OnLine SC 3325

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

1. This writ petition is directed against an order of the Chief General Manager, Pradeshik Cooperative Dairy Federation Limited, Lucknow dated 10.03.2016, punishing the petitioner with reduction to his basic scale, after disciplinary proceedings.

2. The petitioner is a retired employee of the Pradeshik Cooperative Dairy Federation (for short, 'PCDF'), which is a State Government undertaking, funded and supported by the Government in the Ministry of Dairy Development. The petitioner appears to have joined the PCDF in the year 1985 on the post of an Accounts Assistant at District Varanasi as a regular employee. He put in more than thirty years' service before superannuating on 31.08.2017. At the time of his retirement, he was posted as an Accounts Assistant with the Cattle Feed Factory, PCDF, Ram Nagar, Varanasi. The petitioner says that he had an unblemished career until the fateful proceedings. Disciplinary proceedings were instituted against the petitioner on the 12th of August, 2013. He was suspended from service pending inquiry. An Inquiry Officer was appointed. The Inquiry Officer served the petitioner with a charge"sheet, carrying a total of seven charges. The charge"sheet is one dated 09.11.2013 and comes up with allegations regarding financial irregularities in the organization, issuing a cheque on 20.06.2013, drawing on a bank account, where there were insufficient funds, as well as a charge about forging the signatures of the General Manager, Dairy Production Federation, Raibareli to pay off dues etc., leading to the petitioner's integrity not being certified and two increments withheld for two years.

3. The petitioner submitted a reply to the charge"sheet. He denied the charges, coming up with defence pleas. The Inquiry Officer, the petitioner alleges, without holding an inquiry in accordance with salutary procedure, submitted a report dated 30.01.2015, holding the charges proved. Amongst others, it is averred that no oral inquiry was held in the sense that no evidence of witnesses for the establishment was recorded in support of the charges. It is also alleged that the mandatory provisions of the Uttar Pradesh Cooperative Dairy Federation Employees Service Regulations, 2010 (for short, 'the Regulations of 2010') were observed in breach, as also the Uttar Pradesh Cooperative Societies Employees

Service Regulations, 1985 (for short, 'the Regulations of 1985').

4. The petitioner was served with a show cause notice dated 16.03.2015, which he answered by means of his reply dated 06.05.2015. The Chief General Manager, PCDF by his order dated 10.03.2016 proceeded to punish the petitioner, reducing him to the basic scale. For the period of suspension, he was denied salary, except the subsistence allowance, that he had received, but granted continuity in service. The petitioner says that due to incorrect advice, he submitted a representation/departmental appeal to the Managing Director, PCDF Limited, Lucknow, which does not lie for the class of penalty awarded to him under Regulation 88 read with Regulation 85(1) of the Regulations of 2010. It is also urged that the order impugned could not have been passed by the Chief General Manager, the Appointing Authority, without the prior approval of the Registrar, Cooperative Societies in view of the embargo carried in Regulation 88 of the Regulations of 2010.

5. A notice of motion was issued on 06.11.2024, in answer to which a counter affidavit was filed on 27.11.2024. This counter affidavit was filed on behalf of the Chief General Manager, PCDF by the Managing Director.

6. Parties having exchanged affidavits, the petition was admitted to hearing, which proceeded forthwith. Orders were reserved.

7. Heard Mr. Ashutosh Tripathi, learned Counsel for the petitioner, Mr. G.D. Mishra, learned Counsel appearing on behalf of respondent No.2 and Mr. S.C. Upadhyay, learned Standing Counsel appearing on behalf of respondent No. 1.

8. Upon hearing learned Counsel for the parties, what is evident is that the penalty imposed is one of reduction to the basic pay scale in perpetuity. This is a penalty, which under the Regulations of 2010 cannot be imposed upon an employee of the PCDF,

without the issue of a charge"sheet and holding disciplinary proceedings. Apparently, this is a major penalty. In order to appreciate the nature of penalties and their classification, according to gravity, and a fortiori the procedure to be adopted and the remedies of appeal against various classes of penalties available to various Appellate Authorities, the provisions of Regulations 85"91 may be quoted with profit:

"85. Penalties." (1) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under Section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by anyone of the following penalties"

- (a) censure,
- (b) withholding of increment,
- (c) fine on an employee of Category IV (Peon, Chaukidar etc.),
- (d) withhold pay whole or part for the suspension period,
- (e) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the institution by the employee's conduct,
- (f) reduction in rank or grade held substantively by the employee,
- (g) removal from service, or
- (h) dismissal from service.

(2) It shall be unlawful to impose more than one penalty. Copy of order of the punishment shall invariably be given to the employee concerned and entry to this effect shall be made in the service record of the employee.

(3) No penalty except censure shall be imposed unless a show cause notice has been given to the employee and he has either failed to reply within the specified time or his reply has been found to be unsatisfactory by the punishing authority.

(4)(a) The charge"sheeted employee shall be awarded punishment by the appropriate authority according to the seriousness of the offence:

Provided that no penalty under sub"clause (e), (f) or (h) of clause (1) shall be imposed without recourse to disciplinary proceedings.

(b) No employee shall be removed or dismissed by an authority other than by which he was appointed unless the appointing authority has made prior delegation of such authority to such other person or authority in writing.

(5) The appointing authority or person authorized by him while passing orders for stoppage of increments shall state the period for which it is stopped and whether it shall have effect of postponing future increments or promotion.

86. Disciplinary proceedings.- (1) The disciplinary proceedings against an employee shall be conducted by the Inquiry Officer with due observance of the principles of natural justice for which it shall be necessary that"

(a) the employee shall be served with a charge sheet containing specific charge and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charge within reasonable time which shall not be less than fifteen years;

(b) such an employee shall also be given an opportunity to produce at his own cost or to cross examine witnesses to his defence and shall also be given an opportunity of being heard in person, if he so desires;

(c) if no explanation in respect of charge"sheet is received or the explanation submitted is unsatisfactory, the competent authority may award him appropriate punishment considered necessary.

(2)(a) Where an employee is dismissed or removed from service on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the employee has absconded and his whereabouts are not known to Federation/ Milk Union for more than three months; or

(c) Where the employee refuses or fails without sufficient cause to appear before the Inquiring Officer when specifically called upon in writing to appear; or

(d) Where it is otherwise (for reasons to be recorded) not possible to communicate with him. The competent authority may award appropriate punishment without taking or continuing disciplinary proceedings.

(3) Disciplinary proceedings shall be taken by the Federation/Milk Federation against the employee on a report made to this effect by the inspecting authority or an officer of the Federation/Milk Union under whose control the employee is working.

(4) The Inquiring Officer shall be appointed by the appointing authority for the purpose by the appointing authority:

Provided that the officer at whose instance disciplinary action was started shall not be appointed as an Inquiring Officer nor shall the Inquiring Officer be the appellate authority.

(5) In the case of an erring"employee falling in clause (4) of Regulation No. 7 the Competent Authority if so provided in the bye"laws shall draw up a duplicate charge"sheet against the employee and the same shall be communicated to the authorized officer who shall, if prima facie case has been made out by the reporting authority, withdraw him from the Federation/Milk Union and take disciplinary action against him.

(6) An employee other than one referred to in clause (5) may be placed under suspension in the following circumstances by the appointing authority or any other officer authorized for the purpose"œ

(a) when the said authority is satisfied that a prima facie case exists, which is likely to result in the removal, dismissal or reduction in rank of the employee.

(b) when an enquiry into his conduct is immediately contemplated or is pending and his further continuance on his post is considered detrimental to the interest of the Federation/Milk Union.

(c) when a complaint against him of any criminal offence is under police investigation for which he has been arrested or he is undergoing trial in a Court of law for offence under the Indian Penal Code, U.P. Cooperative Societies Act, 1965 or any other Act or charges have been framed against him by the Criminal Court:

Provided that suspension shall be obligatory where it is called for in terms of clause (1) of Regulation No. 88.

(7)(a) An employee under suspension shall be entitled to a subsistence allowance as per relevant rules applicable to State Government employee from time to time:

Provided that an employee who is under suspension on the date of coming into force of these regulations shall continue to draw such portion of pay and such allowance as he was allowed to draw for the period of suspension:

Provided further that a payment of the subsistence allowance shall be made unless the employee has furnished a certificate, and the authority passing the order of suspension is satisfied that the employee was not engaged in any other employment, business, profession, or vocation and had not earned remuneration therefore during the period under suspension.

(b)(1) When an employee is reinstated, the authority competent to order the reinstatement shall make specific order regarding pay and allowance to be paid for the period of suspension whether or not the said period shall be treated as a period spent on duty:

Provided that where the authority passing the order of reinstatement is of the opinion that the employee has been fully exonerated or the suspension was wholly unjustified, the employee shall be given the full pay and allowances to which he would have been entitled had he not been suspended.

(2) In cases not covered by the proviso to foregoing sub"clause (1) the employee shall be given such proportion of pay and allowance as the Competent Authority may order.

(c) In case falling under proviso to sub"clause (b)(1) the period of suspension shall be treated as a period spent on duty for all purposes.

(d) In case falling under sub"clause (b)(2) the period of suspension shall not be treated as a period spent on duty, unless the Competent Authority specifically directs that it shall be so treated.

(e) The order of suspension shall not take retrospective effect.

(f) Leave shall not be granted to an employee under suspension.

(g) An employee against whom proceedings have been taken either for his arrest for debt or a criminal charge or who is detained under any law for preventive detention shall be considered as under suspension for the period during which he is so detained in custody or is undergoing imprisonment and not be allowed any pay and allowance other than the subsistence allowance admissible under sub"clauses (a) and (b) for such period until the termination of the proceedings taken against him or until he is relaxed from detention and allowed to rejoin duty as the case may be.

(h) A subsistence allowance shall be payable to the family of an employee who is detained in jail on the basis of report of the superintendent of the concerned jail even if there is no certificate under regulations.

(i) A suspended employee shall remain at the place of attachment and in contact of the Investigation Officer during the period of suspension and shall intimate his address of residence and telephone number in writing to the concerned employer, place of attachment and Investigation Officer.

(8) In case of fine it shall be deducted from his pay in monthly instalment, each such instalment not exceeding one"fourth of his monthly salary.

(9) The order of suspension may be revoked by"the"

(a) the authority which passed the orders, or

(b) the appointing authority, if there are sufficient reasons for revocation and the same shall be recorded in the order of revocation.

87. Appeal.- Orders imposing penalty under sub"clause (a) to (d) of Clause (1) of Regulation No. 85 shall be appealable to the authorities as mentioned in Appendix 'D'.

88. (a) Order imposing penalty under sub"clause (a) to (d) of Clause (1) of Regulation No. 85 shall not be passed except with the prior concurrence of the Appointing Authority and

under sub”clause (e) to (g) except prior approval of the Registrar.

(b) An appeal against imposed penalties of sub”clause (a) to (d) of Clause (1) of Regulation 85 may to the following”

Nature of penalty	Class of the penalised employee	Authority imposing penalty	Appellate Authority
1	2	3	4
Censure	Class 3	Any Class I Officer be authorised by the appointing authority	Appointing Authority
	Class 3 and Class 4	1. Appointing Authority 2. Any officer authorised by the appointing authority	Registrar Committee of Management
Fine	Class 4	1. Appointing Authority 2. Any Class 1 or Class 2 Officer so authorised for this purpose by the appointing authority	Registrar Appointing Authority
Recovery of financial leave pay or re”reimburse	Class 3 and 4	1. Appointing Authority 2. Any first class officer so authorised for this purpose by the appointing authority	Chairperson Appointing Authority

89. Every appeal shall comply with the following requirements”

(a) It shall be couched in polite and respectful language.

(b) It shall contain all material facts and argument and shall be complete in itself.

(c) It shall be accompanied by an attested copy of the impugned order.

(d) It shall specify the relief desired.

(e) It shall be submitted through proper channel within 30 days from the date of receipt of order imposing the penalty.

90. An appeal preferred through proper channel under sub”clause (e) of Regulation No. 86 shall be forwarded without undue delay to the appellate authority with the comments of the authority through which it is submitted.

91. Save as provided in these regulations, no appeal shall be addressed or endorsed to or bear recommendations of other authorities or persons. A defiance of this regulation as well as any attempt to influence or canvass the appellate authority shall be deemed as breach of discipline, rendering the appeal liable to rejection and the employee to action for breach of discipline.â€”

9. A perusal of Regulation 85(1) shows that various classes of penalties, or so to speak grades of them, are envisaged under sub”clauses (a) to (h) of Regulation 85(1) of the Regulations of 2010. A comparison of clauses (1), (3) and (4) of Regulation 85 would show that for the more serious penalties envisaged under sub”clauses (e), (f) or (h) of clause (1) of Regulation 85, the procedure for holding disciplinary proceedings has been made mandatory. Clause (4)(a) of Regulation 85 would show that for serious misconduct, a charge”sheet has to be issued. Clause (3) says that except for censure, other penalties, which would include those enumerated in sub”clauses (b), (c) and (d) of clause (1) of Regulation 85, a show cause notice is mandatory. No charge”sheet or disciplinary proceeding is envisaged. This would lead to the inescapable conclusion that the punishment of reduction to the basic pay scale, which is apparently covered by clause (f), that speaks about reduction in rank or grade held substantively by the employee, is regarded as a major punishment to be awarded after regular disciplinary proceedings.

10. Now, having regard to the Regulations of 2010 and the salutary procedure to hold disciplinary proceedings, it is essential

that in the departmental inquiry, the Inquiry Officer must convene himself into an Inquiry Tribunal, detached from the Establishment, of which he might otherwise be a part. He must not sit with the assumption that the charges are true and it is the employee, who is required to dispel the charges, that come with proof of themselves. He must require the Establishment to prove the charges by producing evidence through a Presenting Officer, particularly oral evidence or witnesses to prove the charges in a case, where a major penalty may be imposed. Even if the inquiry proceeds ex parte, it is the duty of the Inquiry Officer to require the Establishment to prove the charges in the employee's absence. A default in filing a reply or offering his defence, would not lead to Establishment of the charges ipso facto. The petitioner has averred in paragraph No.12 of the writ petition that no inquiry was held or the statement of witnesses recorded in support of the charges. The facts that no witnesses were examined by the Establishment and the Inquiry Officer opined merely on the basis of idle papers annexed to the charge"sheet, with no evidence being led on behalf of the Establishment and findings of guilt recorded, are admitted to the respondents. In this connection, a part of paragraph No.9 of the counter affidavit filed by respondent No.2 is very relevant. It reads:

“9. That in reply to the contents of para 12 of the writ petition, it is stated that the charges were based upon the document, as such the enquiry officer considered the document and the reply of the petitioner and held the petitioner guilty.”

11. A perusal of the Inquiry Officer's report removes all iota of doubt that an inquiry in the sense understood in a major penalty matter was ever held. There was a fundamental breach of salutary procedure. No evidence whatsoever was produced, particularly, witnesses in support of the charges by the Establishment to prove them. The Inquiry Officer sat with a closed mind, shuffled through the charge"sheet and the petitioner's reply besides idle papers, and cursorily held the

charges proved. The fact that the petitioner was given opportunity before the Disciplinary Authority to appear in person and explain himself, does not absolve the Establishment of their burden to prove the charges at the inquiry. The entire approach of the respondents is one of regarding the charges as proof of themselves with burden upon the petitioner, the charge"sheeted employee, to dispel the charge. This approach of the respondents is fundamentally flawed and vitiates the findings of the Inquiry Officer as also the resultant order of punishment. The law in this regard is well settled as held by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570, State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236 and the Bench decisions of this Court in State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB), Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB) and State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB) (LB).**

12. The position of the law in this regard that has withstood the test of time has been recently endorsed by the Supreme Court in **Satyendra Singh v. State of U.P. and another, 2024 SCC OnLine SC 3325**, where it has been held:

“12. Learned counsel for the State was ad idem to the submissions of the appellant's counsel that no witness whatsoever was examined during the course of the inquiry proceedings. On a minute appraisal of the Inquiry Report, it is evident that other than referring to the documents pursuant to the so"called irregular transactions constituting the basis of the inquiry, the Inquiry Officer failed to record the evidence of even a single witness in order to establish the charges against the appellant.

13. This Court in a catena of judgments has held that the recording of evidence in a disciplinary proceeding proposing charges of a major punishment is mandatory. Reference in this regard may be held to *Roop*

Singh Negi v. Punjab National Bank, (2009) 2 SCC 570 and *Nirmala J. Jhala v. State of Gujarat*, (2013) 4 SCC 301.

13. Apart from the other issues, it is also true that in view of Regulation 88, the impugned order imposing the punishment of reduction to basic pay scale could not have been awarded without the prior approval of the Registrar, Cooperative Societies. Nevertheless, since this Court is of opinion that the impugned order is vitiated more fundamentally by a flawed inquiry, it would not matter much because the order impugned has to be quashed with liberty to the respondents, if they so elect to proceed afresh from the stage of the charge"sheet.

14. There is still a further grievance that the petitioner makes and more relief that he seeks. The petitioner has retired from service way back on 31.08.2017. It is the petitioner's case that he has not been paid his gratuity, employees provident fund, group insurance and dues on account of leave encashment. Even if the respondents elect to proceed afresh against the petitioner, they would not be at liberty to impose a punishment higher than that awarded by the order impugned. This would not result in any kind of terminal punishment against the petitioner or an order for recovery of the loss occasioned. Therefore, while the respondents may consider the issue of awarding gratuity to the petitioner, they would have to ensure payment of the employee's provident fund, group insurance and dues on account of leave encashment, irrespective of the outcome of the inquiry de novo, if any, undertaken against the petitioner.

15. In the result, this petition succeeds and is **allowed**. The impugned order dated 10.03.2016 passed by the Chief General Manager, PCDF is hereby **quashed**. It will be open to the respondents to proceed against the petitioner afresh from the stage of the charge"sheet in the manner indicated in this judgment. If the respondents elect to proceed afresh against the petitioner, the award of gratuity would await the outcome of

disciplinary proceedings taken de novo. The employee's provident fund, group insurance and dues on account of leave encashment shall be paid to the petitioner forthwith, irrespective of the fact, if fresh proceedings are taken against the petitioner or not. If no fresh proceedings are taken against the petitioner, the gratuity due shall also be paid on the basis of the pay scale, to which the petitioner was entitled prior to the order impugned.

16. In the event, the respondents elect to pursue fresh proceedings, the same shall be expedited and concluded within a period of four months next. In the event of fresh proceedings being taken, it will not be open to the respondents to impose a penalty, higher than that awarded by the impugned order dated 10.03.2016, since quashed by this judgment.

17. There shall be no order as to costs.

18. Let this order be communicated to the Chief General Manager, Pradeshik Cooperative Dairy Federation Limited, Lucknow and the Managing Director, Pradeshik Cooperative Dairy Federation Limited, Lucknow through the learned Civil Judge (Sr. Div.), Lucknow by the Registrar (Compliance).

(2024) 12 ILRA 230
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE
THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 3538 of 1982

Smt. Kela & Anr. ...Petitioners
Versus
Jahangir Singh & Ors. ...Respondents

Counsel for the Petitioners:
Virendra Singh, Deoraj Singh, Devendra Dahma, K.M. Garg

Counsel for the Respondents:

K.M.L. Nigam, A.S. Diwaker, Rajiv Asthana,
S.C., Sudhir Kumar Pandey, Syed Ashraf Ali

A. Code of Criminal Procedure, 1973 - Section 145 - Decision by criminal court - Decision by Civil Court - Effect of findings returned in proceedings under Section 145 Cr.P.C. - a decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court - Findings returned in proceedings U/s 145 Cr.P.C. are not binding on a Civil Court. The Civil Court is to decide the issue on merit i.e. on basis of pleadings and evidence in regard to possession of land in dispute. (Para 21)

B. Civil Law - Family Settlement - Whether Registration Required - Scope of Oral Vs Written Arrangements - Applicability of Res Judicata - Civil Procedure Code, 1908 — Principles of Res Judicata, Section 11 - Registration Act, 1908 - Section 17, Documents of which registration is compulsory - Section 49, Effect of non-registration of documents required to be registered - A family arrangement / settlement can be oral, and no question of registration arises if there is no written document - If the arrangement is reduced into writing merely as a memorandum of what has already been orally settled and acted upon, it does not require registration, even if the property value exceeds ₹100 - If the terms were 'reduced to the form of a document' and, the value was Rs 100 or upwards, registration is necessary. Absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document - Dismissal of suit as withdrawn - if a suit is dismissed as withdrawn, without adjudication on merits, proceedings taken therein including judgment passed by trial Court is wiped out, and such withdrawal does not attract the bar of res judicata under Section 11 CPC. Petitioners argued that the Revisional Officer in 1969, u/s 59/61 of the U.P. Land Revenue Act, 1901 already held the family settlement

inadmissible. However, the Court held that since the earlier suit had been dismissed as withdrawn, no adjudication on merits had taken place, and therefore, no finding could operate as res judicata. (Para 22, 23, 24, 25)

Dismissed. (E-5)

List of Cases cited:

1. Kale and otehrs Vs D.D.C. & ors., AIR 1976 SC 807
2. Bishnudeo Narain & anr. Vs Seogeni Rai & ors., AIR 1951 SC 280
3. Banarasi & ors. Vs Ram Phal, 2003 (94) RD 541
4. R.S.R.T.C. & anr. Vs Bajrang Lal, (2014) 4 SCC 693
5. Budhlal & anr. Vs D.D.C., Gorakhpur, 1982 RD 324.

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

1. Heard Sri K.M. Garg, learned counsel for petitioners and Sri Syed Ashraf Ali, learned counsel for respondent no.1.

2. In the present case, contesting original respondent has filed a Suit under Section 229-B of U.P.Z.A. and L.R. Act, 1950 (for short "Act of 1950") against original Petitioners-1 and 2 for declaration that he was a co-tenure holder in suit property with defendants. The Suit was dismissed vide order dated 23.06.1970. In said Suit, following 5 issues were framed :-

"1. Whether plaintiff is co-tenure holder with defendants no. 1 and 2 in the land in suit?

2. Whether defendants no. 1 and 2 are sole sirdar in the land in suit?

3. Whether suit is barred under Order IX Rule 8 CPC?

4. Whether suit is barred by res-judicata?

5. What relief, if any, is the plaintiff entitled?"

3. Issues No. 3, 4 and 5 were not pressed and only issues no. 1 and 2 were decided. For reference, relevant part thereof is quoted below :-

"The first point to be seen is whether plaintiff can acquire sirdari rights by succession as son of Budha because Budha was admitted as tenant of this land. In my opinion, Budha was tenant of this land and so far his death, plaintiff automatically became sirdar of this land. However, the plaintiff has not reported succession as required by U.P. Land Revenue Act and so the Court is precluded for taking cognizance of the case on this point because it is barred under Section 34(5) of U.P. Land Revenue Act. No doubt, the defendants have not taken any objection on this point but this being a legal point and so it has been taken. Plaintiff is said to have filed an application but there is no document to support it. Therefore, the claim of the plaintiff as sole sirdar of the land cannot be recognized. Besides has not pressed this point seriously but has raised his claim on the basis of the compromise and admission. The compromise is dated 06.06.1956. On this date, the Tenancy Act was in force. Therefore, this compromise as best can mean that the plaintiff recognized defendants no.1 and 2 as co-tenant and defendants no. 1 and 2's father recognized the plaintiff as co-tenant. During the continuance of the Tenancy Act, this co-tenancy could not be recognized, in view of the bar created by Section 33 provisions of U.P. Tenancy Act because the Zamindar

was not a party to it. Besides, the compromise was not recognized by Sri B.S. Kaushik, Judicial Officer vide his order dated 22.01.1966. It is placed on behalf of the plaintiff that this suit was withdrawn and so I think the point loses its significance. This compromise is Ex.Ka.-1. This compromise deed has been challenged by defendants no.1 and 2 under the circumstances it was necessary for the plaintiff to have sent this document to some expert for the comparison of thumb mark of Hoop Karan deceased. As given in this document with the admitted document of Hoop Karan. This felicitation deed or compromise is silent about the land revenues payable on this land. This was necessary with a view to decide the valuation of this land coupled with the fact if it requires registration or not. This document was not produced by the plaintiff in case u/s 145 Cr.P.C. in between him and father of defendants no. 1 and 2. Therefore, this document cannot be treated as genuine and in case conferring any title on the plaintiff. The next point is the admission of Smt. Nanhi the then tenant of this land. It is a settled law that there is no admission against legal pleas. When co-tenancy cannot be conferred or recognized by act of parties in the form of compromise, it cannot be recognized on the basis of admission. Therefore, then admission plea will also not help the plaintiff. Therefore, in view of above discussion, plaintiff cannot become sirdar either by succession or by compromise or by admission. Apart from these facts plaintiff has any right after the death of Budha it was necessary for him to file a declaratory suit after reporting succession as required u/s 34 U.P. Land Revenue Act challenging the compromise can admission of the then Zamindar Abbas Hussain because there could not be any super imposition of tenancy over the land

of Jahangir Singh. The act of zamindar could be void u/s 4 of the Tenancy Act. When any compromise restricts a tenant from enforcing his legal rights. Therefore, the plaintiff has no case on the three points referred to above. The fact of possession will not help the plaintiff much because this land became subject of litigation in between the contesting parties after death of Budha in proceedings u/s 145 Cr.P.C. this land was declared to be in possession Hoop Karan. Under these circumstances, the plaintiff was absolutely out of possession ever since 1957. When he was declared as such by the S.D.M. under these circumstances of the plaintiff claims the sole sirdari rights, he should have filed a suit for ejectment against the defendants no.1 and 2 as his tenant. This means that plaintiff was ousted from this land and his rights if any are extinguished by the adverse possession of Hoop Karan and after him his heirs. I, therefore, hold that plaintiff is not co-tenure holder along with defendants no. 1 and 2 in this land but defendants no.1 and 2 are sole sirdars of the same. Both the issues are decided accordingly.”

4. Original respondent-1/plaintiff filed an Appeal before Additional Commissioner which was allowed, vide order dated 30.09.1972. Its relevant part is quoted below :-

“अपीलकर्ता की ओर यह तर्क किया गया कि अवर न्यायालय ने बुद्ध का असल कास्तकार सही रूप से माना था और इसी प्रकार वादी अपील कर्ता वो बुद्ध सिंह का लड़का है उसको विवादित भूमि में वारिस के अधिकारी मिले। यह भी तर्क किया गया कि अवर न्यायालय का यह निर्णय कि दावा 34(4) एकट मालगुजारी से वादित वादित था। गलत क्यो कि बुद्धा सिंह की मृत्यु जमींदारी उन्मुलन के पूर्व हो गयी और उस समय धारा 34(5) एकट मालगुजारी दाखिल खारिज का प्रार्थना पत्र देना आवश्यक नहीं था। यह भी तर्क नहीं किया गया कि कथित पारिवारिक फैसला एकजीवित

1 को गलत रूप से रिक्त न होना निर्णय किया गया। इस विपरीत पत्यपक्षी की ओर से यह तर्क किया गया कि अपीलकर्ता ने विरासतन विवादित भूमि मे अपने को सह कृषक नहीं कहा है बल्कि 6.6.56 के पारिवारिक फैसले के आधार पर ही अपना अधिकार बताया है। यह तर्क किया गया कि वादी ने अपने वाद मे बुद्धा की मृत्यु की कोई समय नहीं लिखा अतएव यह नहीं कहा जा सकता कि बुद्धा की मृत्यु जमींदारी विनाश से पहले हुई या बाद में।

5. पत्रावली का अवलोकन से यह स्पष्ट है कि आरम्भ में विवादित भूमि का कृषक बुद्धा सिंह पिता व वादी था जैसा कि उद्धरण खतौनी 1355 में अंकित है जिसमें बुद्धा सिंह असल कास्तकारण दर्ज है। वादी ने अपने वाद पत्र के पैरा नं० 1 में यह अंकित किया है अपने पिता बुद्धा सिंह के मरने पर यह विवादित भूमि पर जमींदारी उन्मुलन से पूर्व काबिज व दाखिल होकर कास्त कर रहा है। इस प्रकार बुद्धा सिंह की मृत्यु पत्र में जमींदारी विनाश के पूर्व अंकित है वादी के गवाहान नं० 1 अहमद हुसैन व गवाह नं० 2 जहागीर सिंह के कथनों से यह स्पष्ट है कि बुद्धा सिंह की मृत्यु जमींदारी विनाश से पूर्व हुई अतः बुद्धा सिंह की मृत्यु के बाद वादीकर्ता विवादित भूमि का कृषक हो गया 1958 ए० डब्लू० आर० (रेवन्यू) पृष्ठ 34 में दाखिल खारिज का प्रार्थना पत्र देने से कोई आवश्यकता नहीं थी अतः अवर न्यायालय का यह निर्णय की वाद धारा 34(5) से वांछित है गलत जान पड़ता है। ऐसी कोई आपत्ति प्रतिवादी की ओर से उठायी भी नहीं गयी थी। पत्रावली पर दिये हुये विभिन्न प्रपत्रों से यह स्पष्ट है कि विवादित भूमि के बारे में वादी के पति वादी 1 व 2 के मां बाप के बीच काफी मुकदमें बाजी हुई ऐसा प्रकट होता है कि अब्बास हुसैन जो विवादित भूमि के जमीनदार थे उन्होने विना किसी आदेश के 1360 फसली की खतौनी मे अपना नाम मद नं० 3 में दर्ज करा दिया और उसके बाद एक मिला जुला वाद हुबकरण की ओर से दायर किया गया वहां पर यह उल्लेखनीय है कि हुबकरण का नाम बुद्धा के जीवन काल में कभी अंकित नहीं हुआ लेकिन हुबकरण के दावा यू० पी० टेनेन्सी एकट की धारा 63 के अन्तर्गत अब्बास हुसैन जमींदारी के विरुद्ध योजित किया और 2.4.55 के आदेश द्वारा यह वाद डिक्ली हुआ इस दावे में अब्बास हुसैन ने हुबकरण का दावा तसलीम किया था और उसी तसफिये के आधार पर डिक्ली हुई जान पड़ती है ऐसा प्रतीत होता है कि अब्बास हुसैन ने यह तसफिया हुबकरण से मिल जुल कर दिया था जहांगीर सिंह अपीलकर्ता उस वाद में पक्ष नहीं था अतः वह डिक्ली बाध्य नहीं कर सकती और उसका कोई असर इस वाद पत्र पर नहीं है।

6. प्रतिवादी के गवाह संख्या 1 व 2 मे भली भांति साबित किया है पारिवारिक फैसला एकजीवित क-1 पंचायत द्वारा कराया गया था और उस पर हुबकरण का अंगूठा मौजूद है। प्रतिवादीगण 1 व 2 के उस पारिवारिक फैसले से इन्कार किया

परन्तु यह उनका कार्य था कि यह साबित करते कि उनको मिला हुबकरण का अंगुठा इस पर नहीं है इस बात की पुष्टि की यह पारिवारिक हुआ था श्रीमती नन्ही जो प्रतिवादीगण की मां है की स्वीकृत दिनांक 10.6.60 जिसकी प्रतिलिपि पत्रावली पर है होती है श्रीमती नन्ही हुबकरण की वेवा और प्रतिवादीगण 1 व 2 की मां है ओ कुल काल तक विवादित भूमि कि सह कृषक भी रही है और उसके कराओं के कराने के बाद ही प्रतिवादी गण को विवादित भूमि में अधिकार मिले है इस स्वीकृत दिनांक 10.6.60 में नन्हीं ने वादी जहांगीर के संशोधन के प्रार्थना पत्र को सही माना था और उसको विवादित भूमि को 1/2 भाग पर अंकित किये जाने का अनुरोध किया था अतः यह पारिवारिक फैसला एकजीविट क-1 भली प्रकार साबित होता है इस बात को कोई प्रभाव नहीं कि 6.6.59 को जब पारिवारिक फैसला हुआ था जब विवादित भूमि की मालियत सौ रुपये अधिक थी अतएव एकजीविट क को रजिस्ट्री कराना आवश्यक नहीं थी।

7. अतः पत्रावली से यह साबित है कि प्रारम्भ में जहांगीर से ही वादी को विवादित भूमि पर एक मात्र कृषक होने के अधिकार प्राप्त थे परन्तु पारिवारिक फैसले द्वारा उसने हुबकरण को सह कृषक मान लिया और वह दोनों विवादित भूमि के सह कृषक हो गये अतः वादी विवादित भूमि का सह कृषक प्रतिवादीगण 1 व 2 के साथ भली भांति साबित होता है। प्रत्यर्थी की ओर से यह तर्क किया गया कि विवादित भूमि पर वादी का कब्जा साबित नहीं होता है। अतः आर० डी० 1972 पृष्ठ 251 में निर्णय की गयी नजीर के अनुसार उसका वाद धारा 42 एस० आर० एक्ट से बाधित है खसरा 1362 व 64 में जहांगीर का कब्जा अंकित है ऐसा प्रतीत होता है कि धारा 145 के बाद में 9.8.57 को परगनाधिकारी ने विवादित भूमि का कब्जा हुबकरण के पक्ष में तय किया था। परन्तु यह वाद सह खातेदारी का है ताकि एह मात्र खातेदारी का अतः हुबकरण अथवा प्रतिवादी एक व दो का कब्जा सह कृषक जहांगीर सिंह का कब्जा माना जायेगा अतः कब्जे का प्रश्न इस वाद में मौलिक नहीं है और वादी अपीलकर्ता को सह कृषक घोषित किया जाना चाहिए तथा अपील स्वीकार होने योग्य है।"

5. Original petitioners being aggrieved by above order, thereafter, have filed a Second Appeal before Board of Revenue which was dismissed vide order dated 01.02.1982. Its relevant part is quoted below :-

"7. I have examined carefully the judgments of both the Courts below and the record of the case in the light of the

arguments advanced on behalf of the parties. First I would like to deal with the points which have been put forth on behalf of the appellants raising a contention that the suit was barred. The learned lower appellate court has held that Budha Singh, the father of the plaintiff-respondent Jahangir Singh had died before the abolition of Zamindari, and therefore, it was not mandatory for Jahangir Singh to move an application for mutation and consequently the suit was not barred under sub-Section 5 of Section 34 of the U.P. Land Revenue Act. Further, from the trial Court's record, it is clear that Jahangir Singh had moved an application for correction of papers in suit no. 11 of 1960. This fact is not denied by the appellants. In view of the aforesaid findings of the lower appellate Court and above fact there is no force in the contention that the suit was barred under provisions of Section 34(5) of U.P. Land Revenue Act.

A perusal of paragraphs 1, 2 and 3 read with sub part of para 6 of this plaint filed by Jahangir Singh makes it clear that the plaintiff had not only claimed his title and possession over the land in suit but he had also sought a declaration from the trial Court regarding his rights and possession as the sirdar of the land in suit. Under these circumstances, the present suit cannot be governed by the ruling cited by the learned counsel for the appellants. Considering the facts stated in the plaint and the evidence led on behalf of the plaintiff in the trial Court, there is no force in the contention that the suit was barred under Section 42 of the Specific Relief Act.

8. As regards, the question whether the suit was barred due to declaration under Section 145 Cr.P.C. and continuous possession of the appellants for more than 12 years, it would be discussed in the following paragraph as it is related to

the compromise between the parties dated 06.03.1956.

9. Now coming to the compromise dated 06.06.1956, it may be stated that the plaintiff had claimed his rights of title and possession to the land in suit mainly on the basis of this compromise. This compromise was accepted by Nanhi, the mother of the appellants who had come into possession of the land in suit after the death of her husband, Hoop Karan. She was therefore, competent to make an admission in regard to the land in dispute and the appellants who had come into possession of the land in suit after the death of her husband, Hoop Karan. She was therefore, competent to make an admission in regard to the land in dispute and the appellants who were not holding the title and possession of the land in dispute were not required to be party in the suit under Section 33 of the Land Revenue Act and therefore the acceptance of the compromise by Nanhi in that suit could not be questioned or ignored merely on the basis that the appellants were not parties to that suit. On behalf of the respondents, it has been explained that the compromise was in respect of land having less than Rs. 100/- as rent and therefore, its registration was not compulsory according to the then provisions of U.P. Tenancy Act. This contention has not been controverted by the appellants in the courts below. Further no copy of the compromise deed has been filed. In the absence of any written compromise, it is not possible to judge the exact nature and implication of that compromise. The only fact that clearly emerges from the evidence on record in regard to that compromise is that the plaintiff, Jahangir Singh and Hoop Karan and later on his successor, Nanhi and then the two appellants had half share each in the land in dispute which act of both the

appellants. This fact in itself does not correct that the compromise to be valid should have been registered under Section 17 of the Registration Act. In any case, its acceptance by Nanhi in a suit under Section 33 of the U.P. Land Revenue Act was fine so far as the rights regarding title and possession of Jahangir Singh of the land in dispute were concerned. The learned Additional Commissioner has examined at great length the inclusions of this compromise then reversed the findings of the learned trial Court, cannot be sustained for the reason as clearly stated by the learned Additional Commissioner paras 5 and 6 of his judgment. 11, 10 Now coming to the question whether the suit was barred by adverse possession and limitation in view of orders under Section 145 Cr.P.C. I am inclined to agree entirely with the learned Additional Commissioner that the question of possession is not so significant because of co-tenancy of the parties in the land in suit. As stated earlier, the suit was filed in the year 1956 after the first appeal against the decision of the trial Court dated 19.03.1966 had been decided on 04.12.1966. Thus, the suit was within prescribed period of limitation. As regard, the contention that the suit was barred by res-judicata, I afraid it has no force. Since the lower appellate Court had allowed a fresh suit to be filed treating the earlier suit as withdrawn, the principle of res-judicata would not apply in such circumstance. The appellants have failed to show if any adjudication in regard to the title and interest of the parties in regard to the title and interest of the parties in regard to the land in suit had been done by the courts in the aforesaid suit and the first appeal. In the absence, any such fact being established. The appellants cannot be permitted to claim the benefit of res-judicata specially when this was not pressed other before the trial

Court of before the learned Additional Commission in his appeal.

10. In view of the discussion and findings given in the earlier paragraphs, I am of opinion that the appellants have failed to make out any case exclusively in their favour either on the basis of the alleged and exclusive adverse possession over the land in suit supported by a decision under Section 145 Cr.P.C. or any other grounds.

11. In the result, I find that second appeal has no force and it is hereby dismissed.”

6. Above referred orders passed by First Appellate Court and Second Appellate Court are impugned in this writ petition.

7. Learned counsel for petitioners has submitted that Hoob Karan, father of petitioner-2 has earlier filed a suit for declaration under Section 59/63 of Act of 1939 which was decreed vide order dated 23.04.1955 that Hoob Karan was a hereditary tenant. The suit was decided on basis of a compromise. During said suit proceedings, respondent-1 has filed an objection, however, it was rejected.

8. Learned counsel has further submitted that Jahangir Singh, respondent-1 has also filed a suit to declare him a co-tenant which was dismissed for want of prosecution on 28.09.1963. A restoration application filed was also dismissed and thereafter an appeal was filed, which also got dismissed on 06.03.1964. Respondent-1 has also filed another suit under Section 59/63 of Act of 1939 to declare him co-tenant, however, said was dismissed as withdrawn vide order dated 19.03.1969.

9. Learned counsel has further submitted that despite earlier attempt of

original respondent-1 for declaration, was failed, still, he has filed a fresh suit in the year 1969 and present writ petition is outcome of said suit.

10. Learned counsel has further submitted that there were multiple criminal cases between Jahangir Singh and Hoop Karan and proceedings under Section 145 Cr.P.C. was drawn and vide order dated 09.08.1957, it was held that property in dispute was in possession of Hoop Karan and his son was restrained to interfere in his possession.

11. Learned counsel has further submitted that Hoop Karan died in the year 1958 and his wife Nanhi immediately thereafter remarried and as such land in dispute was inherited by petitioners as minor daughters. Nanhi wife of Hoob Karan has no right to file any compromise and settle respondent-1 as co-tenant.

12. Learned counsel has further referred extract of Khatauni 1360-F shows that land in dispute is within municipal limits and it was recorded in the name of Abbas Hussain @ Jindu and in 1365-F, the land in dispute was recorded in the name of Hoop Karan which indicates that Jahangir Singh was not in possession.

13. Learned counsel has further submitted that suit was filed by respondent-1 on basis of an alleged unregistered agreement dated 06.06.1956. Said agreement was never acted upon and being an unregistered agreement, it was not admissible and no presumption could be drawn. The petitioners have filed an application during suit proceedings that unregistered alleged agreement was not only inadmissible but in previous litigation, it was also held inadmissible in evidence.

Learned counsel has further referred a death certificate dated 22.09.2003 which shows that father of Jahangir Singh viz. Buddha died on 11.09.1956 i.e. after Act of 1950 came into force and since he has not reported the succession in terms of Section 34(1) of Act of 1939, the suit was barred by Section 34(5) of said Act.

14. Learned counsel has also referred orders passed in proceedings under Section 145 Cr.P.C. which was decided on 09.08.1957 that at that time, possession of petitioners was found on land in dispute. Family arrangement was inadmissible in evidence for want of compulsory registration.

15. In support of his submissions, learned counsel has placed reliance upon judgments of Supreme Court in **Kale and otehrs vs. D.D.C. and others, AIR 1976 SC 807, Bishnudeo Narain and another vs. Seogeni Rai and others, AIR 1951 SC 280, Banarasi and others vs. Ram Phal, 2003 (94) RD 541 and R.S.R.T.C. and another vs. Bajrang Lal, (2014) 4 SCC 693** as well as judgment of this Court in **Budhlal and another vs. D.D.C., Gorakhpur, 1982 RD 324.**

16. Learned counsel for respondents has submitted that suit filed by respondent-1 was wrongly dismissed by trial Court, however, First Appellate Court has rightly interfered with a reasoned order and decreed the suit and therefore, a Second Appeal filed by the petitioners was rightly dismissed.

17. Learned counsel has further submitted that any finding returned during proceedings U/s 145 Cr.P.C. are not binding on civil proceedings or revenue proceedings.

18. Learned counsel has referred paragraph 5, 6 and 7 of judgment passed by First Appellate Court that Buddha was काश्तकार and his name was recorded in 1355-F. After his death respondent-1 was in possession of land in dispute and used the land as काश्त before Act of 1950, therefore, he would not require to report for mutation under above referred provisions. Name of Hoop Karan was only recorded during lifetime of Buddha. The family agreement dated 06.06.1956 was proved and since it was only for purpose of preparing the recital of shares already distributed, therefore, no registration was required.

19. Heard learned counsel for parties and perused the record.

20. First issue to consider is what would be the effect of findings returned in proceedings under Section 145 Cr.P.C. that Hoop Karan alone was in possession as on 09.08.1957. In this regard, the Court takes note of a judgment passed by Supreme Court in **Shanti Kumar Panda vs. Shakuntala Devi, (2004) 1 SCC 438** that a decision of Criminal Court does not bind the Civil Court and its relevant part are being quoted below :-

“15. It is well settled that a decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. (See Sarkar on Evidence, 15th Edn., p. 845.) A decision given under Section 145 of the Code has relevance and is admissible in evidence to show: (i) that there was a dispute relating to a particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment under Section 146(1), on the given date; and (iv) that the Magistrate

found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession though, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate's order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court.

16. In *Bhinka v. Charan Singh* [AIR 1959 SC 960 : 1959 Cri LJ 1223] this Court held that the Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. His order is a temporary order irrespective of the rights of the parties, which will have to be agitated and adjudicated upon by a competent forum and in the manner provided by law. The life of the said order is coterminous with the passing of a decree by a civil court and the moment a civil court makes an order of eviction, it displaces the order of the criminal court. The orders under Section 145 of the Code are thus merely police

orders and do not decide any question of title.

17. We would like to clarify that in the case of *Bhinka* [AIR 1959 SC 960 : 1959 Cri LJ 1223] the question — what is a competent court, did not arise for determination; nor did the question as to what is the weight and value to be assigned to or what is the efficacy of the order of the Magistrate in a subsequent suit or proceeding initiated before a competent court directly arise for consideration. This we say because it is also well settled that Sections 145 and 146 nowhere specifically provide for the order of the Magistrate being subject to and superseded by only a decree of “civil court”. The words “competent court” used in Section 146(1), in the context in which they have been used, only mean “any court which has jurisdictional competence to decide the question of title or rights to the property or entitlement to possession based on right or title to the property though the court is not necessarily a civil court”. The words “until evicted therefrom in due course of law” as occurring in sub-section (6) of Section 145 mean the eviction of the party successful before the Magistrate, consequent upon the adjudication of title or right to possession by a competent court; that does not necessarily mean a decree of eviction. The party unsuccessful before the Magistrate may dispute the correctness of the finding arrived at by the Magistrate and is at liberty to show before the competent court that it had not dispossessed the successful party or that it is the unsuccessful party and not the successful party who was actually in possession and the finding to the contrary arrived at by the Magistrate was wholly or apparently erroneous and unsustainable in law.

18. In *Jhummal v. State of M.P.* [(1988) 4 SCC 452 : 1988 SCC (Cri)

974] this Court has held that a concluded order under Section 145 CrPC, made by a Magistrate of competent jurisdiction should not be set at naught merely because the unsuccessful party has approached the civil court. An order made under Section 145 CrPC, deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to decision of the civil court. The unsuccessful party, therefore, must get relief only in the civil court. He may move the civil court with a properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil court has jurisdiction to give a finding different from that which the Magistrate has reached. Here again we may hasten to add that the expression “civil court” used by this Court in *Jhummal case* [(1988) 4 SCC 452 : 1988 SCC (Cri) 974] means competent court and not necessarily a civil court as commonly understood.”

21. In aforesaid circumstances, Court is of considered opinion that findings returned in proceedings U/s 145 Cr.P.C. are not binding on a Civil Court. The Court will decide the issue on merit i.e. on basis of pleadings and evidence in regard to possession of land in dispute.

22. Second issue for consideration is effect of alleged family settlement dated 06.06.1956 i.e. whether it requires registration or not. In this regard, learned advocates for rival parties have referred judgment of Supreme Court in *Kale* (supra) wherein it was held as follows :-

“20. A Full Bench of the Allahabad High Court in *Ramgopal v. Tulshi Ram* [AIR 1928 All

641, 649 : 26 ALJ 952] has also taken the view that a family arrangement could be oral and if it is followed by a petition in court containing a reference to the arrangement and if the purpose was merely to inform the court regarding the arrangement, no registration was necessary. In this connection the Full Bench adumbrated the following propositions in answering the reference:

“We would, therefore, return the reference with a statement of the following general propositions:

With reference to the first question:

(1) A family arrangement can be made orally.

(2) If made orally, there being no document, no question of registration arises.

With reference to the second question:

(3) If though it could have been made orally, it was in fact reduced to the form of a “document”, registration (when the value is Rs 100 and upwards) is necessary.

(4) Whether the terms have been ‘reduced to the form of a document’ is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not ‘reduced to the form of a document’, registration was not necessary (even though the value is Rs 100 or upwards); and while the writing cannot be used as a piece of evidence for what it may be worth, e.g. as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were ‘reduced to the form of a document’ and, though the

value was Rs 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document.””

23. Learned counsel for petitioners has referred a decision dated 19.03.1969 passed by Revisional Officer in a Suit filed by respondent-1 under Section 59/61 of U.P. Land Revenue Act, 1901 wherein on issue of admissibility of family settlement an order was passed that it could not be admissible in evidence though it has not been disputed that suit was subsequently dismissed as withdrawn vide order dated 19.03.1969.

24. On a question that whether said finding on compromise would be final on issue and would raise a bar of res-judicata, the Court considers the discussion made by Second Appellate Court that petitioners have failed to show that any adjudication in regard to title and interest of parties was decided in said suit. Said suit was dismissed as withdrawn, therefore, any finding returned therein would not act as a res-judicata. In this regard, a reference is taken of a judgment passed by Supreme Court in **Sri Ramchandra Mission and another vs. P. Rajgopalachari and others, (2008) 15 SCC 533** and its relevant paragraph is quoted below :-

“12. It is pointed out that the earlier suit having direct effect was withdrawn and the effect of it has to be considered. The effect of the withdrawal of a suit has been considered by this Court in *K. Sivaramaiah v. Rukmani Ammal* [(2004) 1 SCC 471] . It was inter alia observed as follows : (SCC p. 475, para 5)

“5. So far as Original Suit No. 7359 of 1989 is concerned, the findings recorded in the judgment therein could have constituted res judicata but the fact remains that the appellate court permitted the withdrawal of the suit and once the suit has been permitted to be withdrawn all the proceedings taken therein including the judgment passed by the trial court have been wiped out. A judgment given in a suit which has been permitted to be withdrawn with the liberty of filing a fresh suit on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to such permission of the court.””

25. From Ramchandra Mission (supra), it is evident that if a suit is dismissed as withdrawn, proceedings taken therein including judgment passed by trial Court would be wiped out whereas admittedly in present case, the suit was dismissed as withdrawn without any judgment on merit as well as order dated 22.01.1966 passed in said suit has only referred that since value of land involved in family settlement was more than Rs. 100/-, therefore, it is required registration, which could be considered as a trial order passed on merit.

26. So far as issue in terms of Kale (supra) that on basis of contents of family settlement that whether it requires registration or could still be considered, therefore, by said order, requirement of res-judicata was not fulfilled, therefore, it would not be barred for trial Court, to consider whether said document requires registration or not. The plea of res-judicata was rightly rejected by Trial Court and by Second Appellate Court. Nanhi has accepted the family settlement/compromise as well as it was also not correct to contend that property was valued more than Rs.

100/- as well as that even it was valued more than Rs. 100/-, still, since by said document, shares of party which were already accepted and acted upon were recorded, therefore, no registration was required.

27. The issue no.3 before trial Court i.e. whether suit was barred under Order IX Rule 9 CPC was not pressed. Order IX Rule 8 CPC provides procedure where defendants only appear. Order IX Rule 9 CPC provides decree against plaintiff by default bars fresh suit i.e. if a suit is wholly or partially dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside. However, in present case, the suit was dismissed for want of prosecution on 28.09.1963 though the order is not on record.

28. As referred above, a factor would go against petitioners that said issue was not pressed during suit proceedings when it was dismissed. Even it was not raised specifically in second appeal. Therefore, despite above provisions, petitioners will not get any help from it.

29. Last issue for consideration is if the condition prescribed U/s 34 (1) of Act of 1901 was not complied with whether in view of Section 34(5) of Act of 1901, no suit could be filed.

30. In this regard, Court takes note of findings returned that father of respondent-1 Buddha died before Act of 1950 came into force, therefore, he was not required to report in terms of Section 34(1) of Act of 1901. The Court takes note that by way of filing supplementary affidavit, petitioners have brought on record a death certificate

of Buddha that he died after Act of 1950 came into force, however, said document has been placed for first time before this Court, therefore, it has not been considered by trial Court, First as well as Second Appellate Courts.

31. In view of above, in writ jurisdiction, said document cannot be verified or scrutinized. No material was produced before Revenue Courts that Buddha died after enforcement of Act of 1950.

32. In aforesaid circumstances, Court is of considered opinion that all arguments raised in this writ petition have no force, therefore, this Court does not find any ground to interfere with impugned order, hence, writ petition stands **dismissed**.

(2024) 12 ILRA 241
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE
THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 4242 of 1982

Dindyal & Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:

H.O.K. Srivastava, A K Rai, Ashish Kumar Ojha, H.M. Srivastava, H.N. Srivastava, M. Kumar, Narendra Kumar, Neeraj Srivastava, Salilendu Kr. Upadhyaya, Shailendra Kumar Verma, Vineet Kumar Singh, Vishnu K.Rai

Counsel for the Respondents:

V.K.S. Chaudhary, A.N. Singh, Akhilesh Singh, Ashok Yadav, Awdhesh Singh,

Km.Akanksha Yadav, Mahendra Nath Pandey, Manjari Singh, Prem Prakash, S.C.

Krishna Rai (dead) through LRs Vs Banaras Hindu University through Registrar & ors., (2022) 8 SCC 715

Tenancy Law - Maintainability of Suit - Applicability of Government Grants Act, 1895 (as amended by U.P. Amendment Act, 1960) - Section 2 - Exclusion of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 - Section 2 of Government Grants Act explicitly provides that the provisions of the Transfer of Property Act, 1882 - U.P. Tenancy Act, 1939, and Agra Tenancy Act, 1926 shall not apply to grants made by or on behalf of the Government, and such Grants will operate notwithstanding anything contrary contained in these Tenancy laws - It is well settled that there can be no estoppel against law. Issue of maintainability of a suit can be considered at any stage of the proceedings. In the present case, land in dispute was given on Grant to ancestors of plaintiffs, therefore, any right would be accrued only in terms of recital of Grant as well as in terms of Crown Grants Act (later on known as Government Grants Act). the Trial court did not address the issue of maintainability, however the First Appellate Court rightly held that the plaintiffs' suit was barred under the Government Grants Act, 1895 (as amended by the U.P. Amendment Act, 1960), as the plaintiffs' rights were based on the U.P. Tenancy Act, 1939, which was excluded by Section 2 of the Government Grants Act. All suits were dismissed under Order VII Rule 11 CPC. Board of Revenue in second appeal, despite acknowledging that the Government Grants Act excluded the tenancy laws, wrongly held that "other provisions" of the Tenancy Acts could still apply without specifying grounds or statutory basis. That was held to be a self-contradictory, perverse, and illegal conclusion. Writ petition allowed; impugned order of the Board of Revenue is set aside. (Para 16, 17)

Allowed. (E-5)

List of Cases cited:

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In present case, original respondent - 3 has filed 5 suits bearing Suit Nos. 18, 19, 20, 21 and 22 of 1954 under Section 175 of U.P. Tenancy Act, 1939. Suits were directed against different defendants and in regard to different plots. According to plaintiffs, they were sir-holders of plots whereas defendants were their sub-tenants and they were liable for ejectment.

2. Later on, on 29.09.1956, plaintiffs applied for amendment of pleadings, which was allowed that they were occupancy tenants of land in dispute since it was given to their ancestors as a grant. The defendants of all suits contested that they are not sub-tenants of plaintiffs and have acquired hereditary rights and suits are barred by limitation. They have challenged the plaintiff's title also. In the suit, following 6 issues were framed :-

"1. Whether defendants is a subtenant of the plaintiff liable to ejectment u/s 175 U.P. Tenancy Act?

2. Whether plaintiff occupancy tenants of the land in suit?

3. Whether the suit is within time?

4. Whether the land in suit is demarcable?

5. Whether Itwari is a necessary party?

6. Should these suits be stayed under Provisions of Section 10 of U.P. Agricultural Tenants Acquisition of Privileges Act?"

3. Trial Court vide order dated 30.09.1958, dismissed the Suit No. 18 and 21. Suit Nos. 19 and 20 were decreed in part and Suit No. 22 was decreed in its entirety.

4. Trial Court held that plaintiffs were occupancy tenants of all lands involved in five suits. In Plot Nos. 12, 18, 20, 32, 16 and 26 defendants were held as "*bila tasnia*". Relevant finding in regard to issue no. 1 is quoted below :-

"In suit No. 18 plaintiff have sued Ratiram Punni for ejectment from plot no. 20. In 1352F and 1359F Khatauni Ratiram is shown as holding this land bila tasnia is commencing from 1352 F. plaintiff Ujagar Singh stated that Pumi was admitted to this land but Punni name as holding it never appeared in the Khatauni Ratiram has entered the witnesses box and denied this fact. hence I am unable to believe that Ratiram was over admitted as subtenant of plot no.201 Therefore in respect of Plot No. 20 I hold that Rati Ram is not a subtenant. Issue No. 2 in respect of suit No. 18 is answered in the negative.

In the suit No. 19 plaintiffs have sued Moti, Mauji, Chotey and Itwari in respect of plots 4,31 ani 32. Out of these plots 4, 31 and 32 are recorded as subtenants at Rs. 46/- rent in 1359 F with 17 years and 12 years duration respectively. Ujagar Singh and his witnesses have said that these persons were admitted as subtenants. None of the defendants have entered the witness box to rebut that statement. Hense the oral evidence of plaintiffs coupled with entries in Khatauni proves that defendants are subtenants of plaintiffs in respects of plot 4 and 31. In respect of plot no. 32 defendants are recorded as bila tasfia tenants. Therefore I hold that defendants are not subtenants of

plot no. 32. Issue No. 1 in respect of Suit No. 19, in respect of plots 4 and 31 is answered in the affirmative, while in respect of lot no. 32 it is answered in the negative.

In suit No. 20 plaintiffs have sued Lachman and Dharamjit and Neku in respect of plots no. 7,9,25,20,10,16, and 26. In Khatauni of 1350 F and 1359 F defendants are recorded as subtenants at Rs. 50/- rent in respect of plots 7,9,25,29 and 10 while in respect of plots 16 and 26 they are recorded as bila tasfia tenants from 1352 F. None of these defendants have entered the witness box to rebut the plaintiffs evidence about contract of subtenancy. Therefore, I hold that defendants are subtenants of plot no. 7 , 9, 10,25 and 26 atleast. Because the plots 16 and 26 are entered as bila tasfia am unusual to believe that these plots were let out to defendants consequently. Issue no. 1 is answered in the affirmative in respect of plots no. 7,9, and 10,25 and 29 and in the negative in respect of plot 16 and 26.

In suit No. 21 Umrao defendant has been suit for ejectment from plots 12 and 18. Umrao is record as bila tasfia tenant from 1352F of both these plots Umrao has also entered the witness box and denied the alleged contract of tenancy. Therefore, I hold that Umrao was never a subtenant of plaintiffs and is cultivating these lands without contract. Hence Issue No. 1 in suit no. 21 is answered in the negative.

In suit No. 22 Nathoo, Bhikham and Ratiram S/o Punni have been sued for ejectment from plot no. 3/7/96. This plot is recorded as subtenancy of defendants or their predecessors at Rs. 61/- The duration in 1352F is 15 years and the duration in 1359F is 32 years. None of the defendants except Ratiram has entered the witness box to deny the alleged contract of tenancy.

From the entries it appears that the contract originally took place between Punni, Bachoo and Bhikham. Therefore, denial by Ratiram is of little consequences. Ujagar Singh and his witness have said that Risaldar Saheb land admitted the defendant as subtenants. The entries in Khatauni support their version. Therefore, I hold that defendants in suit NO. 22 are subtenants of plaintiffs in respect of plot no. 3. Issue No. 1 in respect of suit No. 22 is answered in the affirmative.

It was urged by the learned counsel for plaintiffs that Ex.P1 proves the contract with Umrao Ratiram and others. A perusal of Ex.P1 will show that it does not convey anything. Against the name of Umrao plot no. 16 is noted about which he has not been sued. Similarly in respect of other case too this documents does not help the plaintiffs.

For the above reasons Issue no. 1 is answered in the negative in respect of suit nos. 18 and 21 in toto, in the respect of Suit No. 19 only in respect of plot no. 32 and in respect of suit no. 20 in respect of plots 16 and 26. Issue NO. 2 is answered in the affirmative. In suit no. 22 in respect of plots 4 and 31 in suit no. 19 in respect of plots 9,7,10,25 and 29 in Suit no. 20.”

5. Both plaintiffs and defendants were aggrieved by aforesaid orders and, therefore, 7 appeals were filed, which were decided vide judgment and order dated 06.06.1973 and all suits were dismissed under Order 7 Rule 11 CPC on a ground that as the disputed land was a Nazul land and since it was a land given on grant under Crown Grants Act, 1895 (later on known as "Government Grants Act, 1950"), therefore, provisions of said Act would be applicable and according to provisions of Section 2 and 3 as Amended of it, on such land neither provisions of U.P. Tenancy

Act, 1939 nor Agra Tenancy Act, 1926 would be applicable. Relevant part thereof is quoted below :-

“7. मैने उभयपक्षों के योग्य वकीलों के तर्क सुने और पत्रावली का अवलोकन किया। आयुक्त के पत्र दिनांक 23.6.33 की प्रतिलिपि के अवलोकन से यह सिद्ध है कि विवादित भूमि नजूल की भूमि है। उजागर सिंह पी० डब्ल्यू० 1 ने भी यही कहा कि नजूल की सनद मिली थी और वह नजूल में दाखिल है। ऐसी दशा में यह मानी हुई बात है कि विवादित भूमि नजूल के भूमि थी। जब रिसालदार हुलास सिंह पिता और दादा वादीगण को (अस्पष्ट) वर्ष हुये उठाई गईं चूंकि विवादित भूमि नजूल की भूमि थी अतः इस पर एक्ट 3 आफ 1926 लागू नहीं था और न यू० पी० टेनेन्सी एक्ट (अस्पष्ट) था। क्राउन ग्रांट्स एक्ट 1895 लागू था जो कि गवर्नमेन्ट ग्रांट्स एक्ट 1950 से बदल गया और जिसका संशोधन यू० पी० अधिनियम संख्या 13 आफ 1960 से हो गया। 1967 आर० डी० पृष्ठ 434 पर दी हुई (अस्पष्ट) के अवलोकन से यह सिद्ध है कि इस भूमि पर आगरा टेनेन्सी एक्ट 19 (अस्पष्ट) या यू० पी० टेनेन्सी एक्ट 1939 लागू नहीं था। मैं अपीलकर्ता के योग्य वकील के इस तर्क से सहमत नहीं हूँ कि इस भूमि पर आगरा टेनेन्सी एक्ट 1926 और यू० पी० टेनेन्सी एक्ट 1939 लागू है। ऐसी दशा में वाद धारा 175 यू० पी० टेनेन्सी एक्ट के अन्तर्गत चलने योग्य नहीं है एक्ट 3 आफ 1926 उस समय लागू था जिस समय आकुपैन्सी अधिकार (अस्पष्ट) जाना कहा जाता है। यदि बहस के लिये सही मान भी लिया जाये (अस्पष्ट) 3 आफ 1926 इस भूमि पर लागू था तब भी इस भूमि में जो (अस्पष्ट) की भूमि है आकुपैन्सी अधिकार धारा 16 एक्ट 3 आफ 1926 के अन्तर्गत नहीं दिये जा सकते थे। उपरोक्त अधिनियम की धारा 16 के अन्तर्गत आयुक्त की आकुपैन्सी अधिकार देने का कोई अधिकार नहीं था। धारा 16 सबक्लाज 5 के अन्तर्गत आकुपैन्सी अधिकार रजिस्टर्ड इन्सट्रुमेन्ट के द्वारा ही दिये जा सकते थे परन्तु इस भूमि के विषय में कोई रजिस्टर्ड इन्सट्रुमेन्ट नहीं लिखा गया। चूंकि वादीगण नजूल की भूमि के कृषक थे अतः उनको उपरोक्त अधिनियम की धारा 16 के अन्तर्गत खतौनी अधिकार दिये ही नहीं जा सकते थे। आकुपैन्सी अधिकार देने के (अस्पष्ट) उपरोक्त अधिनियम धारा 18 में तरीका बताया गया है जिसका कि (अस्पष्ट) करना आवश्यक था परन्तु धारा 18 में दिये हुये उपबन्ध का पालन न किया गया। ऐसी दशा में वादीगण के पिता और दादा विवादित भूमि (अस्पष्ट) आकुपैन्सी अधिकार प्रस्तुत ही नहीं कर सकते थे। पत्रावली में ऐसा कोई साक्ष्य नहीं है जिससे यह सिद्ध हो कि आयुक्त को नजूल की भूमि में

(अस्पष्ट) अधिनियम के अन्तर्गत किसी व्यक्ति को आकुपैन्सी अधिकार देने का (अस्पष्ट) हो। केवल अभिलेखों के इन्द्राज के आधार पर वादीगण आकुपैन्सी टेनेन्सी (अस्पष्ट) नहीं हो सकते। चूंकि वादीगण आकुपैन्सी टेनेन्स सिद्ध नहीं है अतः उन्हें धारा 175 के अन्तर्गत वाद योजित करने का अधिकार नहीं है। (अस्पष्ट) के आधार पर मैं इस वाद में गुणगुण निर्णय देने की आवश्यकता नहीं समझता हूँ। उपरोक्त विचार विमर्श के आधार पर मैं अवर न्यायालय के आदेश व आज्ञापित दिनांक 30.9.59 वाद संख्या 19 गाटा संख्या (अस्पष्ट) के विषय में और वाद संख्या 20 के गाटा संख्या 7, 9, 10 (अस्पष्ट) के विषय में और वाद संख्या 22 के विषय में निरस्त करता है और वाद संख्या 10 के गाटा संख्या 4 और 31 के विषय में वाद संख्या 20 के गाटा संख्या 7, 9, 10, 25 और 29 के विषय में और वाद संख्या 22 के सब गाटों के विषय में भी वादी को खंडित करता हूँ और वाद संख्या 18, 19, 20, 21 और 22 के वाद पत्र आदेश 7 नियम 11 सी० पी० सी० के अन्तर्गत निरस्त करता हूँ।”

6. In aforesaid circumstances, plaintiffs filed 5 Second Appeals before Board of Revenue which was allowed vide impugned order dated 29.03.1982. Relevant part thereof are quoted below :-

“12. It is thus clear that although the provisions of Agra Tenancy Act or the U.P. Tenancy Act are not applicable for invalidating the grant but the other provisions of these Acts are applicable. The grant being of occupancy rights, therefore, the plaintiffs are entitled to file the suit for ejectment are maintainable. The lower appellate court wrongly applied the law without considering the provisions of section 2 of U.P. Act XIII of 1960. It is, therefore, held that all the suits are maintainable.

13. It is true as held in A.I.R. 1964 (S.C.) page 536, More a more Basselious Cathelious and another versus Most Dev. Har Poulouse [Athenesine and others, and A.I.R. 1965 (S.C.) [age 1506. Braham Nand Puri Vs. Neki Puri that in ejectment suits the plaintiff must succeed

on the strength of his own title and has to discharge the onus which is on him irreparative of whether the defendant has proved his case or not. In the present case the plaintiff have discharged the onus placed on them and have proved satisfactorily that they are occupancy tenants of all the disputed land are holding over and the terms of the lease granting occupancy tenancy rights on their ancestral substitute and of the defendants are proved to be sub tenants they are liable to be ejectment from the disputed land.

14. No sirdari rights can acquire to the defendant as the U.P.Z.A and L.R Act is not applicable and no heredity rights can accure to them as the provisions of U.P. Tenancy Act can not be applied for invalidating the grant. The entry of 1359 F. showing Ratiram as Bila Tasfia on plot no. 20 who appeared as a witness as D.W. 2 is certainly a sub-tenants of the plaintiff because para 134 of the U.P. Land Records Manual Lays down that occupancy tenants of Government estates are to be recorded in class (C) and persons recorded in class (20) as Bila Tasfia are not trespasser but they are sub-tenants who have entered into contract of sub-tenancy but the rent has not been settled. Reference can be made Mahadeo Pandey versus Suraj Bhan Singh 1964 R.D. page 253 (H.C). It has been held in Bhagwan Bux Singh and others versus Ganesh Bux Singh Retu and others in 1237 R.D. page 572 as follows:-

“The entry in the village records of the defendants as bila tasfia tenants is inconsistent with their possession being adverse. The more fact that the defendants have been in possession for a long time or that they had not paid any rent for the land cannot established title by adverse possession.”

Therefore, in view of the above as the bila tasfia entries of Ratiram

defendant in suit no. 18 was wrongly construed to be entry of a trespasser instead of construing it to be necessary of sub-tenancy in which rent has been settled and rent receipts etc. P-2, P-5, and P-9 were also not considered. Therefore, the suit ought to have been decreed against defendant Rati Ram. So is the case with suit no. 20 the bila tasfia entries of 8 years standing in 1359 Fasli D.W.1 Umrao only having been examined who should not have been believed against the paper entries. Suit no. 21 also ought to have been decreed and accordingly bila tasfia entry of 8 years regarding plot nos. 1, 6 and 26 of suit no. 20 also ought to have been decreed because they are entries of sub-tenants and only rents were not settled and the entry on plot no. 17 of suit no. 19 against defendant not etc for plot no. 32 who did not appear in the witness box and receipt ext P-6 and P-9 were proved the suit for this plot also ought to have been decreed. In suit no. 20 defendants did not appear in the witness box and Shikmi entries of plot nos. 1, 6 and 26 should have been believed and the suit for them also ought to have been decreed. It is settled principle that persons having special knowledge should appear being material witness. If they failed to appear adver inference should be drawn against them. Reliance can be placed on Har Mandir Pathak versus Sankatha Singh 1966 A.L.J. Page 904, A.I.R. 1922 Bombay page 81 Rajmal Man Narain versus Budan Saheb Abdullah Saheb and AIR 1937 Oudh Page 170 Shah Mohammad Khan vs. Ahmad Ali Khan.

Jaitu and Genda Lal supported the plaintiff's case and the suits against them were decreed. The statement of Umrao defendant in suit no.21 had been ovassive. He stated that Bhawani had been cultivating after his death he cultivated it vaise hec which shows as evasiveness.

Thus, there is no preponderance of evidence of sub-tenancy of defendants to be sub-tenants of the plaintiff. Rent receipts Ex. P-10 11 and P-12 prove in the names of Punni Bacchu Bikhu, respectively proves the plaintiffs case against defendant of suit no. 22 and suit against them was rightly decreed.

It is, therefore, clear that the plaintiffs have proved their case to be hilt that the defendants are their sub-tenants and they are libale to be ejected from the disputed plots and all the suits of the plaintiffs are liable to be decreed and the judgments and decree passed by the lower appellate court are liable to be set aside and the judgments and decree passed by the trial Court are liable to be confirmed regarding suits of plots in the suits which were decreed and are liable to be set aside regarding the suits or the plots in the suits which were dismissed and all the suits are liable to be decreed with costs althrough.

15. In view of the above, all the 5 appeals are allowed and the judgments and decree passed by the lower appellate court are set aside and the judgments and decree passed by the trial court regarding the suits and the plots for which the suits were decreed are confirmed and the judgments and decree passed by the trial court dismissing the suits or dismissing the suits regarding from plots in them are set aside and the suits for the plots in these suits also the plaintiffs suits stand decree i.e. all the 5 suits are decreed with costs for ejectment of all the defendants from all the disputed plots."

7. Sri H.N. Singh, learned Senior Advocate assisted by S/Sri assisted by S/Sri S.K. Verma, Vineet Kumar Singh, S.K. Singh and Brijesh Kumar Shukla, Advocates for petitioners has submitted that trial Court has not considered the effect

of amendment i.e. land in dispute was admittedly to be a land given as a Grant, therefore, provisions of Crown Grants Act (later on known as Government Grants Act) would alone be applicable. However, during suit, effect of it were not considered.

8. Learned Senior Advocate has further submitted that during First Appeal which is in continuation of suit, aforesaid issue was raised and therefore, issue of maintainability was considered and therefore in view of Amended Section of Government Grants Act wherein it was provided that provisions of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 would not be applicable, therefore, claim of plaintiffs that they are 'sir holders' and defendants were sub-tenants was rightly rejected. Rights could be settled only on basis of recital of the Grant.

9. Learned Senior Advocate has further submitted that the Second Appellate Court has passed an order of reversal, however, provisions of Section 100 of CPC either before Amendment or after it were not considered i.e. neither substantial questions of law were framed nor a finding was returned that decision was contrary to law or failed to determine some material issue of law or there was any substantial error or defect in procedure prescribed by the Code.

10. Learned Senior Advocate has further referred findings returned by the Board of Revenue in the Second Appeal that "8. Lower Appellate Court wrongly construed the Grant to ancestors of plaintiffs to be invalid for want of a compliance of Section 16(5) of Agra Tenancy Act and also that of provisions of Section 18 of that Act were not complied with." and submitted that First

Appellate Court has not held Grant to ancestors of plaintiffs to be invalid rather First Appellate Court has held that since it was a grant under Crown Grants Act (Government Grants Act), therefore, right on land in dispute will be decided in terms of provisions of said Act and as referred above, Section 2 and 3 (as amended) of said Act specifically provides that provisions of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 would not be applicable, therefore, claim on basis of said Act as raised by the plaintiffs was rejected and suit was held to be not maintainable, therefore, above referred findings were absolutely perverse.

11. Learned Senior Advocate has further referred that Board of Revenue in paragraph 12 of impugned order has held that provisions of U.P. Tenancy Act, 1939 or Agra Tenancy Act, 1926 would not be applicable for invalidating Grant but other provisions of these Acts are applicable and that grants being of occupancy right, plaintiffs are entitled to file a suit for ejectment.

Learned Senior Advocate has further submitted that aforesaid findings are not only self-contrary but against the provisions of Sections 2 and 3, as amended, of Government Grants (UP Amendment) Act, 1960 which specifically provides that entire U.P. Tenancy Act, 1939 or Agra Tenancy Act, 1926 would not be applicable.

12. None appeared on behalf of contesting respondents, therefore, I have perused the counter affidavit filed by one of respondents. So far as non maintainability of suit is concerned, reply of respondents is quoted below :-

“10. That the contents of paragraph 13 of the petition are incorrect.

(a) The suits were maintainable. The suits were in accordance with the Government Grants Act. In fact the defence that the defendants acquired rights under Section 180(2) of U.P. Tenancy Act ran counter to it and was hit, if at all, by the provisions of Government Grants Act, 1860 as amended in Uttar Pradesh.

(b) further the question of maintainability on the ground that the Government Grants as amended in Uttar Pradesh was not at all raised in the written statements and hence it could not be raised for the first time at the appellate stage. The learned Additional Commissioner acted under a misconception of law. The defendants had full opportunity to contest the suit and the plaint could not be rejected at the appellate stage. The suits filed by the plaintiffs-respondents were maintainable in law.

11. That the contents of para 14 of the petition are incorrect. The case of the plaintiffs-respondents was consistent from the very beginning and they claimed occupancy rights in their favour which accrued to them under law on the basis of the grant made in their favour by the Government. In the court of Assistant collector, First Class, defendants did not raise any plea against the maintainability of the suits and as such there was no question of denying that the land in dispute is nazul land. This question was raised for the first time before the learned Additional Commissioner as stated earlier. The allegations made are against the material on record. The correct position can be ascertained from the judgments of the Court below.

12. That the contents of para 15 of the petition are innocent and misconceived. The provisions of Section

16, 17 and 18 of Agra Tenancy Act 1926 and the restrictions contained therein were not applicable in view of Section 2 of Government Grants Act as amended and applicable in Uttar Pradesh. The registration of the instrument was not at all necessary and the Government could grant occupancy rights irrespective of the alleged restrictions contained in Agra Tenancy Act, 1926. Such rights could be granted even on nazul land. The learned Additional Commissioner acted under a misconception of law. The view taken by respondent-1 is correct and do not suffer from any error of law. The suits filed under Section 175 of U.P. Tenancy Act were legally maintainable in law.”

13. Heard learned Senior Advocate for petitioners and perused the record.

14. It is well settled that there is ‘no estoppel against law’ (*see Krishna Rai (dead) through LRs vs. Banaras Hindu University through Registrar and others, (2022) 8 SCC 715*). If a suit is barred by provisions of any law i.e. issue of maintainability could be considered at any stage. In present case, issue of maintainability was not considered by the trial Court, however, this issue was specifically raised and considered by First Appellate Court. The First Appellate Court, after due consideration of the provisions of Government Grants Act, held that suit filed by plaintiffs will be barred since their right was based on U.P. Tenancy Act, 1936 which would not be applicable in terms of Amended Section 2 of Government Grants Act. Relevant Sections are mentioned hereinbelow :-

“8. After the Government Grants (U.P. Amendment) Act, 1960 (U.P. Act No. 13 of 1960) Section 2 of the

Government Grants Act, 1995 stands as follows:-

“2. Amendment of Sections 2 and 3 of the Act IV of 1898-

For Sections 2 and 3 of the Government Grants Act 1895, (hereinafter called the Principle Act). The following shall be substituted, and be deemed always to have been substituted:

2. (1) Transfer of Property Act, 1882, not to apply to Government Grants – Nothing contained in the Transfer of Property Act, 1882, shall apply or deemed over to have applied to any grant or other transfer of land or of any interest therein, heretofore made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever: and every such grant and transfer shall be constructed and take effect as if the said Act had not been passed.

(2) U.P. Tenancy Act, 1939, and Agra Tenancy Act, 1928, not to effect certain reasons made by or on behalf of the Government – nothing contained in the U.P. Tenancy Act, 1939 or the Agra Tenancy Act, 1926, shall affect, or deem to have ever affected any rights, created, conferred or granted, whether before or after the date of the passing of the Government Grant (U.P. Amendment) Act, 1960, by leases of land by or on behalf of, Government in favour of any person: and every such creation, confirmment or grant shall be constructed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1929.

(3) Certain leases made by or on behalf of the Government to take effect according to their tenant – All provisions, restrictions, conditions and limitations contained any such creation, confirmment or grant referred to in Section 2, shall be valid

and take effect according to their tenor; any decree or direction of a Court of law or any rule of law, statute or enactment of the legislature, to the contrary notwithstanding:

Provided that nothing in this Section shall prevent, or be deemed over to have prevented the effect of any enactment relating to the acquisition of property, Land Reforms or the imposition of ceiling on agriculture land.

This sub-section 2 lays down that every such creation confirmment or grant shall be constructed and take effect notwithstanding anything to the contrary, contained in U.P. Tenancy Act, 1939, or Agra Tenancy Act, 1929. The implements that even if the grant is to the contravention of the provision of the U.P. Tenancy Act or the Agra Tenancy Act, the creation, the confirmment or grant shall not be constructed to be invalid on such ground. Therefore, the lower Appellate Court wrongly constructed the grant to the ancestor of the plaintiffs to be invalid for want of a compliance of Section 16 (5) of Agra Tenancy Act and also that provisions of Section 18 of that Act were not complied with. In view of Section 2 as amended by U.P. Act XIII of 1907 any provisions of any law except provided by that section are not to be constructed for invalidating the grant. Therefore, in not setting the grant register the grant cannot be invalidated and the provisions of Section 18 of Agra Tenancy Act for creation of occupancy right when if not complied with cannot debar confirmment of occupancy right by the State on the ancestor of the plaintiffs. Therefore, lower Appellate Court committed illegality in deciding otherwise.”

15. It is being admitted position that land in dispute was given on Grant to ancestors of plaintiffs, therefore, any right

would be accrued only in terms of recital of Grant as well as in terms of Crown Grants Act (later on known as Government Grants Act).

16. First Appellate Court has rightly considered the relevant provisions and held that since provisions of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 would not be applicable to land in dispute, therefore, all suits were dismissed under Order VII Rule 11 CPC.

17. Board of Revenue in Second Appeal has accepted that land in dispute was a land given under Grant and as such in view of provisions of Crown Grants Act (later on known as Government Grants Act) and provisions of U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 would not be applicable, however, despite above observations, Board of Revenue has erred in further observing that other provisions of both Tenancy Acts would be applicable without any specific ground. Said observation is self contrary, which render impugned order illegal.

18. If the provisions of both Tenancy Acts are not applicable, the Second Appellate Court has wrongly held that some part of it is still applicable, despite there was no such differentiation in amended provisions of the Government Grants (UP Amendment) Act, 1960 (U.P. Act No. 13 of 1960) as well as no basis was recorded by the Board of Revenue.

19. In aforesaid circumstances, the findings returned by Board of Revenue are perverse, contrary to law as well as are self-contrary.

20. Accordingly, writ petition is **allowed**. Impugned order is set aside, and,

therefore, keeping in view that interim order remained in currency, therefore, its legal consequence shall follow.

(2024) 12 ILRA 250
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE
THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 5994 of 2012

Hindi Vidyapeeth ...Petitioners
Versus
Hindi Sahitya Sammelan & Anr. ...Respondents

Counsel for the Petitioners:

Anil Kumar Mehrotra, Kunal Ravi Singh,
V.K.S. Chaudhary

Counsel for the Respondents:

Amar Nath Tiwari, Azad Rai, Manish Kumar
Jain, Radhey Shyam Mishra, Ramesh
Chandra Dwivedi, Suresh Chandra Mishra

गवर्नमेंट ग्रांट्स एक्ट, 1895 - उत्तर प्रदेश भू-राजस्व अधिनियम, 1901; धारा: 33/39 - वाद पोषणीयता - हिंदी साहित्य सम्मेलन, प्रयाग' वर्ष १९१४ में पंजीकृत हुई। उत्तर प्रदेश सरकार ने लगभग १०० बीघा विवादित भूमि का अधिग्रहण 'हिंदी विद्यापीठ, प्रयाग' की स्थापना के लिए किया, जिसमें स्पष्ट था कि विवादित भूमि पर केवल 'हिंदी विद्यापीठ, प्रयाग' की स्थापना होगी। यह भूमि राजस्व कागजात में क्राबिज़ रही और १४२० फसली में श्रेणी २ में दर्ज थी। वर्ष १९९८ में 'हिंदी साहित्य सम्मेलन, प्रयाग' ने उत्तर प्रदेश भूमि राजस्व अधिनियम, १९०१ की धारा ३३/३९ के अंतर्गत एक वाद दायर किया कि विपक्षी 'हिंदी विद्यापीठ, प्रयाग'

का नाम सिकमी खाने से पृथक् किया जाए। उपजिलाधिकारी ने वाद पोषणीय न होने के कारण वाद निरस्त कर दिया। अपर आयुक्त ने न केवल आदेश दिनांक ११.०१.२००० (जिसमें वाद पोषणीय नहीं माना गया था) निरस्त किया, वरन् वाद को गुण-दोष पर निस्तारित भी कर दिया। राजस्व परिषद ने निगरानी को बलहीन मानते हुए वाद निरस्त किया। आयुक्त और राजस्व परिषद ने वाद पोषणीयता पर कोई टिप्पणी नहीं की। न तो आयुक्त और न ही राजस्व परिषद ने यह निर्णय दिया कि क्या उत्तर प्रदेश भू-राजस्व अधिनियम, १९०१ के अंतर्गत कार्यवाही की जा सकती है, क्योंकि विवादित भूमि उत्तर प्रदेश सरकार द्वारा 'हिंदी विद्यापीठ, प्रयाग' के निर्माण हेतु दी गई थी। गवर्नमेंट ग्रांट्स एक्ट, १८९५ के प्रावधान लागू होंगे या नहीं, यह भी विचारणीय था। यह नॉन जेड. ए. जमीन थी। उत्परिवर्तन अभिलेख विशिष्ट व्यक्ति को कोई अधिकार, स्वामित्व या हित प्रदान नहीं करता, और राजस्व अभिलेख में उत्परिवर्तन केवल वित्तीय उद्देश्य के लिए हो सकता है। आयुक्त इलाहाबाद और राजस्व परिषद के आदेश त्रुटिपूर्ण पाए जाने पर निरस्त कर दिए गए तथा पुनः निपटारे हेतु प्रयागराज के आयुक्त को प्रेषित किया गया। (Para 17, 19, 20, 22)

निस्तारित (E-5)

संदर्भित मामलों की सूची :

1. पी. किशोर कुमार प्रति विट्ठल के. पाटकार २०२३ आई. एन. एस. सी. १००९
2. सावर्णी बनाम इंदर कौर एवं अन्य (१९९६) ६ एस. सी. सी. २२३,
3. बलवंत सिंह और अन्य बनाम दौलत सिंह (मृत) द्वारा विधिक प्रतिनिधि और अन्य (१९९७) ७ एस. सी. सी. १३७,
4. जितेंद्र सिंह बनाम मध्य प्रदेश राज्य और अन्य २०२१ एस. सी. सी. ऑनलाइन एस. सी. ८०२

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

१- "हिंदी साहित्य सम्मेलन, प्रयाग" (सोसायटी रजिस्ट्रीकरण अधिनियम, १८६० के अंतर्गत, दिनांक ०८.०१.१९१४ द्वारा, एक रजिस्टर्ड संस्था) एवं उत्तर प्रदेश शासन के मध्य, एक करार, दिनांक ३ अक्टूबर १९२७ को हुआ, जिसके द्वारा करीब ९९ बीघा १९ बिस्वा का एक स्थान जो मौजा महेवा, पट्टी उपरहार, परगना अरैल, तहसील करछना, जिला इलाहाबाद, में स्थित है, को उक्त संस्था के लिए अधिग्रहण किया गया, जिसका एकमात्र उद्देश्य एक 'हिंदी विद्यापीठ, प्रयाग' का निर्माण करना था, जो विद्यार्थियों को कृषि संबंधी शिक्षा दे और एक कृषि फार्म की स्थापना करें। उक्त अधिकरण का पूर्ण प्रतिफल उत्तर प्रदेश शासन को दे दिया गया था।

२. कालांतर में 'हिंदी विद्यापीठ, प्रयाग' भी सोसायटी रजिस्ट्रीकरण अधिनियम, १८६० के अंतर्गत एक रजिस्टर्ड संस्था, दिनांक २४.३.१९३२ को हो गयी। इस संस्था का प्रमुख उद्देश्य, 'हिंदी साहित्य सम्मेलन, प्रयाग' द्वारा स्थापित 'हिंदी विद्यापीठ, प्रयाग' का संचालन और प्रबंधन करना है। बाबू पुरुषोत्तम दास टंडन इस संस्था के प्रथम २५ सदस्यों में से एक थे। 'हिंदी साहित्य सम्मेलन, प्रयाग' की स्थाई समिति हर वर्ष ३ रिक्त (२५ सदस्यों में से) स्थानों पर सदस्य नामांकित कर सकती है। समिति के नियमानुसार, यह संस्था अपने कार्य हेतु वित्तीय निर्णयों को लेने के लिए स्वतंत्र है। नियम १६ के अनुसार अगर यह समिति अपना कार्य बंद कर दे तो इसकी सारी संपत्ति का अधिकारी 'हिंदी साहित्य सम्मेलन, प्रयाग' होगा। जैसा बताया

गया है कि हिंदी विद्यापीठ संस्था व संस्थान तथा कृषि फार्म वर्तमान में भी उक्त भूमि पर कार्यरत हैं।

३. ऐसा प्रतीत होता है कि प्रारंभ में दोनों संस्थाएँ सुचारु रूप से एवं दूसरे के हित के लिए कार्य करती रहीं व इनका एकमात्र उद्देश्य रहा कि हिंदी विद्यापीठ संस्थान का उद्देश्य पूर्ण हो सके। कालांतर में आपस में कुछ विरोध उत्पन्न हो गये। जिसके कारण आज यह दोनों संस्थाएँ एक दूसरे के समक्ष खड़ी हैं और वाद उच्च न्यायालय तक आ पहुँचा है।

४. प्रारंभ में राजस्व पड़ताल के दौरान 'हिंदी विद्यापीठ, प्रयाग', राजस्व कागजात में 'काबिज' रहा और लैंड रिकॉर्ड मैनुअल के पैरा १२४ के अनुसार १४२० फसली में श्रेणी २ में दर्ज रहा।

५. उपरोक्त के संदर्भ में वर्ष १९९८ अर्थात् करीब ६ दशक के उपरांत 'हिंदी साहित्य सम्मेलन, प्रयाग' ने एक वाद संख्या ४४/५ सन् १९९८, उत्तर प्रदेश भू-राजस्व अधिनियम, १९०१ की धारा ३३/३९ के अंतर्गत दायर किया कि, विपक्षी 'हिंदी विद्यापीठ, प्रयाग' का नाम 'सिकमी' खाने से पृथक् किया जाए। प्रार्थना पत्र में उपरोक्त इतिहास व दोनों संस्थाओं के उद्देश्य इत्यादि का कोई उल्लेख नहीं किया गया था। प्रार्थना पत्र के महत्वपूर्ण अंश निम्न उल्लेखित किये जा रहे हैं:-

“ १. यह कि प्रार्थी हिन्दी साहित्य सम्मेलन का प्रबन्धमंत्री है।

२. यह कि प्रार्थी हिन्दी साहित्य सम्मेलन की समस्त चल अचल सम्पत्ति का देख रेख एवम् सुरक्षा व्यवस्था करता है।

३. यह कि भूमि निम्न पर हिन्दी साहित्य सम्मेलन का नाम खुदकाशत के रूप में कागजात में दर्ज होता चला आ रहा है।

४. यह कि भूमि निम्न पते पर हिन्दी साहित्य सम्मेलन का रखते हुये हमेशा से रहा हैं और मुझको इसके भौतिक अधिकार प्राप्त है।

५. यह कि भूमि निम्न पर हिन्दी विद्यापीठ का कमी कोई कब्जा दखल नहीं रहा और न ही कभी उसे किसी प्रकार का भौमिक अधिकार का प्राप्त रहा है।

६. यह कि भूमि निम्न पर बिना किसी सक्षम अधिकारी के आदेश के विपक्षी का नाम सिकमी के रूप में दर्ज कर दिया है।

७. यह कि इस प्रकार की प्रविष्ट महज लिखावट के भूल के कारण हुयी है।

८. यह कि प्रार्थना पत्र देने का कारण भूमि पर सम्बंधी पर नाम सिकमा के रूप में दर्ज होने के कारण उत्पन्न हुआ है।

९- यह कि प्रार्थना पत्र देने का कारण माह जून सन् १९९८ ई० में विपक्षी एक का नाम सिकमी के रूप में दर्ज होने की जानकारी होने के कारण उत्पन्न हुआ है।

१०- यह कि प्रार्थना पत्र देने के कारण न्यायालय के क्षेत्राधिकार के सीमा के अन्तर्गत पैदा हुआ है और न्यायालय को प्रार्थना पत्र सुनवाई का पूरा अधिकार प्राप्त है।

११- यह कि न्यायालय शुल्क मू०. वार्षिक है और उस पर नियमानुसार अदा किया जाता है।

१२- प्रार्थी निम्न उपसम की याचना करता है-

यह कि भूमि पर से विपक्षी का नाम सिकमी खाने से पृथक किया जाने का आदेश दिया जावे।”

६. उक्त प्रार्थना पत्र का वादी 'हिंदी विद्यापीठ, प्रयाग' ने विरोध किया और अपनी आपत्ति दायर की व कई दस्तावेज भी संलग्न किए। जिसके महत्वपूर्ण अंश निम्नलिखित उद्धर्णित किये जा रहे हैं:-

“६. यह कि प्रार्थना पत्र की धारा ६ स्वीकार नहीं है वादग्रस्त भूमि पर हमेशा से ही हिन्दी विद्यापीठ का अध्यासन रहा चला आ रहा है और आवेदक का इस पर कभी भी कब्जा व दखल नहीं रहा।

१४. यह कि आवेदक विवादित भूमि के कभी भी जमींदार नहीं थे। अतः उनके नाम वादग्रस्त भूमि अगर अभिलेखों में खुद काशत करके दर्ज है तो सर्वथा गलत है।

१५. यह कि भूलेख नियमावली के अन्तर्गत सर्व प्रथम कब्जे की प्रविष्टि खसरे में होती है और कालान्तर में पर्यवेक्षक कानूनगो के आदेशानुसार खसरे की उक्त प्रविष्टि के आधार पर सिकमी का इन्द्राज किया जाता है।

१६. यह कि वर्तमान आवेदन पत्र सिकमी की प्रविष्टि को निरस्त कराने हेतु है अतः यह दावा धारा ३३/३९ भू-राजस्व अधिनियम की परिधि में नहीं आता बल्कि इस प्रकार का आवेदन पत्र धारा २८ भू-राजस्व अधिनियम की परिधि में आता है जिसके सुनवाई का क्षेत्राधिकार केवल जिलाधिकारी को है। इस आधार पर इस न्यायालय को प्रस्तुत

प्रार्थना पत्र के निस्तारण का विधिक अधिकार नहीं है।

१७. यह कि वादग्रस्त भूमि हिन्दी विद्यापीठ के लिए राज्य सरकार द्वारा सन् १९२७ में अधिग्रहित की गई थी जिसके मुआवजे की धनराशि का भुगतान हिन्दी विद्यापीठ के कोष से किया गया था।

१८. यह कि विवादित भूमि पर वर्ष १९२७-२८ से ही हिन्दी विद्यापीठ का ही अध्यासन चला आ रहा है और उसमें से ग्राम मीरखपुर की तमाम भूमि में हिन्दी विद्यापीठ के भवन पशुशाला एवं कृषि फार्म में कार्यरत कर्मचारियों के लिए क्वार्टर भी बने हैं।

१९. यह कि ग्राम महेवा पश्चिम पट्टी में भी हिन्दी विद्यापीठ का नलकूप लगा है तथा पक्की नालियाँ बनी हैं जिनके निर्माण में हिन्दी विद्यापीठ का ही धन व्यय हुआ है। अलावा इसके महेवा पश्चिम पट्टी की भूमि में हिन्दी विद्यापीठ की चहरदीवारी भी बनी है।

२०. यह कि सम्पूर्ण विवादित भूमि हिन्दी विद्यापीठ के ही सीमांकन निशान से घिरी हुई है। कही-कही पर पक्की चहरदीवारी कही-कही कटीले तार सरपट की झाड़ से विद्यापीठ की भूमि घिरी हुई है।

२१. यह कि हिन्दी साहित्य सम्मेलन से विवादित भूमि से कभी भी कोई वास्ता या सरोकार नहीं रहा है और न उनका उस पर कभी कब्जा व दखल ही रहा है इस आधार पर भी उनका आवेदन पत्र निरस्त होने योग्य है।”

७. तहसीलदार, करछना ने एक आख्या दिनांक ०२.०७.९८ प्रेषित करी, कि विवादित भूमि पर वादी 'हिंदी विद्यापीठ, प्रयाग' का नाम त्रुटिवश व बिना किसी सक्षम न्यायालय के

आदेश से अंकित हुआ है, अतः संशोधन कर प्रतिवादी 'हिंदी साहित्य सम्मेलन, प्रयाग' का नाम 'खुदकाशत' के रूप में अंकित होना चाहिए।

८. उप जिलाधिकारी, करछना ने आदेश दिनांक ११.०१.२००० द्वारा प्रतिवादी का वाद पोषणीय न होने के कारण निरस्त कर दिया। प्रतिवादी का तर्क कि वो खुदकाशत को आधारहीन माना। क्योंकि विवादित भूमि नॉन ज़ेड.ए. (Non Z.A.) की भूमि है, इसलिए न तो वो जमींदार हो सकते हैं और न तो उन्हें (अकृषिक) भूमि का भूमिधर ही माना जा सकता है। स्वत्व के अधिकार के लिए वादी व प्रतिवादी स्वतंत्र है। आदेश के महत्वपूर्ण अंश निम्नलिखित उद्धृष्ट किये जा रहे हैं:-

“मैंने उभय पक्षों के विद्वान अधिवक्ताओं को विस्तार से सुना एवं पत्रावली पर उपलब्ध समस्त अभिलेखीय व मौखिक साक्ष्यों का भली भांति परीक्षण किया। पत्रावली पर उपलब्ध गजट नोटिफिकेशन सन् १९२७ की प्रति से स्पष्ट है कि उक्त भूखण्ड राज्य सरकार द्वारा हिन्दी विद्यापीठ के पक्ष में अधिग्रहित की गयी थी जिसके फलस्वरूप हिन्दी विद्यापीठ का कब्जा दखल विवादित भूखण्डों पर आज भी बना हुआ है। इसलिए वादी का यह कथन मानने योग्य नहीं है कि हिन्दी विद्यापीठ का नाम लिपिकीय त्रुटि के कारण अभिलेखों में अंकित है यहां यह भी उल्लेखनीय है कि वादी द्वारा खसरे की प्रविष्ट को निरस्त कराने के उद्देश्य से प्रस्तुत वाद दायर किया गया है जो धारा ३३/३९ में स्वीकार करने योग्य नहीं प्रतीत होता जहां तक वादी का यह तर्क कि वे खुद काशत के रूप में अंकित है। इसलिए

भी स्वीकार करने योग्य नहीं है। ताकि विवादित भूखण्ड नान जेड ए की भूमि है जिसके वे जमींदार नहीं हो सकते और न ही उन्हें श्रेणी १५ (आकृषिक) भूमि का भूमिधर माना जा सकता है। इसलिए भी वादी का वाद पोषणीय नहीं है यदि वादी को अपने स्वत्व का अधिकार की घोषणा कराना हो तो उन्हें सक्षम न्यायालय में विहित प्राविधानों के अन्तर्गत चाराजोई प्राप्त करनी चाहिए। इस प्रकार धारा ३३/३९ भू० रा.अधि० के अन्तर्गत दिया गया प्रस्तुत आवेदन पत्र बलहीन है। धारा ३३/३९ के अन्तर्गत मात्र लिपिकीय त्रुटि का संशोधन किया जा सकता है। जबकि प्रस्तुत प्रकरण में लिपिकीय त्रुटि से प्रतिवादी का नाम अंकित होना प्रमाणित नहीं होता ।

अतएव उपरोक्त विवेचना के आधार पर प्रस्तुत वाद पोषणीय न होने के कारण निरस्त किया जाता है बाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो।”

९. उपरोक्त आदेश दिनांक ११.०१.२००० से क्षुब्ध होकर प्रतिवादी 'हिंदी साहित्य सम्मेलन, प्रयाग' ने अपर आयुक्त, इलाहाबाद मण्डल के समक्ष एक निगरानी प्रस्तुत की, जो आदेश दिनांक २८.७.२००४ द्वारा स्वीकार कर ली गई और न केवल आदेश दिनांक ११.०१.२००० (जिसके द्वारा वाद पोषणीय नहीं माना था) निरस्त किया गया वरन् वाद को गुण-दोष पर निस्तारित भी कर दिया। वादी के पक्ष में अंकन निरस्त कर दिया व प्रतिवादी के पक्ष में अंकन करने का आदेश पारित कर दिया। आदेश के प्रमुख अंश निम्न है:-

“ मैंने उभयपक्षों के विद्वान अधिवक्तागण के तर्कों को सुना तथा पत्रावली का सम्यक् अवलोकन किया।

पत्रावली के अवलोकन से विदित होता है कि विद्वान अवर न्यायालय ने प्रश्नगत मामले में तहसीलदार की आख्या तलब की थी। तहसीलदार की आख्या दिनांक २६.६.१९९८ में विवादित भूमि पर विपक्षी हिन्दी विद्यापीठ का नाम भाग २ में दर्ज है। यह अंकन बिना किसी सक्षम अधिकारी के आदेश से किया गया है। पत्रावली के अवलोकन से यह भी स्पष्ट है कि निगरानीकर्ता हिन्दी साहित्य सम्मेलन का नाम शासकीय अभिलेखों में खुदकाशत दर्ज है। विद्वान अवर न्यायालय में भाग-२ की प्रविष्टि को एक लम्बी प्रविष्टि मानते हुये अभिलेख संशोधन करने के इनकार कर दिया है। जो की उचित नहीं है। अभिलेख में त्रुटि स्पष्ट है यह भी स्पष्ट है कि यह त्रुटि बिना किसी सक्षम अधिकारी के आदेश की गयी है। पत्रावली में संलग्न वर्ष १९२७ का गजट से स्पष्ट है कि प्रश्नगत संस्था हिन्दी साहित्य सम्मेलन तथा ३० प्र० सरकार के बीच में एक एग्रीमेंट हुआ था उस समय विपक्षी का कोई अस्तित्व नहीं था। बल्कि निगरानीकर्ता बतौर खुद काशत सुदीर्घकाल से दर्ज था अतः उसे अपने सत्व को उद्घोषित कराने की कोई आवश्यकता नहीं थी जैसा कि विद्वान अवर न्यायालय ने अवधारित किया है आर० डी० १९८७ पृष्ठ ३ कलावती बनाम गांव सभा में माननीय राजस्व परिषद की पूर्णपीठ ने यहां तक अवधारित किया है कि यदि चकबंदी के साथ भी गलत इन्द्राज है तो उसका संशोधन करने का अधिकार कलेक्टर को है। ऐसे प्रकरणों की सरसरी तौर पर निरस्त नहीं किया जा सकता ऐसे प्रकरण धारा-३३/ ३९ के परिसीमा में

आते हैं। और ऐसे प्रकरणों का संशोधन धारा ३३/३९ के अन्तर्गत किया जा सकता है। विरोधी पक्ष का भाग-२ में अंकन १४०३ फ० से है। यह अंकन बिना किसी सक्षम अधिकारी के आदेश के है जो विधि सम्मत नहीं है जैसा कि आर० डी० १९८६ पृष्ठ २५३ तथा आर० डी० १९८७ पृष्ठ ३ पर अभिहित किया है।

अस्तु उक्त विवेचना के आधार पर निगरानी स्वीकार की जाती है। अवर न्यायालय द्वारा पारित आदेश दिनांक ११.०१.२००० एतद् द्वारा खण्डित किया जाता है। विद्वान अवर न्यायालय की पत्रावली मेरे आदेश के अनुपालन हेतु प्रेषित की जावे। तथा इस न्यायालय की पत्रावली दाखिल दफ्तर हो।”

१०. वादी ने उपरोक्त आदेश के विरुद्ध एक निगरानी राजस्व परिषद के समक्ष प्रस्तुत करी, जो आदेश दिनांक १३.०९.२०११ द्वारा बलहीन मानते हुए निरस्त कर दी गई। आदेश के प्रमुख अंश निम्न है:-

“इस प्रकरण में महत्वपूर्ण तथ्य यह देखा जाना है कि किस प्रकार से वर्ग-२ का इन्द्राज अभिलेखों में दर्ज किया गया। अपर आयुक्त ने अपने प्रश्नगत आदेश में स्पष्ट रूप से यह निष्कर्ष निकाला है कि निगरानीकर्ता के पक्ष में विवादित भूमि पर वर्ग-२ का इन्द्राज बिना किसी सक्षम अधिकारी के आदेश के दर्ज किया गया है। अतः कागज दुरुस्ती के वाद अन्तर्गत धारा-३३/३९ भू-राजस्व अधिनियम के तहत इस प्रकार की गलतियों को शुद्ध किया जाना पूरी तरह से न्यायोचित है। इस मामले में इस बात पर कोई विवाद नहीं है कि वादग्रस्त भूमि पर विपक्षीगण का नाम भूमिधरी के रूप

में दर्ज है। इन परिस्थितियों में यह तथ्य महत्वपूर्ण है कि भूमिधरी की भूमि पर कैसे निगरानीकर्ता का नाम वर्ग-२ में आ गया इसको सिद्ध करने का प्रयास निगरानीकर्ता की ओर से होना चाहिए था जो कि वह नहीं कर पाये। इन परिस्थितियों में मैं स्वयं को अपर आयुक्त द्वारा दिये गये प्रश्नगत आदेश से सहमत पाता हूँ। मेरे विचार से अपर आयुक्त का प्रश्नगत आदेश दिनांक २८.०७.२००४ विधिक है तथा इसमें किसी परिवर्तन का कोई औचित्य नहीं है। निगरानी बलहीन होने के कारण निरस्त किये जाने योग्य हैं जिसे एतद्वारा निरस्त किया जाता है।"

११. उपरोक्त वर्णित आदेश २८.०७.२००४ व १३.०९.२०११, वर्तमान याचिका के वादी द्वारा आक्षेपित किए गए हैं।

याचिकाकर्ता का पक्ष

१२. याचिकाकर्ता के विद्वान अधिवक्ता श्री त्रिवेणी शंकर, श्री अनिल कुमार मेहरोत्रा व श्री विपुल कुमार ने निम्न तर्क प्रस्तुत किये:-

(क) वादी 'हिंदी विद्यापीठ, प्रयाग' का स्वतंत्र रूप से विवादित भूमि पर कब्जा है। यह संस्था स्वतंत्र रूप से संचालित है। संस्था ने अपने व्यय से विवादित भूमि पर विकास किया है। प्रतिवादी का विवादित भूमि पर कभी भी भौतिक रूप से या परोक्ष रूप से कोई कब्जा नहीं रहा है।

(ख) विवादित भूमि, प्रतिवादी को उत्तर प्रदेश सरकार द्वारा एक करार के रूप में दी गई थी। जिसका एक ही उद्देश्य था कि 'हिंदी विद्यापीठ, प्रयाग' (वादी) स्थापित हो और उसके

स्थापना के उपरांत, वादी ही विवादित भूमि पर काबिज रहा। करार की शर्तों के अनुसार ही भूमि का काबिज या मालिक निर्धारित किया जा सकता है। जिसका आक्षेपित आदेशों में कोई विचार नहीं किया गया। भूमि का अधिकारी कौन है, इसका निर्धारण करार की शर्तों व वादी एवं प्रतिवादी संस्था के नियमों के आधार पर ही किया जा सकता है। मात्र इस कारण से भी कि करार के समय वादी का जन्म ही नहीं हुआ था, प्रतिवादी के पक्ष में निर्णय नहीं दिया जा सकता है। इसके लिए उनके करण एवं बाद में वादी की संस्था के नियमों पर भी मनन करना पड़ेगा।

(ग) उपरोक्त कारणवश विवादित भूमि, धारा ३३/३९, उ०प्र० भू-राजस्व अधिनियम, १९०१ के अंतर्गत निर्धारित नहीं किया जा सकता है। प्रतिवादी 'हिंदी साहित्य सम्मेलन, प्रयाग' कभी भी विवादित भूमि का स्वामी नहीं रहा। वह कभी भी खुदकाशत भी नहीं रहा। विवादित भूमि हमेशा 'हिंदी विद्यापीठ, प्रयाग' के आधिपत्य में रही व वहीं इसकी देखरेख करता रहा एवं आज भी कर रहा है।

(घ) वादी 'हिंदी विद्यापीठ, प्रयाग' के नाम का अंकन श्रेणी २ में नियमानुसार था। उसको निरस्त करने में वैधानिक त्रुटि करी गई है। 'हिंदी विद्यापीठ, प्रयाग' एक रजिस्टर्ड संस्था है। यह विवादित भूमि उसी संस्था के स्थापना के लिए उत्तर प्रदेश सरकार ने अधिग्रहित की थी, जो कृषि शिक्षा, कृषि कार्य के प्रयोजन के लिए स्थापित और वर्तमान में कार्यशील भी है।

(ङ) वादी के विद्वान अधिवक्ता ने अपने तर्कों को मजबूती प्रदान करने के लिए **अजीम अहमद काज़मी एवं अन्य बनाम उत्तर**

प्रदेश सरकार एवं अन्य २००२ ए.एल.एल. सी.जे. ६४ (डी.बी.); श्रीमती हदीसुल निशा बनाम एडिशनल कमिशनर (जुडीशियल), फैजाबाद एवं अन्य २०२१ (१५२) आर.डी. ४२६ तथा शैलेन्द्र सिंह एवं अन्य बनाम एडिशनल कमिशनर (एड.), अयोध्या डि०, अयोध्या एवं अन्य २०२४ (१६३) आर.डी. ६७ के मामलों में पारित, उच्च न्यायालय, इलाहाबाद के निर्णयों को उद्धरित किया।

प्रतिवादी का पक्ष

१३. (क) प्रतिवादी के विद्वान वरिष्ठ अधिवक्ता, श्री प्रमोद जैन ने उत्तर प्रदेश सरकार व हिंदी सम्मेलन के मध्य करार का संदर्भ देते हुए कहा कि, उस करार के समय वादी 'हिंदी विद्यापीठ, प्रयाग' पैदा ही नहीं हुआ था। अतः उसका विवादित भूमि पर कोई अधिकार हो ही नहीं सकता है।

(ख) वादी के पक्ष में अंकित राजस्व प्रविष्टि, का कोई विधिक आधार न होने के कारण निरस्त करने योग्य थी। अतः आयुक्त, इलाहाबाद ने विधिक आदेश पारित कर उक्त प्रविष्टि को निरस्त कर प्रतिवादी का नाम अंकित करने का विधियुक्त आदेश दिया।

(ग) वादी 'हिंदी विद्यापीठ, प्रयाग', प्रतिवादी 'हिंदी साहित्य सम्मेलन, प्रयाग' के अंतर्गत बनाई गई एक संस्था है, जिसका कार्य उक्त विद्यापीठ को संचालित करना है। विवादित भूमि का स्वामित्व हमेशा से 'हिंदी साहित्य सम्मेलन, प्रयाग' का रहा है। 'हिंदी विद्यापीठ, प्रयाग' संस्था के नियमावली के अनुसार, अगर वह उक्त कार्य में असफल होती है, तो समस्त संपत्ति का अधिकारी प्रतिवादी

'हिंदी साहित्य सम्मेलन, प्रयाग' ही होगा, अतः विवादित भूमि का स्वामित्व सदैव 'हिंदी साहित्य सम्मेलन, प्रयाग' का ही रहा है।

(घ) 'हिंदी विद्यापीठ, प्रयाग', 'हिंदी साहित्य सम्मेलन, प्रयाग' की ही एक संस्था है, जिसका अपना स्वतंत्र अस्तित्व नहीं है। 'सिकमी काश्तकार', काश्तकार के अंतर्गत होता है। वादी अपने पक्ष में अंकित राजस्व प्रविष्टि के संदर्भ में कोई विधिक आदेश प्रस्तुत करने में असफल रहा है। वर्तमान मामला केवल वार्षिक रजिस्टर की गलतियों के सुधार का है, जिस पर आयुक्त व राजस्व परिषद ने उचित न्यायिक निर्णय पारित किया है, जिसमें किसी भी प्रकार के हस्तक्षेप की आवश्यकता नहीं है।

(ङ) धारा ३३/३९, उ०प्र० भू-राजस्व संहिता, १९०१, की कार्यवाही एक सरसरी कार्यवाही है तथा वादी और प्रतिवादी अपने अधिकार के लिए उचित कार्यवाई करने के लिए स्वतंत्र है। प्रतिवादी ने एक वाद धारा ५९, काश्तकारी अधिनियम १९५९ के अंतर्गत दायर किया है।

१४. उभय पक्षों के विद्वान अधिवक्ताओं को सुना एवं पत्रावली का परिशीलन किया।

१५. 'हिंदी साहित्य सम्मेलन, प्रयाग' की स्थापना १ मई, १९१० में नागरीय प्रचारिणी समाज के तत्वाधान में हुई। वर्ष १९१४ में यह संस्था पंजीकृत हुई। श्री पुरुषोत्तम दास टंडन सम्मेलन के सदस्य व मंत्री रहें। ऐसा कहा जाता है वह इसके उत्थान के लिए जियें और इसलिए उन्हें 'सम्मेलन के प्राण' के नाम से संबोधित भी किया जाता रहा है। इस संस्था के निम्न उद्देश्य रहे:-

“क- हिन्दी साहित्य सम्मेलन के सब अंगों की पुष्टि और उन्नति का प्रयत्न करना।

ख- देशव्यापी व्यवहार और कार्यों को सुलभ करने के लिए राष्ट्रलिपि देवनागरी और राष्ट्रभाषा हिन्दी का प्रचार करना।

ग- हिन्दी भाषा को अधिक सुगम, मनोरम, व्यापक और समृद्ध बनाने के लिए समय-समय पर उसके अभावों को पूरा करना और उसकी शैली में संशोधन और त्रुटियों को दूर करने का प्रयत्न करना।

घ- हिन्दी-साहित्य की दुर्लभ पाण्डुलिपियों और पुस्तकें की सुरक्षा के लिए हिन्दी- संग्राहलय, पुस्तकालय व वाचनालय की स्थापना तथा हिन्दी-माध्यम से परीक्षाओं का संचालन करना आदि।”

१६. ऐसा भी कहा जाता है कि विशेष रूप से श्री पुरुषोत्तम दास टंडन के अथक प्रयास से उत्तर प्रदेश सरकार ने करीब १०० बीघा जमीन (अब विवादित भूमि) का अधिग्रहण 'हिंदी विद्यापीठ, प्रयाग' की स्थापना के लिए ही किया। जो करार के विवरण से स्पष्ट भी होता है कि विवादित भूमि पर केवल 'हिंदी विद्यापीठ, प्रयाग' की ही स्थापना होगी एवं उसका उपयोग कृषि शिक्षा व कृषि फार्म के कार्य के लिए ही किया जाएगा और ऐसा प्रतीत होता है कि उक्त विद्यापीठ के उचित संचालन का भूमि के विधिक उपयोग के लिए एक अलग संस्था 'हिंदी विद्यापीठ, प्रयाग' का निर्माण किया गया, जो उस संस्था के स्थापना व संचालन के लिए बनाई गई। उक्त संस्था की नियमावली के अनुसार वह अपने कार्यों के लिए स्वतंत्र है, परंतु अगर संस्था कार्य न कर पाए तो समस्त संपत्ति पर 'हिंदी साहित्य सम्मेलन' का स्वामित्व हो

जाएगा। वाद के तथ्यों में वह दशा अभी अनुपस्थित है।

१७. उपरोक्त पृष्ठभूमि में यह निर्धारित करना कि वादी के पक्ष में अंकित राजस्व प्रविष्टि विधिक है अथवा नहीं। इस वाद बिन्दु के निर्धारण के लिए, उपरोक्त वर्णित संस्थाओं की नियमावली का अध्ययन भी आवश्यक हो जाता है, परंतु आयुक्त व राजस्व परिषद ने उक्त पक्ष पर ध्यान नहीं दिया। यह भी महत्वपूर्ण रहेगा कि उ०प्र० भू- राजस्व अधिनियम, १९०१ के अंतर्गत कार्यवाही हो भी सकती है अथवा नहीं, क्योंकि विवादित भूमि, उत्तर प्रदेश सरकार द्वारा एक करार के माध्यम से 'हिंदी विद्यापीठ, प्रयाग' के निर्माण हेतु ही दी गई थी। तो क्या गवर्नमेंट ग्रांट्स एक्ट (सरकारी अनुदान अधिनियम, १८९५) के प्रावधान लागू होंगे, यह भी विचारणीय रहेगा। यह भी विचारणीय रहेगा कि यह नॉन जेड. ए. की भूमि है, और जैसा उप-जिलाधिकारी ने भू-राजस्व अधिनियम के अंतर्गत प्रार्थना पत्र ही अपोषणीय माना था। परंतु न तो आयुक्त ने और न ही राजस्व परिषद ने इस विधिक विषय पर कोई ध्यान दिया और न ही कोई उचित व न्याय संगत कारण से पोषणीयता के विषय पर निर्णय दिया गया, को गलत या निराधार कारित किया। अतः आयुक्त व राजस्व परिषद ने विधिक त्रुटि कारित की है।

१८. आयुक्त व राजस्व परिषद ने वाद पोषणीय है अथवा नहीं, पर भी कोई टिप्पणी नहीं की है। वादी द्वारा अनेक दस्तावेज भी संलग्न किये गये थे परंतु उस पर भी कोई ध्यान नहीं दिया।

१९. उच्चतम न्यायालय ने पी.किशोर कुमार प्रति विठ्ठल के. पटकार २०२३ आई.एन.एस.सी. १००९ के निर्णय में सावर्णी बनाम इंदर कौर एवं अन्य (१९९६) ६ एस.सी.सी. २२३, बलवंत सिंह और अन्य बनाम दौलत सिंह (मृत) द्वारा विधिक प्रतिनिधि और अन्य (१९९७) ७ एस.सी.सी. १३७, जितेंद्र सिंह बनाम मध्य प्रदेश राज्य और अन्य २०२१ एस.सी.सी. ऑनलाइन एस.सी. ८०२ के मामलों में पूर्व में पारित निर्णयों का उल्लेख करते हुए एक बार फिर से निर्धारित किया कि उत्परिवर्तन प्रविष्टि व्यक्ति के पक्ष में कोई अधिकार, स्वामित्व या हित प्रदान नहीं करती है और राजस्व अभिलेख में उत्परिवर्तन प्रविष्टि केवल वित्तीय उद्देश्य के लिए ही हो सकती है।

२०. सामान्यतः ऐसे मामलों में जहां कार्यवाही सरसरी होती है, उच्च न्यायालय अनुच्छेद २२६ के अंतर्गत वृहद क्षेत्राधिकार होते हुए भी हस्तक्षेप नहीं करता है। जब तक विवाद पोषणीयता का न हो या किसी विधि का स्पष्ट रूप से उल्लंघन न हुआ हो। वर्तमान प्रकरण में, जैसा पूर्व प्रस्तरों में यह निर्धारित किया गया है कि इस वाद में पोषणीयता का सारवान विषय अन्तर्निहित है तथा आयुक्त व राजस्व परिषद ने इस विषय पर मनन नहीं किया है, अतः यह न्यायालय आक्षेपित आदेशों में हस्तक्षेप करना उचित व न्यायहित मानता है।

२१. इस निर्णय को पूर्ण करने से पहले, उपरोक्त के संदर्भ में यह उल्लेख

करना आवश्यक है, कि उक्त दोनों संस्थाओं के समस्त पदाधिकारियों से यह अपेक्षा है, कि वो मनमुटाव भुलाकर, आपस में संवाद करके विवाद को सुलझाने पर विचार, यह ध्यान रखकर करें कि दोनों संस्थाओं का विवादित भूमि से संबंध का उद्देश्य, कि विद्यापीठ व कृषि फार्म को एक उच्च स्तरीय शिक्षा संस्थान बनाया जा सके, समान है एवं आपसी कलह के कारण इस महत्वपूर्ण उद्देश्य का हास हो रहा है, जो इन संस्थाओं के संस्थापकगण, विशेष रूप से श्री पुरुषोत्तम दास टंडन द्वारा अपने जीवनकाल में इस संस्था के लिए किये गये कार्यों को असफल करने की ओर ले जा रहा है। दोनों संस्थाओं का साथ-साथ मिलकर कार्य करना ही उनके लिए सच्ची श्रद्धांजलि होगी। अन्यथा, उत्तर प्रदेश शासन को विवादित भूमि को वापस लेने के लिये, विधिवत् कार्यवाही करने की स्वतंत्रता हो सकती है।

२२. उपरोक्त के संदर्भ में आयुक्त, इलाहाबाद द्वारा पारित आदेश दिनांक २८.०७.२००४, तथा राजस्व परिषद द्वारा पारित आदेश दिनांक १३.०९.२०११, दोनों ही त्रुटिपूर्ण होने के कारण निरस्त किये जाते हैं एवं आयुक्त, प्रयागराज को वर्तमान वाद इस आशय से प्रतिप्रेषित किया जाता है कि उपरोक्त विवेचना को ध्यान में रखते हुए, अपील का पुनः निर्धारण, शीघ्र करें।

२३. वर्तमान याचिका उपरोक्त आदेश व निर्देश के साथ निस्तारित की जाती है।

(2024) 12 ILRA 260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 10320 of 1983

Ashok Kumar	Versus	...Petitioner
D.D.C.		...Respondent

Counsel for the Petitioner:

Rajeshwar Tiwari, Dipendra Kumar, Faujdar
 Raj, O.P. Mishra, Pradeep Kumar Rai

Counsel for the Respondent:

S.N. Singh, R.N. Singh, Rahul Sahai, SC

A. The Hindu Adoptions and Maintenance Act, 1956 - Sections 7 & 11 – Section 7 - Capacity of a male Hindu to take in adoption - Any male Hindu who has a wife living shall not adopt except with the consent of his wife - S. 11, Conditions for a valid adoption - In every adoption, the child to be adopted must be actually given and taken in adoption by the parents with intent to transfer the child from the family of its birth to the family of its adoption. It is mandatory for an adoption to be treated as valid that two important conditions mentioned in Section 11 of the Act of 1956 are present, i.e., the consent of wife before a male Hindu adopts a child, and proof of a ceremony of giving and taking adoption. (Para 12)

B. Civil Law - U.P. Consolidation of Holdings Act, 1953 - Section 9-A(2) – Adoption - Objections filed u/s 9-A(2) by the petitioner on basis of a registered adoption deed, whereas other two objections were filed on basis of an unregistered will and on basis of inheritance. Consolidation Officer rejected objections filed by the

petitioner and held that adoption proceedings were not legal and were not in accordance with law, as the adoption deed was not signed by the adopted mother. C.O. returned finding that the wife of Bhuneshwar Singh (adopted father) was not visible in photographs. Wife of Bhuneshwar (adopted father) had not put her signature or thumb impression on the adoption deed. Even the wife of Subedar Singh (natural father) was also absent, and as such, the said document was not sufficient to prove adoption. Objection on basis of inheritance was only accepted. Appeal of petitioner was allowed and held that registered adoption deed was a valid document and adoption was carried out by a due legal process. A registered document carries presumption unless rebutted. Settlement Officer Consolidation did not refer to the presence of wife of the adopted father and did not set aside the findings returned by the Consolidation Officer. Board of Revenue held that since the wife of Bhuneshwar (adopted father) had not signed the adoption deed, which indicates that she had not given her consent for adoption, which was a mandatory requirement. Held – Adopted father and mother of petitioner died prior to proceedings. Wife of adopted father had not signed the adoption deed, and the photographs also indicate that she had not participated in the ceremony. One witness had not even identified her in photographs, therefore, the Court was of the opinion that mandatory requirement that person who adopts a child must have consent of his wife was absent. Adoption was not legally valid. (Para 18)

Dismissed. (E-5)

List of Cases cited:

1. Uttam Chandra & ors. Vs St. of U.P. & ors.,
 2023:AHC:225752

2. M. Vanaja Vs M. Sarla Devi(Dead), (2020) 5 SCC 307

3. Moturu Nalini Kanth Vs Gainedi Kaliprasad (Dead, Through Lrs.), (2023) SCC OnLine SC 1488

(Delivered by Hon'ble Saurabh Shyam Shamsbery, J.)

1. Heard Sri Pradeep Kumar Rai, learned counsel for petitioner and Sri Somitra Anand, Advocate, holding brief of Sri Rahul Sahai, learned counsel for contesting respondents.

2. Present proceedings are arising out of objections filed under Section 9-A(2) of U.P. Consolidation of Holdings Act. Petitioner filed objection on basis of a registered adoption deed dated 12.05.1967, whereas other two objections were filed on basis of an unregistered will and on basis of inheritance.

3. The Consolidation Officer by an order dated 25.04.1977 rejected objections filed by the petitioner and held that adoption proceedings were not legal and were not in accordance with law so much as that adoption deed was not signed by adopted mother, therefore, a mandatory condition was not complied with. Similarly, objections on basis of an unregistered will was also rejected. Objection on basis of inheritance was only accepted. Findings returned in regard to adoption are reproduced hereinafter :-

“एडप्शन के प्रमाण में रजिस्टर्ड गोदनामा दस्तावेज दिनांक 09.08.67 प्रस्तुत है। साथ ही एक फोटो जिसे गोदनामा भी फोटो बताया जाता है, भी दिया गया है। इस पर भवनेश्वर सिंह सुबेदार सिंह तथा उनकी पत्नी के हस्ताक्षर हैं एवं अंगूठा निशान है। राम नरेश, सुदर्शन व राम लक्ष्मण के गवाह की हैसियत से हस्ताक्षर हैं किन्तु एस०आर० के समक्ष पहचान के समय केवल राम नरेश व सुदर्शन उपस्थित हैं। साक्ष्य में भी यही दो गवाह आये। इनकी निष्पक्षता के सम्बन्ध में ऊपर निष्कर्ष निकाले जा चुके हैं। एस०आर० ने अपनी तसदीक में स्पष्ट किया है कि भवनेश्वर सिंह पालकी के अन्दर

से दस्तावेज को स्वीकार किया। इस प्रकार वे उस समय काफी कम जोर थे उपरोक्त परिस्थितियों, गोदनामों की कार्यवाही संदिग्ध बनाती है। इस मुकदमा में प्रस्तुत अशोक आदि ने भी यह अपने बयान में स्पष्ट किया है कि ब्रह्मदेव जो सुबेदार के भाई थे, गोदनामों की कार्यवाही के समय उपस्थित थे। गोदनामों के फोटो में उनका चित्र सुबेदार के बगल में है। एस०पी० के प्रमाण पत्र तथा उसके बयान से स्पष्ट है कि ब्रह्मदेव जो पश्चिमी बंगाल में हुगली जिले में कान्स्टेबल थे। दिनांक 12-5-67 से 14-5-67 तक अवकाश पर नहीं थे। गोद की कार्यवाही जैसा कि गवाहों ने बयान किया है कि तथा गोदनामा दस्तावेज में अंकित है। दिनांक 12-5-67 को हुई बताया जाता है। इस तरह एक संदेहास्पद स्थिति पुनः सामने आती है या तो गोदनामा की कार्यवाही दिनांक 12-5-67 से 14-5-67 के पहले या बाद हुई इससे एक निष्कर्ष और निकाला जा सकता है कि गोदनामा का फोटो बाद में सबूत के लिए बनाया गया।

गोद के प्रमाण में जो फोटो दिया गया है उसकी तसदीक फोटोग्राफर द्वारा नहीं करायी के सम्बन्ध में पूजा पाठ की कार्यवाही में लगे पंडित व नाऊ आदि को न ही गोद के सत्यापन के लिए साक्ष्य में प्रस्तुत किया गया है और न फोटो में बताया गया है।

16 हिन्दू एजाप्शन एक्ट मेंटिनेन्स एक्ट में पंजीकृत गोदनामा के दस्तावेज से गोद के सम्बन्ध में प्रिजम्पशन करने का प्राविधान अवश्य है किन्तु गोद का दावा करने वालों पर तब भी तथा इससे पक्ष इसे रीबूट इसे साबित करने का भार अदालत रहता है क्योंकि कर सकता है। उदक्षत धारा के अनुसार केवल वह प्रीज्यूम किया जा सकता है कि हिन्दू एडप्शन एक्ट मेंटिनेन्स एक्ट के प्राविधानों के अनुसार गोद की कार्यवाही हुई है। इसके अतिरिक्त कपिलदेव आदि की ओर से इस गोदनामों के विरुद्ध जो साक्ष्य एवं सबूत प्रस्तुत है तथा गोदनामा के दस्तावेज एवं गवाहों के साक्ष्य हैं उससे गोदनामा काफी संदेहास्पद स्थित हो गयी है। इस प्रकार यदि दस्तावेज के रजिस्टर्ड होने के कारण यदि गोदनामा के सम्बन्ध में ही लिया जाय तो भी विवादित तथ्यों के आ जाने पर अशोक की ओर से गोदनामा को साबित करना चाहिए था। किन्तु इसे उनकी ओर से साबित नहीं किया जा सकता है।

11 हिन्दू एडप्शन एण्ड मेंटिनेन्स एक्ट के अनुसार गोद की वैधता के लिए यह आवश्यक है कि गोद में लिया जाने वाले बच्चों को दोनों लेने व देने वाले माता व पिता वास्तव में दे लेवे इस मुकदमा में जो फोटो दिया गया है, उसमें स्पष्ट नहीं होता कि देने वाले सुबेदार व उनकी पत्नी ने

बच्चों को दिया है। फोटो में जिसे गोद का प्रमाण बताया जाता है, में केवल सूबेदार बच्चों को पकड़े हुए दिखाई देते हैं। उनकी पत्नी उनके साथ इसमें शरीक दिखाई नहीं देती। इसी प्रकार भुवनेश्वर व उनकी पत्नी को लेते हुए दिखाई नहीं आये है। गोदनामा दस्तावेज पर केवल सूबेदार की औरत का अंगूठा निशानी बताया जाता है। भुवनेश्वर की पत्नी का अंगूठा निशान या हस्ताक्षर नहीं है। इस प्रकाश धारा 11 के उप खण्ड 6 का पालन नहीं हुआ। गोद में अवैधता का दोष है तथा गोद साबित नहीं है। ”

4. In aforesaid circumstances, the petitioner as well as other filed two appeals before Assistant Settlement Officer Consolidation. The Appeal of petitioner was allowed by an order dated 10.11.1982, that registered adoption deed was valid document and adoption was carried out by a due legal process. A registered document carries presumption unless rebutted. The relevant part thereof so far as adoption is concerned is reproduced hereinafter :-

“मैने विद्वान अधिवक्ताओं की बहस सुनी तथा पत्रावली पर आए सबूत के अवलोकन से इस निष्कर्ष पर पहुँचा कि पत्रावली पर आए कागजी व जबानी सबूत श्रीमती शिव कुमारी व हरमुनिया भुवनेश्वर सिंह की लड़की साबित है। हरमुनिया के राजेन्द्र प्रसाद सिंह लड़के हैं। नकल पैदाइश रजिस्टर दाखिल है इसमें भुवनेश्वर सिंह के एक लड़की 25.08.31 की और दूसरी 13.03.34 की पैदा दिखाई है। रजिस्टर दाखिल खारिज में शिव कुमारी व हरमुनिया भुवनेश्वर सिंह की लड़की दर्ज है। बैजनाथ सिंह रामगहन तथा हरमुनिया के इस सम्बन्ध में बयान हुआ है। दूसरी ओर से इसके विरुद्ध कोई सबूत दाखिल नहीं है। ब्रम्हा शंकर की तरफ से जो वसीयत दिनांक 30.01.67 की दाखिल की गयी है वह रजिस्ट्रीशुदा दस्तावेज नहीं है। इसमें लिखने की तारीख को मशकू किया गया है। यह तारीख दूसरी रोशनाई से लिखी गयी है। इस दस्तावेज के आधार पर मकुदमा चलने के काफी बाद में आपत्ति दायर की गई है। इन परिस्थितियों में इन दस्तावेज संदिग्ध है तथा वैध नहीं माना जा सकता। जहां तक गोदनामों का प्रश्न है, यह गोदनामा रजिस्ट्रीशुदा दस्तावेज है। इस पर गोद लेने वाले एवं देने वाले के दस्तखत है। इसलिए धारा 16 हिन्दू एडॉप्शन एवं मेन्टीनेंस एक्ट के अनुसार इसको वैध

माना जाएगा जब कि इसे अवैध न साबित किया जाय यह जिम्मेदारी दूसरी पक्ष की थी। इस दस्तावेज को अवैध साबित नहीं किया जा सकता है। रजिस्ट्रार के समक्ष भुवनेश्वर सिंह ने इसको स्वीकार किया है। भुवनेश्वर सिंह के कमजोर होने से यह दस्तावेज संदिग्ध नहीं माना जा सकता। गोदनामों की रसम भी हुई है ए जिसका फोटो कराया गया है। इस फोटो को गवाहान ने साबित किया है। यह 12.5.67 को होना बताया गया है। दूसरा पक्ष इस आधार पर इसे फर्जी कहता है कि इसमें ब्रम्हदेव सिंह भी है जो उस दिन छुट्टी पर नहीं थे परन्तु 7.5.67 का जारी किया हुआ सुपरिन्टेन्डेंट आफ पुलिस पश्चिमी बंगाल का सर्टिफिकेट है ए जिसमें 7 दिन की छुट्टी ब्रम्हदेव सिंह को स्वीकार की गयी है। एडवोकेट कमिश्नर द्वारा 3.4.76 को एस०पी० हुगली का बयान दर्ज किया गया है। यह बयान पत्रावली पर दाखिल है। इसमें कहा गया है कि ब्रम्हदेव सिंह इस तारीख को अर्जित अवकाश पर नहीं थे परन्तु आकस्मिक अवकाश के सम्बन्ध में कोई कागजात उपलब्ध नहीं पाए गये। भले ही ब्रम्हदेव सिंह अवकाश पर थे या नहीं परन्तु जो फोटो दाखिल किया गया है ए उसमें ब्रम्हदेव सिंह हैं। छुट्टी पर होने या न होने से इसको फर्जी नहीं माना जा सकता। इस फोटो को गवाहान ने साबित किया है।

इन परिस्थितियों में गोदनामों की कार्यवाही साबित है तथा गोद का दस्तावेज वैध है। इसके आधार पर अशोक कुमार सिंह ही भुवनेश्वर सिंह का दत्तक पुत्र है। अन्य आपत्ति कर्ताओं को कोई हक नहीं मिल सकता। ”

5. The contesting respondents thereafter filed a revision petition before the Board of Revenue and by order dated 02.07.1983, which was allowed and order passed by Settlement Officer Consolidation was set aside and claim of petitioner on basis of registered adoption deed was rejected. Wife of Bhuneshwar Singh (adopted father) has not signed on adoption deed. The findings returned that adoption deed was not proved. The relevant part thereof is reproduced hereinafter :-

“श्री अशोक कुमार सिंह स्वयं को मृतक भुवनेश्वर का दत्तक पुत्र बताते हैं। उनके कथन के समर्थन में सुदर्शन सिंह व रामनरेश सिंह व सुवेदार सिंह का बयान हुआ है। साक्ष्यों से स्पष्ट है कि सामनरेश व कपिल देव से दुश्मनी है। दोनों में मुकदमेबाजी हुई है। सुदर्शन ने स्वयं स्वीकार किया है कि अन्य मुकदमों में उन्होंने कपिलदेव आदि के विरुद्ध गवाही

दी है। सुवेदार अशोक कुमार के पिता है। इनकी गवाही स्वभावतः इन्टेस्टेड गवाही है। उक्त गवाहों के बयान के अतिरिक्त गोदानामा के प्रमाण में रजिस्ट्रीशुदा गोदानामा दिनांक 9-8-67 प्रस्तुत किया गया है। तवा साथ ही साथ एक फोटो प्रस्तुत किया गया है। जिसे गोदानामा में का फोटो बताया जाता है। गोदानामें पर भुवनेश्वर सिंह तथा सुवेदार सिंह के पत्नी के हस्ताक्षर है एवं अंगूठा निशानी है। राम नरेश, सुदर्शन राम लखन के गवाह की हैसियत से हस्ताक्षर है। सब रजिस्ट्रार के समक्ष पहचान के समय केवल राम नरेश व सुदर्शन उपस्थित हुए हैं। अधीनस्थ न्यायालय में भी इन्हीं लोगों ने गवाही की है। तब रजिस्ट्रार ने अपने तस्दीक में उल्लेख किया है कि भुवनेश्वर ने पालकी के अन्दर से दस्तावेज को स्वीकार किया। अशोक कुमार के गवाहों ने अपने बयान में स्पष्ट किया है कि ब्रम्हदेव जो सुवेदार के भाई है, गोदानामा में की कार्यवाही के समय उपस्थित थे। गोदानामे के फोटो पर उनका चित्र है, जो सुवेदार के बगल में है। पुलिस अधीक्षक का प्रमाण पत्र तथा उनके बयान से स्पष्ट है कि ब्रम्हदेव पश्चिम बंगाल में हुगली जिले में कान्स्टेबल थे। इस प्रकार गोदानामा में को साबित करने के लिए गवाहों का बयान कराया गया है। फोटोग्राफ में ब्रम्हासिंह सुवेदार के बगल में है। पुलिस अधीक्षक का स्थान कमीशन के जरिए लिया गया। बयान से स्पष्ट होता है कि ब्रम्हा सिंह दिनांक 12-5-67 से 14-5-67 तक कोई अवकाश पर नहीं थे। गोदानामा की कार्यवाही दिनांक 12-5-67 को हुई। इस प्रकार एक सन्देहास्पद स्थिति सामने आ जाती है। या तो गोदानामा की कार्यवाही दिनांक 12-5-67 से 14-5-67 के पहले या बाद में हुई हो। जब ब्रम्हदेव दिनांक 12-5-67 से 14-5-67 तक अवकाश पर नहीं थे तो दिनांक 12-5-67 को वह गोदानामा के समय उपस्थित कैसे हो सकते हैं।

निगरानीकर्तागण के विद्वान अधिवक्ता ने यह बहस किया कि पुलिस अधीक्षक का बयान ठीक नहीं हुआ है। अतः उसे मानना न्यायसंगत न होगा। लेकिन पुलिस अधीक्षक का बयान बजरिये कमीशन हुआ है और एक अधिकारी के बयान को न मानने का कोई कारण समक्ष में नहीं आता है इससे स्पष्ट है कि जो फोटो दाखिल किया गया है, वह सम्भवतः किसी धार्मिक अनुष्ठान का फोटो है, जिसमें सभी लोग उपस्थित थे और बाद में सम्भवतः सबूत बनाने के लिए इसे दाखिल कर दिया गया हो। जहाँ तक गोदानामा का सवाल है, धारा 16 हिन्दू एडाप्शन एक्ट में पंजीकृत गोदानामा के सम्बन्ध में प्रीजम्पशन करने का प्राविधान अवश्य है किन्तु यह

भी उल्लिखित है कि गोदानामा का दावा करने वाले की उसे निर्विवाद रूप से साबित करने का तथा अन्य पक्षों को खिलाफत करने का अधिकार है। मेरे समक्ष ए०डब्ल्यू०सी० 1981, पृष्ठ 204 पर उल्लिखित माननीय उच्च न्यायालय की व्यवस्था प्रस्तुत की गयी इस व्यवस्था में यह उल्लेख है कि यदि गोद लेने वाले व गोदानामा देने वाले ने गोदानामा में पर हस्ताक्षर किया है तो गोदानामा में की रस्म साबित करने के लिए अन्य सबूत देने की जरूरत नहीं है। 1977 ए०आई०वार० पृष्ठ ॥ पर प्रदत्त व्यवस्था का हवाला निगरानीकर्ता गण की ओर से दी गयी और कहा गया कि जब तक दस्तावेज अवैध साबित नहीं हो, उसे मानना होगा। इस आधार पर विद्वान अधिवक्ता ने यह तर्क किया कि दस्तावेज गोदानामा में को वैध मानकर अग्रिम कार्यवाही करना न्याय संगत होगी।

परन्तु गोदानामे का ध्यानपूर्वक अवलोकन करने से विदित होता है कि सभी पक्षों के गोदानामें पर हस्ताक्षर नहीं है। प्रस्तुत स्थल पर गोदानामें के समय भुवनेश्वर सिंह की पत्नी के हस्ताक्षर गोदानामें पर नहीं है जब कि साक्ष्यों से स्पष्ट है कि भुवनेश्वर की पत्नी दस्तावेज गोदानामा लिखने के समय जीवित थी सुवेदार सिंह अशोक कुमार की गवाही में शामिल भी हुए थे। ऐसा परिस्थिति में उनका हस्ताक्षर गोदानामा पर अनिवार्य है। मुनेश्वर की पत्नी के गोदानामा में पर हस्ताक्षर न होने के कारण गोदानामा में की प्रक्रिया विधानतः दूषित हो जाती है और यह धारा ॥ के उप खण्ड 6 का उल्लंघन है। इसके अतिरिक्त कपिलदेव आदि की ओर से इस गोदानामें के विरुद्ध जो साक्ष्यादि प्रस्तुत हैं, उससे स्थिति काफी सन्देहास्पद हुई है और ऐसी परिस्थिति में अशोक कुमार की ओर से निर्विवाद रूप से गोदानामा साबित करना चाहिए था। उत्तरवादीगण की ओर से 1956 ए०आई०आर० पृष्ठ 504, किशोरी लाल बनाम मु० चलती बाई वाद में उल्लिखित माननीय सुप्रीम कोर्ट की व्यवस्था प्रस्तुत की गयी है, जिसमें यह उल्लेख है कि चूंकि गोदानामें के फलस्वरूप सारा स्वत्व और अधिकार दूसरे बच्चे में स्थानान्तरित हो जाता है, गोदानामा में को निर्विवाद रूप से साबित होना आवश्यक है। प्रस्तुत स्थल पर ब्रम्हदेव का गोदानामे के समय उपस्थित होना, लेकिन स्वयं उनका अवकाश पर न होना, फोटो का फोटोग्राफ आदि का तसदीक न करवाना, भुवनेश्वर की पत्नी द्वारा गोदानामें पर हस्ताक्षर न करना तथा गोदानामें को ग्राम के पुरोहित तथा नाई आदि से साबित न करवाना यह सारी की सारी परिस्थितियां गोदानामें की

पूरी कार्यवाही को विवादग्रस्त बना देता है और विवादग्रस्त परिस्थिति में गोदनामा को स्वीकार करना न तो न्याय संगत ही कहा जा सकता है और न ही युक्तिसंगत कहा जा सकता है।

अशोक कुमार की ओर से वरासत के प्रश्न पर तहसीलदार के आदेश दिनांक 26-6-76 की नकल प्रस्तुत की गयी है। यह आदेश सुपरवाइजर कानूनगो का है। इसे न्यायिक आदेश नहीं माना जा सकता। इस प्रकार की प्रविष्टियों का वरासत के प्रश्न पर निर्णय लेते समय कोई महत्व नहीं है। इस प्रकार गोदनामा के आधार पर विशेषकर उस परिस्थिती में जब कि गोदनामा संदिग्ध है, अशोक कुमार के पक्ष में कोई आदेश प्रदत्त करना न्यायसंगत नहीं प्रतीत होता। निगरानी स्तर पर मेरे समक्ष मुकदमा नम्बर 282/77 सरकार बनाम रामदाहिन धारा 380 भा०द०वि० व अदालत मुंसिफ मजिस्ट्रेट पूर्वी में दिए गए सूबेदार सिंह के बयान की नकल प्रस्तुत की गयी है, जिसमें सूबेदार सिंह ने कहा है कि गोदनामा कब हुआ, इसकी जानकारी उसे नहीं है। कहाँ पर हुआ, इसकी जानकारी उसे नहीं है। गोदनामा का संस्कार मेरे सामने नहीं हुआ। मुझे रामगहन की गवाही के बावत तथा मुकदमा होने के बावत कोई जानकारी नहीं है। उल्लेखनीय है कि अशोक कुमार श्री सूबेदार सिंह के पुत्र हैं। स्वयं सूबेदार सिंह के इस बयान से भी गोदनामे की परिस्थितियाँ अत्यन्त संदिग्ध हो जाती हैं। सूबेदार सिंह ने स्वयं अपने बयान में कहा है कि इनके सामने गोदनामें की रसम पूरी नहीं हुई थी। उनकी इस स्वीकारोक्ति के समक्ष गोदनामें के सम्बन्ध में दिए गए सारे के सारे प्रमाण निरर्थक हो जाते हैं। इस प्रकार गोदनामा मान्य नहीं कहा जा सकता। ”

6. The aforesaid order is challenged at the behest of petitioner in present writ petition. This Court by an order dated 26.08.1983 granted stay, however, by an order dated 25.09.1992, stay application was rejected since no one has appeared on behalf of petitioner and according to further order-sheet, it appears that interim order was later on granted.

7. Sri Pradeep Kumar Rai, learned counsel for petitioner submitted that adoption was carried out in a due process and witnesses have specifically stated that procedure was followed and since it was a registered document as such it has a presumption of its correctness. He further submitted that Board of Revenue has

erroneously emphasised that photograph of Brahma Shankar Singh during the adoption was not possible since on that date he was on duty in West Bengal, however, a certificate from concerned Police Authority shows that he was on leave on particular date on a special ground.

8. Learned counsel further submitted that adopted father and mother of petitioner were not alive during objections and biological father of petitioner has recorded his statement that in his presence adoption proceedings were carried out, with consent of adopted father and mother in presence of number of persons and after Puja and Ceremony, a Bhoj was also organized.

9. Per contra, Sri Somitra Anand learned counsel for contesting respondents submitted that adoption deed has to be proved in terms of provisions provided under the Maintenance and Adoption Act 1956 and consent of wife of a male who adopts a child was mandatory as well as there must be proof of ceremony of actual giving and taking adoption. However, in the present case, signature of adopted mother was neither on adoption deed nor she was present at the time of its registration. Adopted father has given his consent while sitting in a “Palki”™ at the time of registration.

10. Learned counsel further referred findings returned by Board of Revenue that on basis of evidence of biological father, adoption procedure could not be proved. In photographs of ceremony placed on record, adopted mother was not seen as well as witnesses produced were interested. The other relevant witnesses such as “Pandit and Nau”™ were not even produced.

11. I have considered the above submissions and perused the record. Before considering the rival submission, few paragraphs of a judgment passed by this Court in case of **Uttam Chandra and 2 others Vs. State of U.P. and 10 others, 2023:AHC:225752** would be relevant, wherein judgments of Supreme Court in **M. Vanaja Vs M. Sarla Devi(Dead), (2020) 5 SCC 307, Moturu Nalini Kanth Vs. Gainedi**

Kaliprasad (Dead, Through Lrs.), (2023) SCC OnLine SC 1488 were followed and its relevant paragraphs are mentioned hereinafter:-

M. Vanaja (supra) :-

“13. Section 6 of the 1956 Act, prescribes the prerequisites for a valid adoption, which are:

*“6. Requisites of a valid adoption.””
No adoption shall be valid unless””*

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.”•

14. Section 7 provides that the male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. The consent of his wife has been made mandatory by the proviso to Section 7. Section 9 deals with persons who are capable of giving a child in adoption. The other conditions for a valid adoption are stipulated in Section 11 of the 1956 Act. One such condition is Section 11(vi) which is as under:

*“11. Other conditions for a valid adoption.””

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption:

Provided that the performance of datta homan shall not be essential to the validity of an adoption.”•

15. A plain reading of the above provisions would make it clear that compliance of the conditions in Chapter I of the 1956 Act is mandatory for an adoption to be treated as valid. The two important conditions as mentioned in Sections 7 and 11 of the 1956 Act

are the consent of the wife before a male Hindu adopts a child and proof of the ceremony of actual giving and taking in adoption. The appellant admitted in her evidence that she does not have the proof of the ceremony of giving and taking of her in adoption. Admittedly, there is no pleading in the plaint regarding the adoption being in accordance with the provisions of the Act. That apart, the respondent who is the adoptive mother has categorically stated in her evidence that the appellant was never adopted though she was merely brought up by her and her husband. Even the grandmother of the appellant who appeared before the Court as PW 3 deposed that the appellant who lost her parents in her childhood was given to the respondent and her husband to be brought up. PW 3 also stated in her evidence that the appellant was not adopted by the respondent and her husband. Therefore, the appellant had failed to prove that she had been adopted by the respondent and her husband Narasimhulu Naidu.

16. The appellant relied upon a judgment of this Court in L. Debi Prasad [L. Debi Prasad v. Tribeni Devi, (1970) 1 SCC 677] to submit that abundant evidence submitted by her before the Court would point to the fact that she was brought up as the daughter of the respondent and her husband (Late) Narasimhulu Naidu. Such evidence can be taken into account to draw inference that she was adopted by them. The facts in L. Debi Prasad [L. Debi Prasad v. Tribeni Devi, (1970) 1 SCC 677] are similar to those in the instant case. In that case, Shyam Behari Lal was adopted by Gopal Das in the year 1892 when he was an infant. Shyam Behari Lal was unable to establish the actual adoption but has produced considerable documentary evidence to show that he was treated as the son of Gopal Das for a quarter of century. This Court accepted the submission of Shyam Behari Lal and held that there was sufficient evidence on record to infer a valid adoption. Though the facts are similar, we are unable to apply the law laid down in L. Debi Prasad [L. Debi Prasad v. Tribeni Devi, (1970) 1 SCC 677] to the instant case. L. Debi Prasad [L. Debi Prasad v. Tribeni Devi, (1970) 1 SCC 677] case pertains to adoption that took

place in the year 1892 and we are concerned with an adoption that has taken place after the 1956 Act has come into force. Though the appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the defendant, she has not been able to establish her adoption. The mandate of the 1956 Act is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the 1956 Act. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. This Court by its judgment in Ghisalal v. Dhapubai [Ghisalal v. Dhapubai, (2011) 2 SCC 298 : (2011) 1 SCC (Civ) 411] held that the consent of the wife is mandatory for proving adoption.

Moturu Nalini Kanth(supra): -

“36. The presumption, as is clear from the provision itself, is rebuttable. In *G. Vasu v. Syed Yaseen Sifuddin Quadri*, AIR 1987 AP 139, a Full Bench of the Andhra Pradesh High Court pointed out that presumptions are of two kinds - presumptions of fact and of law. It was noted that a presumption of fact is an inference logically drawn from one fact as to the existence of other facts and such presumptions of fact are rebuttable by evidence to the contrary. It was also held that presumptions of law may be either irrebuttable, so that no evidence to a contrary may be given, or rebuttable, and a rebuttable presumption of law is a legal rule to be applied by the Courts in the absence of conflicting evidence. This view was affirmed by this Court in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal*, (1999) 3 SCC 35, and it was held that in order to disprove a presumption, such facts and circumstances have to be brought on record, upon consideration of which, the Court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.

37. In this regard, we may also note that Section 11 of the Act of 1956 stipulates the conditions to be complied with to constitute a

valid adoption and, to the extent relevant, it reads as under:

“~11. **Other conditions for a valid adoption.** - In every adoption, the following conditions must be complied with:”•

(i) to (v) “1.;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption:

Provided that the performance of datta homam shall not be essential to the validity of adoption”™

38. We may now take note of relevant case law. In *Laxmibai (Dead) through LRs. v. Bhagwantbuva (Dead) through Lrs.*, (2013) 4 SCC 97, this Court held that the mere signature or thumb impression on a document is not adequate to prove the contents thereof but, in a case where a person who has given his son in adoption appears in the witness box and proves the validity of the said document, the Court ought to accept the same taking into consideration the presumption under Section 16 of the Act of 1956. Ergo, the proving of the validity of the document is a must.

39. Much earlier, in *Kishori Lal v. Mst. Chaltibai*, AIR 1959 SC 504, a 3-Judge Bench of this Court held that, as an adoption results in changing the course of succession, it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth. On facts, the Bench found that no invitations were sent to the brotherhood, friends or relations and no publicity was given to the adoption, rendering it difficult to believe.

40. In *Govinda v. Chimabai*, AIR 1968 Mys 309, a Division Bench of the Mysore High Court observed that the mere fact that a deed of adoption has been registered cannot be taken as evidence of proof of adoption, as an adoption deed never proves an adoption. It was rightly held that the factum of adoption has to

be proved by oral evidence of giving or taking of the child and that the necessary ceremonies, where they are necessary to be performed, were carried out in accordance with shastras.

41. In *Padmalav Achariya v. Srimatyia Fakira Debya*, AIR 1931 PC 81, the Privy Council found that a cloud of suspicion rested upon an alleged second adoption and the factum of the second adoption was sought to be proved on the basis of evidence of near relatives who were also partisan, which made it unsafe to act upon their testimonies. The Privy Council held that both the adoptions were most improbable in themselves and were not supported by contemporaneous evidence.

42. In *Jai Singh v. Shakuntala*, (2002) 3 SCC 634, this Court noted the statutory presumption envisaged by Section 16 of the Act of 1956 and observed that though the legislature had used “shall”TM instead of any other word of lesser significance, the inclusion of the words “unless and until it is disproved”TM appearing at the end of the statutory provision makes the situation not that rigid but flexible enough to depend upon the evidence available on record in support of the adoption. This Court further noted that it is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession - thus onus of proof is rather heavy. This Court held that the statute allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words “unless and until it is disproved”TM, per this Court, have to be ascertained in proper perspective and as such, the presumption cannot but be said to be a rebuttable presumption. This Court further held that the registered instrument of adoption presumably stands out to be taken to be correct but the Court is not precluded from looking into it upon production of some evidence contra the adoption and the Court can always look into such evidence. This Court further noted the mandate of Section 11 (vi) of the Act of 1956 and held that the “give and take in adoption”TM is a requirement which stands as a *sine qua non* for a valid adoption.

43. In *Mst. Deu v. Laxmi Narayan*, (1998) 8 SCC 701, this Court observed that in view of Section 16 of the Act of 1956, whenever any document registered under law is produced before the Court purporting to record an adoption made and is signed by the persons mentioned therein, the Court should presume that the adoption has been made in compliance with the provisions of the said statute, unless and until it is disproved. It was further held that in view of Section 16 of the Act of 1956, it is open to the persons who challenge the registered deed of adoption to disprove the same by taking independent proceedings.

44. In *Lakshman Singh Kothari v. Rup Kanwar (Smt) alias Rup Kanwar Bai*, AIR 1961 SC 1378, having referred to texts on Hindu Law, this Court observed:

“10. The law may be briefly stated thus : Under the Hindu law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object, it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party.”TM

45. In *M. Vanaja v. M. Sarla Devi (Dead)*, (2020) 5 SCC 307, this Court took note of the relevant provisions of the Act of 1956 and held that a plain reading of the said provisions made it clear that compliance with the conditions in Chapter 1 of the Act of 1956 is mandatory for an adoption to be treated as

valid and that the two important conditions mentioned in Sections 7 and 11 of the Act of 1956 are the consent of the wife before a male Hindu adopts a child and the proof of the ceremony of actual giving and taking in adoption.

46. In *Dhanno wd/o Balbir Singh v. Tuhi Ram (Died) represented by his Lrs*, AIR 1996 P&H 203, a learned Judge of the Punjab & Haryana High Court, faced with the argument that Section 16 of the Act of 1956 required a registered adoption deed to be believed, held that the presumption thereunder, if any, is rebuttable and by merely placing the document on record without proving the ceremony of due adoption, it could not be said that there was a valid adoption. The learned Judge rightly noted that the factum of adoption must be proved in the same way as any other fact and such evidence in support of the adoption must be sufficient to satisfy the heavy burden that rests upon any person who seeks to displace the natural succession by alleging an adoption.”•

(Emphasis Supplied)

12. As referred above it is mandatory for an adoption to be treated as valid that two important conditions mentioned in Section 11 of Act of 1956 are present i.e. the consent of wife before male hindu adopt a child and prove of a ceremony of giving and taking adoption.

13. It is on record that adopted father and mother of petitioner died prior to proceedings. During proceedings statement of Subedar Singh (biological father of petitioner) was recorded wherein he has stated that during adoption proceeding parents of both sides were present including the wife of adopted father, however, witnesses have stated that at the time of registration of the adoption deed, adopted mother (wife of adopted father) was not present.

14. The Court also perused the statement of Sudarshan Singh who has stated that he was witness to ceremony and parents of both sides were present and he was also a signatory to registered document, however, he has also

stated that wife of Bhunshwar Singh was present during registration.

15. Similarly, other witness Ram Naresh though stated that he recognized Bhuneshwar Singh and his wife, however, not able to identify them from photographs. The said witness did not know her name (wife of Bhuneshwar Singh).

16. I have also perused the orders passed by the Consolidation Officer and that a finding was returned that adoption process was not legally followed and essential conditions were absent as wife of Bhuneshwar Singh was not visible in photographs. Even the wife of Subedar Singh (natural father) was also absent. The wife of Bhuvneswar (adopted father) has not put her signature or thumb impression on adoption deed and as such the said document was not sufficient to prove adoption.

17. The Settlement Officer Consolidation has not referred about presence of wife of adopted father and has not set aside the above referred findings returned by Consolidation Officer and only on ground that presence of Brahmdev Singh could not be doubted, disturbed the findings returned by the Consolidation Officer. The Board of Revenue has considered the material and specifically held that a mandatory requirement was not completed since the wife of Bhuvneshwar has not even signed on adoption deed which indicates that she has not given her consent for adoption, which was a mandatory requirement. The Board of Revenue has also considered the statements of witnesses that they were not sufficient to prove the adoption ceremony.

18. In the aforesaid circumstances, it could be held without any doubt that wife of adopted father has not signed the adoption deed as well as the photographs also indicate that she has not participated in the ceremony. One witness has not even identified her in photographs, therefore, the Court is of considered opinion that mandatory requirement that person who adopts a child must have consent of his wife was absent.

19. The Consolidation Officer has returned a finding to this effect and rejected the objection of petitioner, however, without even referring to it as well as without disturbing it, the Settlement Officer Consolidation has erred in causing interference and wrongly allowed the objections of the petitioner. The said error was rightly cured by Board of Revenue and by a very detailed reasoned order has set aside the order passed by the Settlement Officer Consolidation and upheld the findings returned by the Consolidation Officer that adoption was conducted without permission and consent of wife of adopted father. She has not even signed the adoption deed, therefore, adoption was not legally valid.

20. The aforesaid findings returned by the Board of Revenue are in terms of above referred judgment **Uttam Chandra (supra)** and since there are evidence which has not been contradicted, that adoption proceedings were conducted without consent of wife of person who adopted the child, therefore, mandatory requirement was not fulfilled as well as nature of evidence has also not proved beyond reasonable doubt that ceremony of giving and taking was under taken.

21. In the aforesaid circumstances, the Court is of considered opinion that there is no reason to interfere with reasoned order passed by Board of Revenue as the mandatory requirement for valid adoption were not followed, therefore, this writ petition is dismissed.

22. The Court extends apology to litigants since this writ petition is being decided after more than four decades.

(2024) 12 ILRA 269

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.12.2024

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ B No. 15803 of 1981

Bhagwan Bux Singh ...Petitioner
Versus
Board of Revenue, U.P. Allahabad & Ors.
...Respondents

Counsel for the Petitioner:

Krishna Mohan

Counsel for the Respondents:

S.C., D.S. Pandey

A. Civil Law – Indian Succession Act, 1925- Section 63 – Indian Evidence Act, 1872 -Section 68 – Proof of Execution of Will - A Will has to be proved in terms of Section 63, Indian Succession Act, 1925, and Section 68 of Indian Evidence Act, 1872. In order to prove the Will u/s 68 of Indian Evidence Act, 1872, at least one attesting witness has to come forward to prove the Will. Execution of Will cannot be proved and a Will cannot be used as evidence until one attesting witness at least is examined and has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. (Para 26)

B. Civil Law - Will - Land in question was of one Balidan Singh, which was later on inherited by one Sheodin Singh. Plaintiff / Respondent No. 4 claimed that Sheodin Singh has executed a Will deed in his favour and, on the basis of said Will deed, instituted a suit under Section 229B of U.P.Z.A. & L.R. Act, claiming Bhumidhari rights. Plaintiff / Respondent No. 4 was declared co-bhumidhar. Petitioner's appeal was dismissed. Second Appeal was also dismissed. Held: One of the attesting witnesses had died before the suit was filed; however, it is not on record whether the other attesting witness was alive or not. Trial Court decided the issue on the basis of the statement of PW-1 Ranjeet Singh, brother of Brijlal (since deceased), a marginal witness to the Will, and he proved the signatures of his brother. There is no finding that the other attesting

witness was dead; it is, therefore, presumed that he was alive. However, the plaintiff has neither produced him nor was the scribe produced. Witness Ranjeet Kumar can only prove the signature of his brother (since deceased), one of the attesting witnesses. It was mandatory to have examined the other attesting witnesses to prove the Will in accordance with law. It was not the case that the other attesting witness was not alive. Appellate Court has not considered the requisite procedure to prove a Will, i.e., whether the attesting witnesses were examined or not, and the consequence of their non-examination. Board of Revenue has not applied mind whether any question of law was involved or not. As the other marginal witness was not examined, as well as the scribe was also not examined, therefore, the Will cannot be considered to be proved. (Para 21, 22)

Allowed. (E-5)

List of Cases cited:

1. Gaon Sabha Vs B.R., 2024:AHC16953,
2. Dr. Jeevan Bahadur Samaddar Vs Govind Charan Samaddar & ors., dated 30.05.2013 (Second Appeal No. 234 of 2010)
3. Santosh Hazari Vs Purushottam Tiwari, 2001 LawSuit (SC) 237
4. H. Venkatachala Iyengar Vs B.N. Thimmajamma & ors. AIR 1959 SC 443
5. Meena Pradhan & ors. Vs Kamla Pradhan & Anr. 2023 INSC 847

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Mr. Rohit Verma, Advocate holding brief of Mr. Krishna Mohan, learned counsel for petitioner and Mr. Jai Raj, learned counsel for the contesting respondents.

2. In the present case land in dispute was acquisition of one Balidan Singh, which

was later on inherited by one Sheodin Singh, who died issueless in the year 1965. The respondent no. 4 set up a case that he was son of Sheodin Singh's sister and further claimed that such Sheodin Singh has executed a Will deed on 23.07.1957 in his favour as well as on ground of inheritance also.

3. The respondent no. 4 on the basis of said Will deed instituted a suit under section 229B of U.P.Z.A. & L.R. Act, claiming Sirdhari and Bhumidhari rights on part of land in dispute. The Suit was contested by the petitioner that said Balidan Singh has only one daughter namely Sheo Kala and Sheodin Singh was not empowered to execute Will in regard to land in dispute.

4. The Assistant Collector Ist-Class Rai-Bareilly, framed eight issues, including the issue no. 2 i.e. (Did Sheodin Singh execute Will deed in favour of the plaintiff? If so, is it valid?

5. The learned Trial Court decided the said issue, that the Will deed was executed by Sheodin Singh, in favour of the plaintiff and that it was also valid. Other issues were also decided and finally the Suit was decreed and the plaintiff/respondent no. 4 was declared Co-Bhumidar and Co-Sirdar of parts of land in dispute by judgment dated 31.10.1975. The relevant findings, so far as Issue nos.1 and 2 is concerned, are reproduced hereinafter:-

"Issues nos. 1 and 2:-

From the judgment dated 7-6-81 in mutation case no.82 filed by Chhotey Singh in Tahsildar's court shows that it had been held that the plaintiff Chhotey Singh is the sister's son of Sheodin - Singh. The will not deed which is a registered document was executed by Sheodin Singh on 23-7-57 the megina 1 witness of which was Brij Lal, now dead, whose signatures were proved by P.W.1 Ranjit Singh, the brother of Brij Lal. The deceased willed all his property in favour of the plaintiff whom is he has mentioned there in as his sister's son. Sheodin Singh died in 1965 and the deed was executed 8 years prior to his death in which he has clearly mentioned that Chhotey Singh, son

of his sister's Smt. Rajauta lived with Sheodin Singh during his life time. P.W.1 Ranjit Singh also have proved the pedigree given in the plaint and stated that the plaintiff is the son of Rajuta Devi who was the real sister's of Sheodin Singh. Pratap Bahadur Singh, defendant no.8 has also proved the above facts in his statement. Even D.W.1 Ram Swarup Singh has deposed in cross-examination that Baladan Singh had a son Sheodin Singh and a daughter name Rajauta Kunwar. The defendants could not give any concrete proff against the above evidence to prove their version to the effect that Baladan Singh had no daughter, as alleged by them, named Sheo Kala. Thus it is proved beyond doubt that the plaintiff is the real sister's son of Sheodin Singh particularly in view of the statement of Bhagwan Bux Singh himself where in cross-examination he has definitely deposed that Puran- Singh is not the sister's son of Sheodin Singh. No doubt in his examination in chief it was alleged that Puran Singh is the son of Sheo Kala who was the step sister of Sheodin Singh and who has been also living in house of Sheodin Singh. But D.W.2 Bhagwan Bux Singh further stated that Babadan Singh had got only one wife and no second marriage of his was performed.

I, therefore, hold that the plaintiff, Chhotey Singh is the son of Smt. Rajauts, the real sisters of Sheodin Singh.

As regards the validity of the will-deed, executed by Sheodin Singh, dated 23-7-57, it has been argued on behalf of the contesting defendants that he could execute the deed only he respect of the Bhumidhari rights and not Sirdari Land, in this case the matter of intetintance is involved and the plaintiff is not claiming the bhumidhari or Sirdari rights simply on the basis of the will-deed but he has claimed the inheritance on the basis of his being the sister's son of the deceased Sheodin Singh. The contesting defendants have not cared to prove their version that the will is Farzi, as alleged by them in the written-statement.

As such I, hold that the will deed was executed by Sheodin Singh in favour of the plaintiff and that it is also valid.

In view of the above findings Issues Nos.1 and 2 are decided in the affirmative."

6. The petitioner being aggrieved, filed an Appeal before the Additional Commissioner Lucknow, which was dismissed by an order dated 12.3.1978 and the finding in regard to issue of Will by the learned Trial Court was upheld and it was declared to be a genuine registered document.

"अपीलकर्ता ने 1970 आर०डी० पेज 103, 1973 आर०डी० पेज 180 तथा 1967 आर०डी० पेज 358 पर भी भरोसा किया।

मैने उभय पक्षों के विद्वान अभिवक्तागणों की बहस सुनी तथा पत्रावली का अवलोकन किया।

अपीलकर्ता का यह कथन कि शिवदीन की मृत्यु 23-24 वर्ष पहले 1952 में हुयी, सही नहीं है क्योंकि दिनांक 23-7-57 को उसने रजिस्टर्ड वसीयतनामा किया है जिससे स्पष्ट होता है कि उस तिथि को वह जिन्दा था। उस वसीयत नामें से स्पष्ट होता है कि श्रीमती रजीता कुँवर उसकी बहन है और छोटे सिंह वल्द नन्दलाल सिंह उसका लड़का है। यह दस्तावेज मृतक का प्रीवियस स्टेट मेन्ट (प्रीवियस स्टेटमेन्ट) माना जायेगा। और 28वर्षों से पुराना दस्तावेज न होते हुये भी इसकी इस हद तक इवीडेन्सरी वैल्यू (इवेडेन्सरी वैल्यू) महत्वपूर्ण रहेगी। इससे यह अवश्य स्थापित हो जाता है कि मृतक शिव दीन की बहन रजीता थी और उसका लड़का छोटे सिंह था अस्तु वह असारण तथा शिव दीन सिंह की जायदाद का वारिस होगा क्योंकि भगवान वक्स सिंह ने शिवदीन सिंह को इनके जीवन काल में भूमि से निष्कासित आउट कर दिया था। निष्कासन के लिए काफी ठोस साक्ष्य की आवश्यकता है। निष्कासन के गवाह भगवान वक्स सिंह तथा राम स्वरूप है भगवान बक्स सिंह स्वयं पक्ष है। राम स्वरूप डी०डब्ल्यू० 2 का बयान बहुत विश्वसनीय नहीं है क्योंकि यह शिव दीन की बहन रजीता कुँवर को नहीं जानता क्योंकि उसके अनुसार शिवकला वहन थी। यह बयान शिव दीन द्वारा लिखित रजिस्टर्ड विल (रजिस्टर विल से खण्डित होता है अस्तु यह गवाह विश्वसनीय नहीं है। इस गवाह ने यह भी कहा है कि शिवदीन के जीवनकाल ब्रहममन लोगों का कब्जा हो गया था और ब्राहमनों से अगपाल सिंह ने कब्जा कर लिया यह स्पष्ट आउस्टर (आउस्टर) सिद्ध नहीं करता आउस्टर के लिये नालेज (नोलेज) औरडिनायल आफ आइटिन और होस्टइल (होस्टिल) कब्जा काविज करना आवश्यक है जो इस बयान से सिद्ध नहीं होता अस्तु इस साक्ष्य से शिव दीन सिंह का आउस्टर साबित नहीं किया जा सकता है। 368 फ० की रसीद आवराती से भी स्पष्ट होता है कि शिव दीन सिंह का कब्जा उस वर्ष था 1378-77 फ की भी रसीदें शिवदीन सिंह के नाम की है परन्तु उस समय यह मर चुका था परन्तु इससे यह अवश्य इनकार (अपठनीय) किया जा सकता है। कि मरने के उपरान्त भी अपीलकर्ता का कब्जा नहीं था। दिनांक 14-6-52 के रेहन नामें से आउस्टर की बात न न स्पष्ट होती है न प्रजयूम की जा सकती है। इससे ऐसा लगता है कि ब्रहमनो ने हाथ विलाकब्जा रेहन रखा गया जब कि राम स्वरूप गवाह के बयान से प्रतीत

होता है कि ब्राह्मनों का का कब्जा था और उनसे कब्जा जगपाल सिंह ने वावत लिया। इस रेहन नामों से यह और स्पष्ट होता है कि परिवार संयुक्त था और इसमें काउस्टर (आउस्टर) कब्जा मुखालकाना की कोई सम्भावना नहीं थी। अपीलकर्ता का अनुसार शिवदीन सिंह की मृत्यु 1952 में हुयी और 1852 की रेहनामा है सम्भवतया इसी रेहननामों के आधार पर पंडितों ने कब्जा किया और उनसे कब्जा वाद में वावत लिया गया अस्तु जगपाल सिंह का यह कहना कि शिव दीन सिंह की जिन्दगी में ही आउस्टर (आवस्टर) से कब्जा ले लिया था विश्वसनीय प्रतीत नहीं होता। ऐसा कोई केस नहीं है कि शिवदीन से जगपाल सिंह ने वावत लिया अस्तु आस्टर को प्ल (प्लीए) सिद्ध नहीं की जा सकती है जगपाल सिंह और मुखालफाना कब्जा यह आउस्टर नहीं किया जा सकता। अस्तु मातहत अदालत ने यह सही घोषित किया है कि शिवदीन सिंह की मृत्यु पर उसका भान्जा छोटे सिंह वारिस हैं मैं मातहत अदालत के तर्कों एवं निष्कर्षों से सहमत हूँ अस्तु अपील निराधार है और खारिज की जाती है।”

7. In the aforesaid circumstances, the petitioner approached Board of Revenue by way of filing a Second Appeal inter alia on various grounds. For reference relevant grounds are mentioned hereinafter:-

“3. Because the execution of will cannot be proved unless attesting witnesses are examined. Neither the attesting witnesses were examined nor the scribed was produced.

4. Because the finding of the learned court below are perverse as the same are based upon inadmissible and unproved evidence on record. The finding cannot be given on the basis of will unless the same was proved. The will is inadmissible in evidence unless it has been proved.

6. Because the learned lower appellate court has erred in setting up a new case of joint Hindu-family which was not pleaded by any party to the case. The learned appellate court had held that the family of Jagpal Singh and Shiv-Din was joint. It is no body’s case and the learned appellate court cannot travel beyond the pleadings of the parties. The defendant appellant has also taken specific plea that Jagpal Singh ousted Shiv-Din and remained in possession exclusively for the last more-than 20 years. The learned appellate court has erred in holding that no case was pleaded by the appellant that Jagpal ousted Shiv-Din. The court below has misread the pleading of the parties.”

8. The Board of Revenue by an order dated 24.11.1981 dismissed the Second Appeal and upheld the findings returned by the Trial Court as well as of the Appellate Court. The relevant part of the order dated 24.11.1981 is reproduced hereinafter:-

“4. I have gone through the record of the case and have also heard the arguments of the learned counsels for the parties.

5. The learned counsel for the appellant has argued that plot no.509 was not agricultural land and the learned lower courts had no jurisdiction to decide about it and as such the proceedings of the trial court was vitiated. He has cited various rulings to prove his contention. Regarding merits of the case he has argued that the plaintiff was the sister's son but the execution has been denied because will has not been proved and that the mere registration does not validate the will as has been held in various rulings. The latest ruling referred A.I.R. 1977 page 77. He has further argued that the Additional Commissioner could not upset the joint family case as has been held in 1977 Supreme Court A.I.R. page 2262 that mortgage take place during the life time of the deceased and that the oral evidence has not been touched by the lower appellate court.

6. In reply, the learned counsel for the respondent has argued that the survey commissioner whose report is on record found the construction on plot no.599. Moreover, no such plea was taken before the learned Additional Commissioner and the learned counsel for the appellant is barred to raise this plea before this court, and that the mutation proceedings were dropped because of the consolidation and the mutation was ordered on the basis of possession alone but at the same time the respondent was accepted the real sister's son. That the marginal witnesses of the will have died and that adverse possession took place and that son of Sheo Kala was Puran Singh and that is not the son of the sister of Sheodin. The record of the case shows that the appellant had not raised the pleas regarding the suit being barred on account of consolidation proceedings in the village and not framing of the issue as such these two pleas cannot be

raised at this stage and are therefore not being considered. As regards the validity of the will it is a finding of fact and both the trial court as well as the lower appellate court have arrived at the conclusion after careful consideration and shifting of the evidence on record. I also find that the learned Additional Commissioner has not decided the case on the basis of the fact that the family was joint Hindu family. The argument of the learned counsel for the appellant on this point loses its impact in view of the fact that the learned Additional Commissioner has mentioned in passing while discussing the proximity of the defendant-respondent with the deceased contemure holder. It therefore, does not attract the application of the ruling cited by him on this point. The learned Additional Commissioner has considered all the points raised in the appeal and has applied his mind before arriving at the conclusion. In view of the above it does not appear that the learned lower appellate court has committed any mistake or error which would warrant into reference in the second appeal."

9. In the aforesaid circumstances, the petitioner approach this Court and filed the present writ petition in the year 1981 wherein all the above referred orders were impugned. This Court by order dated 23.12.1981 passed an interim order that the entries in favour of the petitioner may not be disturbed and the said stay order was confirmed by an order dated 13.10.1982 which remained in currency.

10. Mr. Rohit Verma, learned counsel appearing on behalf of the petitioner vehemently submitted that the learned Trial Court has not decided the issue in regard to proof of Will in terms of relevant provisions of the Evidence Act. The attesting witnesses and scribe of the Will were not examined and accordingly the Will was not proved in terms of the legal procedure.

11. Learned counsel also referred the above referred grounds taken in the memo of Second Appeal as well as following grounds referred in present Writ Petition:-

"(D) Because the execution of will cannot be proved unless attesting witness or examined. Chhotey Singh respondent no.4 neither produced attesting witnesses nor produced the scribe of alleged will.

(E) Because the respondent no.1, 2 and 3 have given perverse finding as the same relied-upon in admissible and unproved evidence on record. The will is in-admissible in evidence unless it has been proved.

(F) Because a very heavy onus lay upon the person setting up the will and strict proof is required to prove the execution of the will but the respondent no.1, 2 and 3 did not comply the provisions of law.

(G) Because the respondent nos.1, 2 and 3 have erred in setting-up a new case of joint Hindu family which was not pleaded by any party to the case. It was specific plea of the petitioner that Jaspal Singh (father of the petitioner ousted Sheo-Deen Singh deceased and remained in possession exclusively and adversely for the last more than 25 years. The respondent no.1, 2 and 3 misread the pleadings of the petitioner."

12. Learned counsel, in support of his submissions, placed reliance on judgements passed by this Court in Gaon Sabha Vs. B.R., 2024: AHC16953, Dr. Jeevan Bahadur Samaddar Vs. Govind Charan Samaddar and others, dated 30.05.2013 (Second Appeal No. 234 of 2010) and by Supreme Court in Santosh Hazari Vs. Purushottam Tiwari, 2001 LawSuit (SC) 237 and H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Ors. AIR 1959 SC 443.

13. Per contra, Mr. Jai Raj learned counsel for contesting respondent refers the findings returned by the Trial Court and affirmed by the Appellate Court as well as Board of Revenue that since they are not perverse findings, therefore, the same may not be interfered in the writ jurisdiction.

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

15. Before advertng to the rival submissions a recent judgement passed by the

Supreme Court, on the issue of proof of Will, in case of *Meena Pradhan & Ors. Vs. Kamla Pradhan & Anr.* 2023 INSC 847 is relevant and its Paragraph Nos. 7 to 11 are mentioned hereinafter:-

“7. Before delving into the facts of the case, it is pertinent to reproduce the relevant provisions dealing with the validity and execution of the Will.

“Section 63 of the Indian Succession Act, 1925 Execution of unprivileged wills—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of Indian Evidence Act 1872

Proof of Execution of document required by law to be attested—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: xxx”

8. Thus, a bare reading of the above-mentioned provisions would show that the requirements enshrined under Section 63 of the Succession Act have to be categorially complied with for the 4th CIVIL APPEAL NO.3351 OF 2014 execution of the Will to be proven in terms of Section 68 of the Evidence Act.

9. A Will is an instrument of testamentary disposition of property. It is a legally acknowledged mode of bequeathing a testator’s property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. It speaks from the death of the testator. Since the testator/testatrix, at the time of testing the document for its validity, would not be available for deposing as to the circumstances in which the Will came to be executed, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation.

10. Relying on *H. Venkatachala Iyengar v. B.N. Thimmajamma*, 1959 Supp (1) SCR 426 (3rd Judge Bench), *Bhagwan Kaur v. Kartar Kaur*, (1994) 5 SCC 135 (3rd Judge Bench), *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91 (2nd Judge Bench) *Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh*, (2009) 4 SCC 780 (3rd Judge Bench) and *Shivakumar v. Sharanabasappa*, (2021) 11 SCC 277 (3rd Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

i. The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation

shall show that it was intended to give effect to the writing as a Will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and

disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;

x. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstances must be "real, germane and valid" and not merely "the fantasy of the doubting mind". Whether a particular feature would qualify as "suspicious" would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc.

11. In short, apart from statutory compliance, broadly it has to be proved that (a) the testator signed the Will out of his own free Will, (b) at the time of execution he had a sound state of mind, (c) he was aware of the nature and effect thereof and (d) the Will was not executed under any suspicious circumstances."

16. In the present case there are concurrent findings of three Revenue Courts that the Will was proved and there was no suspicious circumstances.

17. It is well settled that in order to disturb concurrent findings there must be material that the concurrent findings were absolutely perverse or a well settled principle of law was not followed.

18. As referred above, the learned Trial Court decided the issue on basis of statement of PW-1 Ranjeet Singh brother of Brijlal (since deceased) a marginal witness to Will and he proved signatures of his brother. The other

marginal witness was not examined as well as scribe was also not examined.

19. The learned Trial Court held that the contesting respondent no. 4/ plaintiff was son of real sister of Sheodin Singh, and that the defendants/petitioner has failed to prove that the Will was fictitious. It was also held that Sheodin Singh, was empowered to execute the Will. His right on basis of inheritance was also accepted.

20. From the bare perusal of the reasons assigned by learned Trial Court, it appears that the above referred principles, to prove a Will, were not followed. It is not on record that other attesting witness was not able to come forward and since he was not produced, therefore, there was no evidence that the attesting witness has seen the testator signed his mark to Will as well as that he has seen other persons also to sign on the Will in his presence.

21. In this regard the Court also takes note of statement of Chhotey Singh, the plaintiff, however, he himself has not stated about details of attesting witnesses and scribe. So far as other witness is concerned, i.e. Ranjit Kumar, he can only prove signature of his brother (since deceased), one of the attesting witnesses. In these circumstances, it was mandatory to examine other attesting witnesses to prove the Will in accordance with law. It was not the case that other attesting witness was not alive.

22. The Court also perused order passed by the Appellate Court. The Appellate Court gave more emphasis that the Will was a registered document as well as whether the testator was empowered to execute the Will or not. The Appellate Court has not considered the requisite procedure to prove a Will i.e. whether the attesting witnesses were examined or not and the consequence of their non examination.

23. The Court further perused specific grounds taken by the petitioners in the memo of second appeal, that execution of Will can not be proved unless attesting witnesses are examined

and in the present case neither one alive attesting witness nor scribe was examined.

24. The Court also perused the order passed by the Board of Revenue in the Second Appeal that the above referred grounds was not even considered and without returning a finding about effect of non-examination of attesting witnesses (alive) and scribe, dismissed the second appeal returning a very short finding. The Board of Revenue has not applied mind whether any question of law was involved or not.

25. In the aforesaid circumstances the Court is of considered opinion that the position of law, so far as proof of Will is well settled and is being retreated in Meena Pradhan & Ors. (Supra) also that a Will has to be proved in terms of Section 63 Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872.

26. As referred above, Section 63 of Indian Succession Act, 1925 contemplates certain formalities that it was mandatory to get the Will attested by two or more witnesses and in order to prove the Will under Section 68 of Indian Evidence Act, 1872, that at least one attesting witness has to come forward to prove the Will.

27. As referred above, in the present case, one of the attesting witnesses has died, before the suit was filed, however, it is not on record whether other attesting witness was alive or not and since there is no finding that he was dead, it is, therefore, presumed that he was alive, however, the plaintiff has neither produced him nor scribe was produced. Therefore, the Will cannot be considered to be proved in terms of above referred provisions, as well as in terms of **Meena Pradhan (supra)**.

28. In the aforesaid circumstances the Court is of considered opinion that there was a question of law involved before the Board of Revenue that the orders passed by the Trial Court and the Appellate Court were contrary to the law and that Will was not proved in

accordance with law, however, the Board of Revenue has failed to consider it.

29. In the aforesaid circumstances the Court can remand the matter to the Board of Revenue to decide the Second Appeal afresh, after framing question of law, however, the Court takes note that this writ is pending since 1981 i.e. for about more than four decades, therefore, to remand the matter at this stage would not be in the interest of justice.

30. In the aforesaid circumstances the Court is of considered opinion that it is a fit case where an interference could be caused in the concurrent findings of three Revenue Courts, since they are perverse and finding returned that the Will was proved was contrary to establish and settled law to prove a Will.

31. The evidence produced by the plaintiff/respondent no. 4 was not sufficient to prove the Will, therefore, the findings returned by the Trial Court/ Appellate Court as well as Board of Revenue are perverse and contrary to law and therefore an interference is caused and accordingly all the impugned judgements are set aside, the suit filed by plaintiff/respondent no. 4 is dismissed and its legal consequence Will follow.

32. With aforesaid observations, this writ petition is **disposed of**.

(2024) 12 ILRA 277
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 54851 of 2017

Ajay Pratap Singh & Ors. ...Petitioners
Versus
Board of Revenue, U.P. Allahabad & Ors.
...Respondents

Counsel for the Petitioners:

Anand Kapoor Pandey, Lalji Chaudhary

Counsel for the Respondents:

Ashok Kumar Singh, C.S.C., Durga Charan Singh Yadav, Manoj Kumar Yadav, Smt. Rekhta Singh

Civil Law – Revenue Law – U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 229-B - U.P. Consolidation of Holdings Act, 1953 - Section 49– Declaration suit filed before Revenue Court after consolidation proceedings- whether the suit is barred by Section 49 of the 1953 Act- Nature and scope – Complete bar on institution of suit or proceedings in respect of rights or interests adjudicated or ought to have been raised during consolidation –Courts correctly dismissed claim – No error found-mixed question of fact and law- petition dismissed. (Paras 11 to 14)

HELD:

I have considered the above submission and perused the record. In order to consider the rival submissions, it would be relevant to consider a judgment passed by Supreme Court in Satyanath & anr. Vs Sarojamani, 2022 (7) SCC 644, wherein it has been held that "preliminary issues can be those where no evidence required and on basis of reading of plaint or applicable law, if jurisdiction of the Court or bar to suit is made out, the Court may decide the such issues with sole objective of expeditious decision, however, in case where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined". (para 11)

In the present case, whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act was a mixed question of law and fact, since in order to consider whether the interest of petitioner (admittedly, a minor at that time) was taken note by her mother during proceedings under Consolidation Act or not and for that the said material i.e. fact has to be

looked into, however, in present case, learned Trial Court has entered into factual aspect of case also at the stage of consideration of preliminary issue on law and held that the suit was barred. (Para 12)

The aforesaid approach is absolutely contrary to Satya Nath (supra). The Appellate Court also committed the same error and proceeded to consider facts of case as well as law and returned finding that plaintiff was neither recorded in revenue record as a minor nor his guardian was on record, therefore, the order passed by Appellate Court was also in teeth of Satya Nath (supra). The error committed of Trial Court as well as Appellate Court was cured by Board of Revenue that all the issues has to be decided and findings has to be returned to all the issues including the issue whether the suit was barred or not. To decide a mixed preliminary issue (on fact and on law) would be an illegality. (Para 13)

In the aforesaid circumstances, I am of considered opinion that in present set of facts an issue whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act was a mixed question of law and fact and, therefore, it ought to have been decided along with other issues and not as a preliminary issue only. (Para 14)

Petition dismissed. (E-14)

List of Cases cited:

1. Dalip Singh Vs St. of U.P. 2010 SCC (2) 114
2. Ashwinkumar K. Patel, Upendra J. Patel & ors., (1993) 3 SCC 161
3. Sriram & ors. Vs Deputy Director of Consolidation, Allahabad Camp, Fatehpur & ors., 2009 Supreme (All) 2646
4. Satyanath & anr. Vs Sarojamani, 2022 (7) SCC 644

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Lalji Chaudhary, learned counsel for petitioners, Ms. Rekha Singh, learned counsel for respondent Nos. 4 to 6 and Sri Durga Charan Singh Yadav, learned counsel for respondent Nos. 7 and 8.

2. Petitioners have set up a case that contesting respondent Jeet Narayan Singh has filed a suit under Section 229 of U.P. Z.A. and L.R. Act on 01.01.1976 for declaration of his title over the disputed land. The suit was contested by mother of petitioner and has filed her written statement. The other written statement was filed by Smt. Mahdei and Smt. Amar Dei and according to petitioners, the said documents are not available in the records.

3. It appears that in aforesaid suit 9 issues were framed (details of same are not on record) and it further appears that issue No. 5 was whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act. The said issue was considered as a preliminary issue and learned Trial Court by an order dated 29.09.1981, decided the said issue and held that suit was barred by Section 49 of the said Act. Relevant part of the order is reproduced hereinafter :-

“प्रतिवादी के विद्वान अधिवक्ता के तर्क से मैं सहमत हूँ पत्रावली के अध्ययन से तथा उस पर उपलब्ध साक्ष्यों से यह स्पष्ट हो जाता है कि जीतनारायन वादी दौरान चकबन्दी मुकदमा में हाजिर आया तथा उसकी माँ जो उसकी नेचुरल गार्जियन थी वह आ०नि० के बाबत चकबन्दी में लड़ी थी और इस तरह चकबन्दी में कार्यवाही हो जाने के कारण प्रस्तुत दावा वादी धारा 49 चकबन्दी ऐक्ट से बाधित है। इस तरह इस वाद बिन्दु के निर्णय के बाद अब किसी भी अन्य वाद बिन्दु के निर्णय की आवश्यकता मैं नहीं समझता हूँ अतः दावा वादी धारा 49 चकबन्दी ऐक्ट से बाधित होने के कारण खारिज किया जाता है। ”

4. The said order was challenged at the behest of contesting respondent i.e. plaintiff, wherein following specific grounds were taken :-

“Grounds of Appeal

1. *Because the plff. appellant was the Bhumidhar of the land in suit was in possession as such. Consequential, he was entitled to the declaration claimed.*

2. Because the issue of Sec. 49 U.P.C.H Act since a mixed question of law and fact, it could not be treated to be the preliminary point. The assumption of the learned lower court to the contrary is manifestly wrong.

3. Because since the appellant was a minor on the relevant dates and the relevant litigation during the consolidation operation was concluded without impleading him as a party and without appointment of a guardian therefore, sec. 49 U.P.C.H Act can have no hearing in the facts and circumstances of the case. The learned lower court has acted illegally in as much as it has held the suit to be barred by Sec. 49 U.P.C.H Act.

4. Because the learned lower court has misappreciated the order of the consolidation authorities and has not drawn correct inferences therefrom.

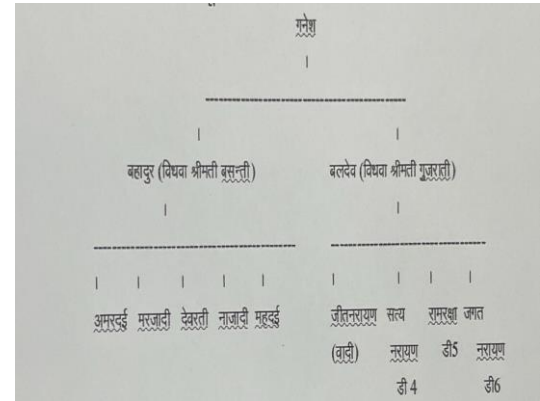
5. Because the procedure adopted by the learned lower court has been grossly irregular and it has acted illegally in not framing proper issue in the case and in improperly shutting out the appellant's evidence and in not affording him reasonable opportunity to produce the same. All this has seriously prejudiced the appellant's case.

6. Because the order of the learned lower court being otherwise bad in law and unwarranted by the evidence on the record is liable to be set aside.

5. The Commissioner, Varanasi decided the said appeal by an order dated 27.05.1983 and dismissed the same. The relevant part thereof is mentioned hereinafter :-

“मैंने उभय पक्ष के योग्य अभिभाषको को सुना और पत्रावली का अवलोकन किया।

पक्षों के बीच उठे विवाद को निर्णित करने के लिये निम्न वंशवृक्ष के लिखे जाने से सहूलियत होगी।



उपरोक्त वंशवृक्ष में वादी की ओर से केवल इस बात पर विवाद उठाया गया कि बहादुर और श्रीमती बसन्ती की 3 लड़कियां (श्रीमती उमरदेई, मरजादी और देवरती) नहीं हैं। प्रतिवादनी श्रीमती शारदा देवी डी 1 की ओर से कहा गया कि यह तीनों भी श्रीमती बसन्ती की ही लड़कियां हैं। इस विवाद को यहां निर्णित नहीं किया जाना है क्योंकि चकबन्दी प्रक्रिया में यह विवाद जीतनरायण आदि की आपत्ति दाखिल करने के बाद निर्णित हो चुकी है। यह निर्णय दिया गया कि श्रीमती उमरदेई आदि तीनों लड़कियां बहादुर की ही हैं और उनके 5 लड़कियां थीं।

इसमें विवाद नहीं कि विवादित आराजी से सम्बन्धित चकबन्दी प्रक्रिया में वादी जीतनरायण सिंह और उसके 3 भाई सत्य नरायण, रामरक्षा और जगत नरायण ने आपत्ति दाखिल किया था। चकबन्दी प्रक्रिया में यह निर्णय दिया गया कि श्रीमती बसन्ती की 5 लड़कियां थीं। अपीलार्थी के अभिवक्ता की ओर से यह तर्क रखा गया कि बहादुर से केवल दो लड़कियां श्रीमती नौजादी और श्रीमती महदेई का होना प्रमाणित है। अभिवक्ता ने मेरा ब्यान उन

अभिलेखीय साक्ष्य की ओर आकृष्ट किया जिसमें दो लड़कियां होना साबित होता है। यह साक्ष्य है वसीयतनामा दिनांक 10.12.49 जिसमें बहादुर ने दो लड़कियां होना माना है। कुटुम्ब रजिस्टर और खतौनी 1363-65 फ० में दो लड़कियां ही वरासतन दर्ज हुईं। अभिवक्ता ने कहा कि इन दो लड़कियों ने अपने को तनहा कहकर बैनामा भी किया था। मैं इस तर्क से सहमत नहीं हूँ। इसका कारण यह है कि चकबन्दी प्रक्रिया में यह विवाद उठाया गया और यह निर्णय हो चुका है कि मृतक श्रीमती वसन्ती के 5 लड़कियां थीं। इसलिये दुबारा इस विवाद को नहीं उठाया जा सकता है। अभिवक्ता ने यह तर्क रखा कि चकबन्दी प्रक्रिया में वादी जीतनरायण नाबालिग था और कोई जिम्मेदार व्यक्ति उसका संरक्षक नियुक्त नहीं हुआ। अभिवक्ता ने चकबन्दी अधिकारी का 19.9.68 का केस रामरक्षा बनाम श्रीमती नौजादी के निर्णय की ओर ध्यान आकृष्ट किया। इसमें है कि रामरक्षा डी5 ने चकबन्दी में अपनी उजूरदारी उठा लिया था। मगर न्यायालय ने जीतनरायण की ओर से उजूरदारी उठाना नहीं माना क्योंकि वह नाबालिग था। यह यह तर्क रखा गया कि नियम 14 चकबन्दी नियमावली के अन्तर्गत उसका संरक्षक नियुक्त नहीं किया गया। इसलिये 5 लड़कियों की उपपत्ति लिखा जाना अनुचित व अवैधानिक था। उन्होंने मेरा ध्यान 1969 आर० डी० 182 की ओर आकृष्ट किया। इसमें कहा गया कि धारा 49 चकबन्दी अधिनियम से दावा बाधित होने का प्रश्न उसी परिस्थिति में माना जायेगा जब कि चकबन्दी अधिनियम व नियमावली का विधिवत पालन किया गया पाया जाय। इस दृष्टान्त नाबालिग के नाम खाता कायम था। उसका कोई विधिवत

संरक्षक नियुक्त नहीं किया गया। ऐसी दशा में यह सिद्धान्त प्रतिपादित किया गया कि संरक्षक नियुक्त न किये जाने के कारण धारा 49 चकबन्दी अधिनियम लागू नहीं होगा। मैं इस तर्क से सहमत नहीं हूँ। इस केस में चकबन्दी प्रक्रिया में जीतनरायण नाबालिग था परन्तु उसके नाम खाता कायम नहीं था। उसका नाम चकबन्दी प्रक्रिया के पूर्व या आधार वर्ष की खतौनी में अंकित नहीं था। चकबन्दी प्रक्रिया में जातनरायण वादी ने और उसके 3 बड़े भाई (प्रतिवादीगण 4, 5 व 6) ने इक्का आपत्ति दाखिल किया था। इसके बाद बड़े भाई रामरक्षा ने अपनी और जीतनरायण की ओर से आपत्ति उठा लिया। यह आपत्ति उठाया जाना स्वयं प्रतिवादी रामरक्षा के हित के विरुद्ध भी थी। कोई कारण नहीं था कि रामरक्षा अपनी और अपने भाइयों के हित के विरुद्ध अपनी आपत्ति वापस लेता। इस पर भी अदालत ने एहतियात बरता और जीतनरायण के नाबालिग होने के कारण उसके विरुद्ध उठाई गई आपत्ति का प्रार्थना पत्र खारिज कर दिया। इस परिप्रेक्ष्य में यह बात स्पष्ट होती है कि न ही चकबन्दी प्रक्रिया के पूर्व या आधार वर्ष की खतौनी में नाबालिग जीतनरायण का नाम अंकित था और न ही यह कहना सही होगा कि उसका संरक्षक चकबन्दी प्रक्रिया में उसका भाई रामरक्षा नहीं था।

विपक्ष की ओर से मेरा ध्यान 1975 आर० डी० 274 की ओर आकृष्ट किया गया जिसमें माननीय हाई कोर्ट ने यह सिद्धान्त प्रतिपादित किया है कि नियम 14 जा० च० नियमावली का उन्हीं केस में लागू होता है जो किसी खातेदार का नाम राजस्व अभिलेखों में अंकित हो। यहां इस केस में लागू नहीं होता है।

जब कोई व्यक्ति अपना नाम अंकित कराने का दावेदार किसी खाते पर हो। इस केस में चकबन्दी प्रक्रिया के पूर्व नौजादी आदि का नाम विवादित आराजी पर अंकित था और जीतनारायण आदि की ओर से आपति दाखिल की गई थी। इसलिये केस का नाम रामक्षा बनाम नौजादी है। मैं माननीय हाई कोर्ट के केस को मानने के लिये बाध्य हूँ। इसी सन्दर्भ में 1970 आर० डी० 508 भी महत्वपूर्ण है। इस केस में यह बात कही गई है कि अगर चकबन्दी प्रक्रिया में आपति दाखिल करने वाला नाबालिग है तो यह बात निरर्थक है क्योंकि वह अपने संरक्षक द्वारा आपति दाखिल कर सकता था। इस केस में भी यही परिस्थिति है। जीतनारायण अपने माता श्रीमती गुजराती द्वारा आपति दाखिल कर सकती थी। उसने अपर ऐसा नहीं किया तो अब उसकी बस छूट चुकी है और अब वह दुबारा चारजोई किसी माल के अदालत में नहीं कर सकता है। उपरोक्त सभी परिस्थितियाँ और तर्कों पर विचार करने के पश्चात् मैं इस निष्कर्ष पर पहुँचा हूँ कि वादी का दावा धारा 49 जा० च० अधिनियम से बाधित है। अधीनस्थ न्यायालय द्वारा की गई विवेचना से सहमत हूँ।”

6. The aforesaid referred two orders were thereafter challenged by way of filing a Second Appeal before the Board of Revenue. In the Second Appeal following three substantial questions of law were framed:-

“1- धारा- 229-बी उ०प्र०जमी०वि० एवं भूमि व्यवस्था अधिनियम का वाद योजित करने में समय सीमा निर्धारित न होने के बावजूद भी

क्या निम्न न्यायालयों द्वारा वाद को कालबाधित मानकर त्रुटि की गई है?

2- क्या चकबन्दी प्रक्रिया के अंतर्गत पक्षकार के नाबालिग रहते वाद को धारा 49 चकबन्दी अधिनियम से बाधित माना जा सकता है अथवा नहीं?

3- क्या स्वत्व के वाद में परीक्षण न्यायालय द्वारा वाद बिंदु निर्मित कर उनका बिन्दुवार निस्तारण किया जाना आवश्यक है ?”

7. The Board of Revenue considered the above referred questions of law and set aside the order dated 27.05.1983 and 25.09.1981 and remitted the matter back to Trial Court to decide the suit after framing issues and returned finding on all the issues. The relevant part thereof is mentioned hereinafter:-

“मैंने द्वितीय अपील के गुण-दोष पर उभयपक्ष के विद्वान अधिवक्ताओं को विस्तार में सुना तथा पत्रावली का सम्यक् अवलोकन किया। पत्रावली के अवलोकन से यह स्पष्ट होता है कि प्रश्नगत सम्पत्ति वादी जीत नारायण व प्रतिपक्षीगण संख्या 3,4 व 5 के पिता द्वारा अर्जित की गई थी और चकबन्दी के समय वादी/द्वितीय अपीलकर्ता नाबालिग था, पैतृक सम्पत्ति के संबंध में सगे भाईयों के मध्य चले वाद में नाबालिग के विरुद्ध विधितः वाद धारा 49 चकबन्दी अधिनियम से बाधित नहीं होगा। पत्रावली पर ऐसा कोई भी साक्ष्य उपलब्ध नहीं पाया गया कि नाबालिग के संरक्षक के रूप में किसी को न्यायालय द्वारा नियुक्त किया गया हो।

अतः वाद को धारा 49 चकबन्दी अधिनियम से

बाधित नहीं माना जा सकता। तदनुसार सारभूत विधिक प्रश्न संख्या 2 का निस्तारण किया जाता है। जहां तक सारभूत विधिक प्रश्न संख्या 1 का प्रश्न है इस संबंध में स्वतः विदित है कि धारा 229-बी० उ०प्र०जमी०वि० एवं भूमि व्यवस्था अधिनियम का बाद योजित करने में कालसीमा निर्धारित नहीं है और जब वाद धारा 49 से बाधित नहीं है तो यह स्वतः स्पष्ट हो जाता है कि वाद को कालबाधित मानकर उभय अवर न्यायालयों द्वारा त्रुटि की गई है। तदनुसार सारभूत विधिक प्रश्न संख्या 2 निस्तारित किया जाता है। इसी प्रकार सारभूत विधिक प्रश्न संख्या 3 के संबंध में मैं इस निष्कर्ष पर पहुंचता हूं कि परीक्षण न्यायालय द्वारा पारित प्रश्नगत आदेश में यह उल्लेख किया गया है कि वाद में कुल 9 वाद बिंदु निर्मित किये गये किंतु परीक्षण न्यायालय द्वारा मात्र एक ही वाद बिंदु को निस्तारित करते हुए आदेश पारित कर दिया जो सपष्टतया अविधिक है न्यायालय का यह दायित्व था कि जब कुल 9 वाद बिंदु निर्मित किये गये तो उनको सभी का निस्तारण किया जाना चाहिये था अतः परीक्षण न्यायालय द्वारा पारित प्रश्नगत आदेश प्रांग न्याय से बाधित होगा। तदनुसार सारभूत विधिक प्रश्न संख्या 3 भी निस्तारित किया जाता है।

परीक्षण न्यायालय द्वारा अपने आदेश में उल्लिखित किया है कि वाद में कुल 9 वाद बिंदु क्या विरचित किये गये। इसी प्रकार से परीक्षण न्यायालय की पत्रावली पर प्रश्नगत रकबे से संबंधित चकबंदी न्यायालय द्वारा पारित किसी भी आदेश की प्रतिलिपि उपलब्ध नहीं पाई गई जिससे यह स्पष्ट नहीं हो पा रहा है कि

चकबंदी न्यायालय से कब और क्या आदेश पारित हुये। उपरोक्त तथ्यों के आलोक में द्वितीय अपील में बल प्रतीत होता है और यह स्वीकार किये जाने योग्य है और प्रकरण परीक्षण न्यायालय को प्रत्यावर्तित किया जाना आवश्यक प्रतीत होता है।

उपरोक्त तथ्य, परिस्थितियों एवं विवेचना के आलोक में द्वितीय अपील स्वीकार की जाती है और उभय अधीनस्थ न्यायालयों द्वारा पारित प्रश्नगत आदेश क्रमशः दिनांक 27-5-1983 तथा 25-9-1981 निरस्त करते हुए वाद परीक्षण न्यायालय को इस निर्देश के साथ प्रत्यावर्तित किया जाता है कि ऊपर की गई विवेचना के आलोक में वाद बिंदु निर्मित करते हुए और उनका निस्तारण उभयपक्ष को साक्ष्य व सुनवाई का अवसर प्रदान करते हुए गुण-दोष के आधार पर सुनिश्चित करें। अवर न्यायालयों के मूल अभिलेख वापस किये जाय। बाद आवश्यक कार्यवाही यह पत्रावली दाखिल दफ्तर की जाय।”

8. Learned counsel for petitioner has submitted that there are material on record that mother of plaintiff/contesting respondent has contested the objections during the consolidation proceeding and his interest was also protected. A primary issue was decided correctly and suit was barred by Section 49 of U.P. Consolidation of Holdings Act. Learned counsel also submits that relevant documents are missing from the record and matter is if remitted back, it may not be decided in many years.

9. Learned counsel also submits that Board of Revenue has erroneously interfered with the concurrent findings of two Courts as well as a wrong finding was returned that

details of 9 issues framed were not on record. Learned counsel for petitioner has placed reliance on **Dalip Singh Vs. State of U.P.** 2010 SCC (2) 114, **Ashwinkumar K. Patel, Upendra J. Patel and others**, (1993) 3 SCC 161 and **Sriram and others Vs. Deputy Director of Consolidation, Allahabad Camp, Fatehpur and others**, 2009 0 Supreme (All) 2646.

10. Per contra, learned counsel appearing on behalf of contesting respondent submitted that primary issue whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act was not only a question of fact but it was a mixed question of law and fact, therefore, it ought to have been decided after returning findings on all 9 issues framed.

11. I have considered the above submission and perused the record. In order to consider the rival submissions, it would be relevant to consider a judgment passed by Supreme Court in **Satyanath and Another Vs. Sarojamani**, 2022 (7) SCC 644, wherein it has been held that “preliminary issues can be those where no evidence required and on basis of reading of plaint or applicable law, if jurisdiction of the Court or bar to suit is made out, the Court may decide the such issues with sole objective of expeditious decision, however, in case where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined”.

12. In the present case, whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act was a mixed question of law and fact, since in order to consider whether the interest of petitioner (admittedly, a minor at that time) was taken note by her mother during proceedings under Consolidation Act or not and for that the said material i.e. fact has to be looked into, however, in present case, learned Trial Court has entered into factual aspect of

case also at the stage of consideration of preliminary issue on law and held that the suit was barred.

13. The aforesaid approach is absolutely contrary to **Satya Nath** (supra). The Appellate Court also committed the same error and proceeded to consider facts of case as well as law and returned finding that plaintiff was neither recorded in revenue record as a minor nor his guardian was on record, therefore, the order passed by Appellate Court was also in teeth of **Satya Nath** (supra). The error committed of Trial Court as well as Appellate Court was cured by Board of Revenue that all the issues has to be decided and findings has to be returned to all the issues including the issue whether the suit was barred or not. To decide a mixed preliminary issue (on fact and on law) would be an illegality.

14. In the aforesaid circumstances, I am of considered opinion that in present set of facts an issue whether the suit was barred by Section 49 of U.P. Consolidation of Holdings Act was a mixed question of law and fact and, therefore, it ought to have been decided along with other issues and not as a preliminary issue only.

15. In the aforesaid circumstances, I am of considered opinion that there is no reason to interfere with impugned order and accordingly, writ petition is dismissed.

(2024) 12 ILRA 283
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.12.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 10552 of 2024

Satyanarayan & Ors. **...Petitioners**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:

Sanjay Kumar Srivastava, Akshat Kumar

petitioners and Sri Brajendra Amiy, the learned counsel for the opposite party no. 6.

Counsel for the Respondents:

C.S.C., Brajendra Amiy

A. Recovery Law – Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) – Sections 13(4), 14 & 35 – Direction issued to take possession of mortgaged property – Tenancy right over the shop, situating at mortgaged property, how far liable to be protected – No tenancy agreement with the landlords was averred or monthly rents was disclosed – Effect – Held, when the petitioners are unable to establish with the help of some cogent material that their tenancy rights which were created under an oral agreement, are still continuing and are protected by any provision of law which would have effect in spite of the non-obstante clause contained in Section 35 of the SARFAESI Act referred to above, the petitioners cannot invoke the extraordinary discretionary jurisdiction of this Court under Article 226 of the Constitution. (Para 16 and 17)

Writ petition dismissed. (E-1)**List of Cases cited:**

1. Bajarang Shyamsunder Agarwal Vs Central Bank of India & ors.; AIR 2019 SC 5017
2. Trilokchand Fabrication (P) Ltd. Vs St. of U.P.; 2024 SCC OnLine All 103 : 2024 (1) ADJ 824
3. Harshad Govardhan Sondagar Vs International Assets Reconstruction Company Ltd.; (2014) 6 SCC 1

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

1. Heard Sri. Sanjay Kumar Srivastava, the learned counsel for the

2. By means of the instant Writ Petition filed under Article 226 of the Constitution of India, the petitioners have sought quashing of an order dated 15.03.2024 passed by the Additional District Magistrate (Finance and Revenue), Bahraich in Case no. 542 of 2023 under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') directing the Sub-divisional Magistrate, Bahraich and the Officer In-charge, Police Station - Kotwali Nagar, Bahriach to take possession of two secured assets for recovery of debts taken by the opposite party nos. 7, 8 and 10, for which the opposite party no. 9 stood a guarantor. They have also sought quashing of the consequential order dated 16.11.2024 passed by the Sub-divisional Magistrate, Sadar Bahraich nominating the Naib Tehsildar Sadar Bahraich as the Magistrate for the purpose of taking possession of the mortgaged property.

3. The petitioners claim that they are tenants in respect of shop nos. 285, 286, 286, 289, 290 and 291 situated in a building in Mohalla-Steelganj, Bisatkhan, Kasgar Gali, Bahraich for the past more than 60 years. The building in which the aforesaid shops are situated, has been mortgaged by the opposite parties no. 7, 8 and 10 without knowledge or consent of the petitioners. The petitioners have filed an application dated 29.11.2024 before the Additional District Magistrate (Finance and Revenue), Bahraich stating that they are tenants in respect of the aforesaid shops and, therefore, instead of taking physical possession of the shops in their tenancy,

merely notional / symbolic possession of the shops should be taken from them. The application remains undisposed off and the petitioners have sought issuance of a direction for disposal of their application dated 29.11.2024.

4. Undisputedly, the building, the shops situated wherein are in tenancy of the petitioners, has been mortgaged with Punjab National Bank (the opposite party no. 6) for a loan taken by the opposite party nos. 7, 8 and 10. As on 30.11.2022, a sum of Rs.4,24,92,056.13/- was due against the loan account, besides interest with effect from 01.12.2022 and other expenses. The borrowers have failed to repay the loan amount in spite of a recovery notice having been issued under Section 13(2) of the SARFAESI Act. The borrowers did not deliver possession of the mortgaged property to the Bank whereupon the Bank filed an application under Section 14 of the SARFAESI Act which has been allowed by means of an order dated 15.03.2024 passed by the Additional District Magistrate (Finance and Revenue), Bahraich. Section 14 of the SARFAESI Act provides for taking physical possession of the secured assets in such circumstances.

5. The learned counsel for the petitioner has submitted that the petitioners being the tenants of the shops situated in the mortgaged property, have a legal right to continue in physical possession of the shops in question. Their tenancy rights cannot be affected adversely by the failure of the landlord to repay the amount of loan taken by him from the Bank. He has placed reliance upon a judgment of the Hon'ble Supreme Court in the case of **Bajarang Shyamsunder Agarwal versus Central Bank of India and others**: AIR 2019 SC 5017 and a judgment passed by this Court

in the case of **Trilokchand Fabrication (P) Ltd. v. State of U.P.**: 2024 SCC OnLine All 103 = 2024 (1) ADJ 824.

6. In **Bajarang Shyamsunder Agarwal (Supra)**, the appellant claimed to be a tenant of the premises in question since January, 2000 whereas the property was mortgaged on 20.05.2000 i.e. after the commencement of tenancy. Upon failure of the borrower-landlord to repay the outstanding amount, the Bank filed an application under Section 14 of the SARFAESI Act for taking possession of the secured assets, which was allowed. The appellant-tenant filed an application before the Magistrate which was rejected holding that no registered lease deed has been executed by the appellant and, therefore, he is not entitled for the possession of the secured asset for more than one year from the date of execution of the unregistered tenancy agreement in accordance with the law laid down in **Harshad Govardhan Sondagar versus International Assets Reconstruction Company Ltd.**: (2014) 6 SCC 1. The Hon'ble Supreme Court referred to Section 35 of the SARFAESI Act, which provides as follows: -

“The provisions of this Act to override other laws. The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law”.

7. In **Bajarang Shyamsunder Agarwal (Supra)**, the Hon'ble Supreme Court referred to its earlier decision in **Harshad Govardhan Sondagar (Supra)** in which the appellant - Bajarang Shyamsunder Agarwal was also a party and wherein it was held that if the lawful

possession of the secured assets is not with the borrower, rather it is with a lessee under a valid lease, the secured creditor cannot take possession of the secured assets until the lawful possession of the lessee gets determined and the lease will not get determined if the secured creditor chooses to take any of the measures specified under Section 35 of the SARFAESI Act. If the Magistrate is satisfied that a valid lease was created before the mortgage and the lease has not been determined in accordance with Section 111 of the Transfer of Property Act, 1882 then he cannot pass an order for delivery of possession of the secured assets to the secured creditor. In case he comes to the conclusion that there is no valid lease either before the creation of mortgage or after creation of mortgage satisfying the requirement of Section 65-A of the Transfer of the Property Act or even though there was a valid lease, the same stands determined in accordance with Section 111 of the Transfer of the Property Act, he can pass order for delivery of the possession of the secured assets to the secured creditor.

8. In **Harshad Govardhan Sondagar** (Supra), the Hon'ble Supreme Court has distinguished the implications of the registered and unregistered lease deed/oral agreement in the following words: -

"36...We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made 'only by a registered instrument' and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of

possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

(Emphasis supplied by the Hon'ble Supreme Court)

9. The Hon'ble Supreme Court further held in **Harshad Govardhan Sondagar** (Supra) that :-

"a) The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Act. The landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Act.

b) While a yearly tenancy requires to be registered, oral tenancy can still be proved by showing that the tenant has been in occupation of the premises before the Magistrate under Section 14 of the SARFAESI Act.

c) The nonregistration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.

d) Even though Section 35 of the SARFAESI Act has a non obstante clause, it will not override the statutory rights of the tenants under the Rent Control Act. The non obstante clause under Section 35 of the SARFAESI Act only applies to laws operating in the same field.

(Emphasis added)

10. After taking into consideration the aforesaid law laid down in the **Harshad Govardhan Sondagar (Supra)**, the Hon'ble Supreme Court has held in **Bjarang Shyamsunder Agarwal** as follows: -

“In our view, the objective of SARFAESI Act, coupled with the Transfer of the Property Act and the Rent Act are required to be reconciled herein in the following manner:

a) If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of Banks/Creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

b) If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the

SARFAESI Act, it has to satisfy the conditions of Section 65A of the T.P. Act.

c) In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the T.P. Act.”

(Emphasis added)

11. The Hon'ble Supreme Court found that the bona fide of the tenant was doubtful, as there was no good or sufficient evidence to establish the tenancy. The tenants had allegedly entered into an oral agreement of tenancy before the mortgage deed was executed. The tenancy created under an oral agreement results in a fresh tenancy after expiry of the statutory period fixed under the Transfer of the Property Act.

12. The Hon'ble Supreme Court concluded in **Bjarang Shyamsunder Agarwal** that when the claim of the appellant-tenants was not supported by any conclusive evidence, the rejection of his stay application by the Magistrate was not erroneous. Further, the operation of the Rent Act cannot be extended to a 'tenant at sufferance' vis-a-vis the SARFAESI Act due to the operation of Section 13(2) read-with Section 13 of the SARFAESI Act. A contrary interpretation would fault the intention of the legislature to provide for Section 13, which has valuable role in making the SARFAESI Act a self-executory instrument for debt recovery.

Moreover, such an interpretation would also violate the mandate of Section 35 of the SARFAESI Act which is couched in broad terms.

13. In **Trilokchand Fabrication Pvt. Ltd.** (Supra), a co-ordinate Bench of this Court summarized the principles applicable in such situation in the following words :-

“We have outlined the principles emerging from the aforesaid discussion below:

a) As mandated by Section 107 of the TPA 1882 and Section 17 of the IRA, 1908, the lease of an immovable property, beyond the period of one year can only be created by a registered instrument. An oral agreement, accompanied by the delivery of possession cannot create a lease beyond the prescribed period under Section 107 of the TPA 1882. An unregistered lease, cannot be taken into consideration by the courts, given the bar placed under Section 49 of the IRA, 1908.

b) A tenancy where no period has been fixed, or a tenancy which is deemed to be a month-to-month tenancy, cannot entitle a tenant to seek possession of a secured asset beyond a period of one year when proceedings have been initiated under Section 14 of the SARFAESI Act.

c) If a tenant intends to claim the possession of a secured asset when proceedings have been initiated under Section 14 of the SARFAESI Act it must necessarily be done by way of a registered instrument executed in his favour.

d) When a tenant becomes aware, that proceedings have been initiated under Section 14 of the SARFAESI Act he can either approach the concerned officer authorised by the DM/CMM to take possession of the secured asset, or

surrender the possession of the secured asset. The authorised officer, in a case where, the tenant, resists surrendering the possession of a secured asset, will file an application accompanied by an affidavit containing the necessary details before the DM/CMM. The DM/CMM on receipt of such an application, will determine the rights of the tenant in accordance with the law. If the DM/CMM comes to the conclusion that the tenant has a valid lease entitling him to possession of the secured asset, he will not pass an order delivering the possession of the secured asset to the creditor.

e) Even if a tenant approaches the DRT, under Section 17 of the SARFAESI Act, the DRT cannot restore possession of the secured asset to the tenant. The DRT is only empowered to restore possession of the secured asset to the borrower, and not anyone else.

f) Section 34 of the SARFAESI Act, read in conjunction with Section 9 of the CPC 1908 places a bar on the institution of civil suits regarding matters which a DRT or Appellate Tribunal has been empowered to deal with under the SARFAESI Act. Furthermore, no civil court, can entertain a suit or proceeding, if an aggrieved person has grievance against any measures taken under Section 13(4) of the SARFAESI Act.

g) The availability of an alternative efficacious remedy would normally act as a bar against entertaining a writ petitioner. Nevertheless, under certain exceptional circumstances, a writ petition can be entertained even if an alternative efficacious remedy is available. These circumstances being - a) where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial

procedure, or has resorted to invoke the provisions which are repealed; b) violation of the principles of natural justice; and c) where the vires of an Act is challenged.

h) The writ of certiorari can only be exercised under extremely limited circumstances and not every error of law would warrant the issuance of the writ of certiorari. However, where a lower court/tribunal has failed to exercise its jurisdiction, the same would call for issuance of the writ of certiorari by the High Court.

41. Financial institutions and banks serve as the bedrock of our national economy. They function as custodians of public finances. It is undisputed that a robust banking system is indispensable for a nation's economic health. Consequently, it becomes imperative for all stakeholders, including the judiciary, to collaboratively undertake measures to ensure the security and efficacy of the banking system. The SARFAESI Act stands as a pivotal legislative instrument, endowing banks and financial institutions with the requisite authority to adeptly navigate the issue of NPAs. The fundamental objective underpinning the SARFAESI Act is the facilitation of the expeditious recovery of outstanding dues, thereby circumventing the need for unnecessarily protracted legal proceedings. This assumes heightened significance within the Indian context, where grappling with NPAs has consistently posed a formidable challenge for financial institutions. By authorizing lenders to proactively undertake measures in the retrieval of their investments, the SARFAESI Act assumes the role of a safeguard, preserving the financial well-being of these institutions. The SARFAESI Act also serves as a catalyst for instilling responsible borrowing practices and functions as a deterrent against wilful

defaults. The multiplicity of superfluous litigation, which prolongs the resolution of non-performing assets, dilutes and undermines the overarching purpose of the SARFAESI Act. It is incumbent upon all stakeholders, including borrowers and the judiciary, to ensure that frivolous petitions do not impede the seamless progress of recovery proceedings initiated pursuant to the SARFAESI Act.

(Emphasis added)

14. When we examine the facts of the present case in light of the law laid down in the aforementioned cases, what comes to light is that the petitioners claim to be tenants in respect of some shops situated in the building, which has been mortgaged by the landlords with the opposite party no 6-Punjab National Bank. The petitioners claim to be the tenants in respect of the various shops for past 60 years or more, under oral agreements. The opposite parties no. 7, 8 and 10 had taken loans from the Bank in the years 2012 and 2015 and they had mortgaged two properties, inducing the property in which the shops in question are situated. Upon a default having been committed in repayment of the loan amounts, the Bank filed an application under Section 13(4) read with Section 14 of the SARFAESI Act on 21.03.2003. The petitioners have approached this Court for protecting their possession in respect of the shops in question claiming that the shops are in their tenancy created by oral agreements.

15. The Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 has been enacted by the State Legislature with effect from 01.11.2021. Chapter II of the aforesaid Act contains provisions regarding tenancy. Section 4 falling in Chapter II of the Act provides as follows: -

“4. Tenancy agreement.—

(1) ...

(2) ...

(3) *Where, in relation to a tenancy created before the commencement of this Act,—*

(a) if an agreement in writing was entered into between the landlord and the tenant, they shall jointly present a copy thereof to the Rent Authority within three months of the commencement of this Act.

(b) if no agreement in writing was entered into, the landlord and the tenant shall enter into an agreement in writing with regard to that tenancy and present the same to the Rent Authority within three months of the commencement of this Act:

Provided that where the landlord or the tenant fail to present jointly a copy of the tenancy agreement or fail to reach an agreement within specified period, such landlord and tenant shall separately file the particulars about such tenancy with the Rent Authority within one month from the date of expiry of period mentioned in clause (b) above, in the form specified in First Schedule. If the landlord has submitted his particulars within the specified period but tenant fails to submit such particulars, the landlord may file an application for eviction on this ground alone:

Provided further that during such eviction proceedings, the Rent Authority shall, notwithstanding anything contained in this Act, decide interim rent payable by the tenant during such adjudication.”

16. There is no averment in the entire writ petition that after commencement of the Tenancy Act, 2021 any agreement was entered into between the petitioners and their landlord or that upon failure of the landlord to enter into any agreement any of the petitioners gave any application to the rent authority for regularization of their tenancy. The petitioners

have not disclosed the monthly rents payable by them and there is no pleading that the rents are being paid regularly to the landlords. Thus there is nothing on record to establish that the tenancy of the petitioners is protected under the provisions of the Transfer of Property Act or the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021.

17. When the petitioners are unable to establish with the help of some cogent material that their tenancy rights which were created under an oral agreement, are still continuing and are protected by any provision of law which would have effect in spite of the non-obstante clause contained in Section 35 of the SARFAESI Act referred to above, the petitioners cannot invoke the extra-ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India as establishment of a legally enforceable right and infringement thereof is a *sine quo non* for invoking the writ jurisdiction of this Court.

18. In view of the foregoing discussion, this Court is of the considered view that there is no merit in the writ petition. The writ petition is accordingly **dismissed**.

(2024) 12 ILRA 290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ Tax No. 408 of 2021

M/S NS Papers Limited & Anr.**...Petitioners****Versus****Union of India & Ors.****...Respondents**

Counsel for the Petitioners:

Ms. Arti Agarwal, Ms. Mahima Jaiswal, Mr. Rishabh Jain

Counsel for the Respondents:

Mr. Gaurav Mahajan

Civil Law - The Income Tax Act, 1961- Sections 144 & 144B - Assessment Order-impugned - approved resolution plan-impugned order without any basis in law-the resolution plan alone shall remain payable-new liability-inherently and palpably be illegal- impugned order -quashed and set aside.

Writ Petition is allowed. (E-9)

List of Cases cited:

1. Committee of Creditors of Essar Vs Satish Kumar Gupta reported in (2020) 8 SCC 531
2. Ghanshyam Mishra & Sons (P.) Ltd. Vs Edelweiss Asset Reconstruction Co. Ltd. reported in 2021 (4) TMI 613
3. Ultra Tech Nathdwara Cement Ltd. Vs U.O.I., 2020 SCC OnLine Raj 1097
4. Essar Steel (India) Ltd. (CoC) Vs Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443
5. Akshay Jhunjhunwala Vs U.O.I., 2018 SCC OnLine Cal 142
6. Uttam Galva Metallics Ltd. & Mr. Subodh Karmakar Vs Assistant Commissioner of Income Tax, U.O.I. reported in 2024 (9) TMI 371

(Delivered by Hon'ble Shekhar B. Sarraf, J.)

1. Heard Ms. Arti Agarwal with Ms. Mahima Jaiswal and Mr. Rishabh Jain, learned counsel appearing on behalf of the petitioners and Mr. Gaurav Mahajan, learned counsel appearing on behalf of the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner has challenged the Assessment Order dated April 28, 2021 passed under Section 144 read with Section 144B of the Income Tax Act, 1961 (hereinafter after referred to as 'the Act') for the assessment year 2018-19.

3. Ms. Arti Agarwal, learned counsel appearing on behalf of the petitioner has submitted that the petitioner no.1 was the erstwhile company that went through insolvency proceedings. She submits that the resolution plan was approved on February 24, 2021 wherein the Income Tax Department had also put forward its claim before the resolution professional. Subsequent to the resolution plan being approved, the assessment order has been passed for the particular assessment year.

4. Learned counsel appearing on behalf of the petitioner further reiterates that by letter dated March 8, 2021 this information had been communicated to the Income Tax Department. She, accordingly, submits that the entire proceedings that has been initiated and the impugned order that has been passed are without any basis in law and are specifically contrary to Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code').

5. Learned counsel appearing on behalf of the petitioner relies upon the judgements of the Supreme Court in the case of **Committee of Creditors of Essar vs. Satish Kumar Gupta** reported in (2020) 8 SCC 531 and in the case of **Ghanshyam Mishra and Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.** reported in 2021 (4) TMI 613 to buttress her argument that once a resolution application has come into picture, the

successful applicant cannot suddenly be faced with undecided claims. The relevant paragraph in Satish Kumar Gupta (Supra) is delineated below :-

“67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count. (Emphasis by me)

6. She further submits that since as per the Resolution plan, all pending proceedings are extinguished, now the Resolution Applicant cannot be burdened with this assessment order which is not part of the Resolution Plan. The provisions of IBC ensures that the successful resolution applicant starts running the business of the corporate debtor as a fresh innings after the approval of resolution plan. However, in

the present case respondent No.2 passed an impugned order after approval of the resolution plan and made addition. The Resolution Applicant cannot be saddled with any unforeseen liability and impugned order is bad as it amounted to fastening liability on the Resolution applicant beyond what has been agreed in the Resolution Plan.

7. Furthermore, B.R. Gavai, J. authoring the Supreme Court three Bench judgement in **Ghanshyam Mishra (Supra)** has recently highlighted the principles at paragraph nos.86 to 95 that are extracted below:-

“86. As discussed hereinabove, one of the principal objects of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan

conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable.

87. We have no hesitation to say that the words “other stakeholders” would squarely cover the Central Government, any State Government or any local authorities. The legislature noticing that on account of obvious omission certain tax authorities were not abiding by the mandate of the I&B Code and continuing with the proceedings, has brought out the 2019 Amendment so as to cure the said mischief. We therefore hold that the 2019 Amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

88. There is another reason which persuades us to take the said view. Clause (10) of Section 3 of the I&B Code defines “creditor” thus:

“creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;”

89. Subsections (20) and (21) of Section 5 of the I&B Code define “operational creditor” and “operational debt” respectively as such:

“operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

90. “Creditor” therefore has been defined to mean “any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder”.

“Operational creditor” has been defined to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

“Operational debt” has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

91. It is a cardinal principle of law that a statute has to be read as a whole. Harmonious construction of clause (10) of Section 3 of the I&B Code read with clauses (20) and (21) of Section 5 thereof would reveal that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of “operational debt”. The Central Government, any State Government or any local authority to whom an operational

debt is owed would come within the ambit of “operational creditor” as defined under clause (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of “creditor” as defined under clause (10) of Section 3 of the I&B Code. As such, even without the 2019 Amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term “creditor” and in any case, by the term “other stakeholders” as provided in sub-section (1) of Section 31 of the I&B Code.

92. The Division Bench of the Rajasthan High Court in *Ultra Tech Nathdwara Cement Ltd. v. Union of India* [Ultra Tech Nathdwara Cement Ltd. v. Union of India, 2020 SCC OnLine Raj 1097], by judgment and order dated 7-4-2020 has taken a view that the demand notices issued by the Central Goods and Service Tax Department, for a period prior to the date on which NCLT has granted its approval to the resolution plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in *Essar Steel (India) Ltd. (CoC) [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443]*.

93. The Calcutta High Court in *Akshay Jhunjhunwala v. Union of India* [Akshay Jhunjhunwala v. Union of India, 2018 SCC OnLine Cal 142] has also taken a view that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these courts.

94. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold that the 2019

Amendment is declaratory and clarificatory in nature. We also hold that even if the 2019 Amendment was not effected, still in light of the view taken by us, the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the adjudicating authority (i.e. NCLT).

CONCLUSION

95. In the result, we answer the questions framed by us as under:

(i) That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan.

(ii) The 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the I&B Code has come into effect.

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued.”

(Emphasis by me)

8. Furthermore, division bench of the Bombay High Court in the case of **Uttam Galva Metalics Ltd. and Mr. Subodh Karmakar vs. Assistant Commissioner of Income Tax, Union of India** reported in **2024 (9) TMI 371** has dealt with all the Supreme Court judgments on the point extensively including the judgments cited above and has come to the following conclusion :-

9. Mr. Mahajan, learned counsel appearing on behalf of the respondent authorities has supported the assessment order on the ground that no proper information was given by the petitioner to the Income Tax Authorities with regard to resolution plan. Ergo, the assessment that was carried out by means of faceless assessment was correctly done as the department did not have notice of the IBC proceedings against the petitioner.

10. Learned counsel appearing on behalf of the respondent authorities further submits that all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of resolution plan shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority granted its approval under Section 31 could be continued. He, however, submitted that the question as to whether or not regular assessment under the provisions of the Act can be initiated, continued with and concluded where CIRP under the Code has been initiated and moratorium under Section 14 of the Code has been imposed by the NCLT, has not expressly been raised nor answered, and therefore remains res-integra. The third question and its answer in the

above judgment only relate to initiation of proceedings for recovery of dues and do not relate to the initiation of any fresh assessment proceedings. Moreover, if the final order of the Supreme Court were also perused, it would be clear that it does not cover the point of initiation, continuation and culmination of assessment proceedings, and only declares that the "respondents are not entitled to recover any claims or claim any debts owed to them from the Corporate Debtor accruing prior to the transfer date".

11. He further submits that if proceedings under the Act could be initiated, continued with and culminated during the course of CIRP and institution of Moratorium u/s 14 of the Code, the following may also kindly be considered, for these have a bearing on the fact that income tax proceedings should not get shadowed or extinguished merely by the institution of CRIP and passage of a moratorium order, unless the proceedings were clearly inconsistent with or repugnant to any provisions of the Code, which is not the case here.

12. Upon considering the facts and circumstances of the case, we are of the view that the arguments raised by the learned counsel appearing on behalf of the respondents is without any merit on two counts. Firstly, it is clear by the letter dated March 8, 2021 that the petitioner had informed the Income Tax Authorities with regard to approval of resolution plan. Secondly, the department itself had filed a claim before the Resolution Professional, and accordingly, the argument that the department was not aware of the IBC proceedings holds no water.

13. Even assuming that the department was not informed about the proceedings, the law is very clear as expounded in the

judgments cited above. The resolution applicant cannot be saddled with new claims once a resolution plan has been approved.

14. The argument that an assessment that has been kept pending for a prior period and is quantified subsequent to the approval of the Resolution Plan is an argument in sophistry. If this argument is accepted then all authorities would be in a position to keep assessment/re-assessment pending till completion of the Resolution Plan, and thereafter, culminate the same and saddle the successful Resolution Applicant with an unknown burden. Such an action cannot be countenanced as the same would be an anathema to the fundamental principles of the moratorium provided under the Code. The law cannot be read in a manner wherein the basic structure of the Code is breached by hindering the flow of the same by creation of roadblocks and dams – the underlying principle of the Code is to give a fresh start to the Resolution Applicant. Any new liability being fastened after the approval of the Resolution Plan would inherently and palpably be illegal and go beyond the Lakshman Rekha of the Code.

15. In light of the above, the impugned assessment order dated April 28, 2021 is quashed and set aside. In the event any penalty proceedings have been initiated by the department, the writ petitioner shall be at liberty to challenge the same in accordance with law.

16. Ergo, the writ petition is allowed.

(2024) 12 ILRA 296

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Matters Under Article 227 No. 4053 of 2017

State of U.P. & Anr. ...Petitioners
Versus
M/S Jindal Concrete Udyog ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Rama Goel Bansal, S.C.

Civil Law-The Micro, Small and Medium Enterprises Development Act, 2006-Sections 18 & 19 - The Arbitration and Conciliation Act, 1996-Section 34(1) (3) -

By the orders impugned, the doors for effective adjudication on merits has been closed down by the Courts below. The time for making pre-deposit of 75% of the awarded amount was granted once and the Court below should have taken a lenient view as the matter was not being adjudicated nor any interim order was operating and time should have been extended so as to enable the St. to have made the pre-deposit before the application under Section 34 was entertained and heard--- The matter needs to be heard on merit and St. be directed to comply the mandatory provisions of Section 19 making a pre-deposit of 75% to the awarded amount by extending the time--- Matter is remitted to the District Judge to hear the application filed by the petitioner under Section 34 of Act of 1996 subject to deposit of Rs.20,00,000/- within a period of one month from today.

Petition partly allowed. (E-15)

List of Cases cited:

1. Snehadeep Structures Pvt. Ltd.Vs Mah. Small Scale Industries Development Corp. Ltd. (2010) 3 SCC 34

2. Goodyear India Ltd. Vs Norton Intech Rubbers Pvt. Ltd.& anr.(2012) 6 SCC 345

3. Gujarat St. Disaster Management Authority Vs Aska Equipments Ltd. (2022) 1 SCC 61

4. Appeal under Section 37 of Arbitration and Conciliation Act 1996 No.29 of 2024 (M/s Docket Care Systems Vs M/s Hariwill Electronics India Pvt. Ltd.) decided on 19.04.2024

5. O.M.P. (Comm) 11 of 2023 (Central University of Jharkhand Vs M/s King Furnishing & Safe Co.) decided on 22.02.2024

6. Silpi Industries & ors.Vs Kerala St. Road Transport Corp. & anr.(2021) 18 SCC 790

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. The claimant-respondent M/s Jindal Concrete Udhog had supplied pipe etc. to the provincial division of Public Works Department, Mathura. A reference under Section 18 of Micro, Small and Medium Enterprises Development Act, 2006 (*hereinafter called as "Act of 2006"*) was moved by the claimant-respondent claiming a sum of Rs.2,78,480/- as principal amount and Rs.3,58,096 as interest till date of filing of claim petition, totalling Rs.6,36,576.63, and further claimed interest at the rate of 18% on the amount from the date of filing of claim petition before U.P. State Micro and Small Enterprises Facilitation Council, Kanpur, which was registered as Claim Petition No.28 of 2008, till date of actual recovery.

2. After contest from the State side, final award was made on 03.08.2011 making a final award of Rs.2,78,480/- as principal and Rs.7,47,795.86 as interest upto 14.12.2010 totalling Rs.10,26,275.86 in favour of the claimant.

3. The State filed application under Section 34(1)(3) of Arbitration and Conciliation Act, 1996 (*hereinafter called*

as "Act of 1996") challenging the award before the District Judge, Mathura. An application under Section 9 read with Section 34(4) of Act of 1996 was also filed by the State on 15.09.2011. The claimant filed objection on 18.10.2011 objecting that 75% of the awarded amount was not deposited, hence, proceedings were not maintainable in view of Section 19 of the Act of 2006. On 08.11.2012, an application was moved by the State seeking further time for making deposit. The said application was rejected on 8.11.2012 on the ground that earlier, on 3.10.2012, time had already been granted to the State to comply the mandatory provisions of Section 19 of the Act of 2006 but it failed to do so and thus, the application seeking extension of time as well as objections under Section 34 were rejected.

4. On 30.9.2014, funds were sanctioned by the State Government which led to filing of a recall application by the State on 16.12.2014 for recalling its order dated 08.11.2012 and permitting to deposit 75% of the awarded amount. An application under Section 5 of Limitation Act was also filed for condoning the delay in making recall application. The claimant-respondent contested the recall application as well as delay condonation application and filed its objection. By the order impugned dated 23.02.2017, the application for condonation of delay has been rejected, hence, this writ petition.

5. Learned State counsel submitted that dispute relates to supply made by the claimant-respondent for the period between 2002 to 2004. Act of 2006 came into force on 02.10.2006 and thus the goods supplied prior to enforcement of Act of 2006 cannot be claimed in proceedings under Section 18 of Act of 2006. He then contended that the

word 'entertained' as implied under Section 19 of Act of 2006 means, 'when effective adjudication is done'. According to him, only the application under Section 34 of Act of 1996 was filed for setting aside the award, which has to be read in consonance with Section 19, and, pre-deposit of 75% of the awarded amount would be prior to entertainment of the application filed under Section 34. In the instant case, the Court below was not justified in refusing to grant extension of time for making pre-deposit. It was only on 30.10.2012 that the time was granted and as the pre-deposit could not be made, the Court, on the very next date i.e. 08.11.2012, proceeded to reject the application seeking extension of time along with application under Section 34 of the Act of 1996. He has relied upon decisions rendered in **Goodyear India Limited vs. Norton Intech Rubbers Private Limited and Anr. (2012) 6 SCC 345; Snehadeep Structures Private Limited vs. Maharashtra Small Scale Industries Development Corporation Limited (2010) 3 SCC 34; Gujarat State Disaster Management Authority vs. Aska Equipments Limited (2022) 1 SCC 61; Appeal under Section 37 of Arbitration and Conciliation Act 1996 No.161 of 2024 (Ganga Prasad Memorial Trust and another vs. DHK Eduserve Limited)** decided on 29.04.2024; judgment of Delhi High Court in **O.M.P. (COMM) No.144 of 2019 (Indian Oil Corporation Limited vs. FEPL Engineering (P) Limited & Anr.)** decided on 21.10.2019; **Arcelor Mittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited (2022) 1 SCC 712**; judgment of Division Bench of this Court in **Appeal under Section 37 of Arbitration and Conciliation Act 1996 No.29 of 2024 (M/s Docket Care Systems vs. M/s Hariwill Electronics India Pvt. Ltd.)** decided on 19.04.2024 and judgment

of Apex Court in **Civil Appeal No.6555 of 2022 (Bajaj Auto Limited vs. Ajanta Press and Mechanical Works & Ors.)** decided on 13.09.2022.

6. Smt. Rama Goel Bansal, learned counsel appearing for claimant-respondent submitted that provisions of Section 19 are mandatory and deposit of 75% of the awarded amount was to be made before the objections under Section 34 were heard. According to her, opportunity was provided by the Court on 03.10.2012 for making pre-deposit of 75% of the awarded amount, but, the State failed to comply the order. As the Court below was not convinced with the prayer made by the State, its objections were rejected on 08.11.2012. According to her, the petitioner has an alternative remedy of filing an appeal under Section 37 of the Act of 1996 and the writ petition under Article 227 of Constitution of India is not maintainable. Reliance has been placed upon a decision of Apex Court rendered in **Bhavan Construction vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. & Anr. AIR Online 2021 SC 6** and decision rendered by Apex Court in **Pathapati Subba Reddy (Died) by Lrs & Ors. vs. The Special Deputy Collector 2024 INSC 286**. She lastly contended that the Act of 2006 has been enacted with an object for speedy resolution of disputes. On every stage, there is a time limitation which has to be adhered to by the parties and non compliance would only lead to dismissal of the claim.

7. In the instant case, there had been delay due to procedural approval by the State which led to dismissal of the application. She lastly contended that the Apex Court had made strict observation for speedy disposal of case in case of **Rahul S.**

Shah vs. Jinendra Kumar Ghandhi (2021) 6 SCC 418.

8. I have heard the respective counsel for the parties and perused the material on record.

9. The short controversy engaging attention of this Court is, “whether the Court below could have closed opportunity of the State of making mandatory pre-deposit of 75% of the awarded amount once there was failure on the part of State to deposit the amount in view of order dated 03.10.2012 and no extension of time could have been given leading to dismissal of the application under Section 34 of the Act of 1996 ?”

10. The issue in regard to mandatory deposit of 75% of the awarded amount under Section 19 of the Act of 2006 had been under consideration of Apex Court right since the year 2010. In **Snehadeep Structures Private Limited (supra)** the Apex Court, in depth, dealt with Section 19 of the Act of 2006 and in paras 59 to 65 of the judgment held as under :

“59. Section 19 of the 2006 Act reads as follows:

“19. Application for setting aside decree, award or order.—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.”

This provision, no doubt, requires the deposit to be made before an application under Section 34 of the Arbitration Act is filed. However, we are not inclined to read this provision of a subsequent legislation into the provision in question.

60. While the learned counsel for the appellant Company urged that the legislature had used the terms “appeal” and “application” interchangeably, we are of the view that we cannot conclusively infer the same. Use of the term “application” appears to be in the context of the dispute resolution mechanism provided for under Section 17 (sic Section 18) which essentially comprises of conciliation and arbitration, to be governed by the Arbitration Act, 1996. The legislature has intended to bring about improvements to the Interest Act as stated in the Statement of Objects and Reasons of the 2006 Act. Indeed, it might have contemplated a change in the legal position while enacting the 2006 Act, but we cannot make that change apply retrospectively. In this respect, we agree with the reasoning of the High Court and with the contentions of learned counsel for the respondents as we cannot read the provision of a subsequent enactment into an Act which was repealed by the former.

61. The learned counsel for the appellant Company further contended that when there is doubt about the meaning of a word appearing in legislation, the interpretation that harmonises the object

and purpose of the object of the statute should be adopted, rather than the one which renders the legislation a futility. (See *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940 AC 1014 : (1940) 3 All ER 549 (HL)], *Supdt. and Remembrancer of Legal Affairs v. Abani Maity* (1979) 4 SCC 85 .

62. The Interest Act is a beneficial piece of legislation intended to expedite timely payment of money owed to small-scale industries. Most of the contracts of supply or sale that small-scale industries enter into contain arbitration clauses. These arbitration proceedings result in an “award”. If the term “appeal” is interpreted in the limited context of a “decree or order” and as excluding an application to set aside or remit such awards, the very purpose behind the enactment of the Interest Act will be defeated. We are in agreement with the learned counsel for the appellant Company in this respect.

63. According to the learned counsel for the appellant Company, if the term “appeal” is restricted to challenges launched against a decree or an order, it will effectively lead to discrimination between small-scale industries who have an award in their favour, and the ones which have procured either a decree or an order in their favour, submitted that if there is a construction that leads to the constitutionality of the provision in question, that should be adopted even if straining of language is necessary, relying on *State of Kerala v. M.K. Krishnan Nair* (1978) 1 SCC 552.

64. In the light of our views expressed hereinabove, we do not need to delve into the question whether Section 7 will lead to an unreasonable classification if predeposit of interest is not required

before an award is challenged under Section 34 of the Arbitration Act.

65. Keeping in mind the language of Section 7, object of the legislation and the contextual meaning of the term appeal, we are, therefore, of the view that the term “appeal” appearing in Section 7 of the Interest Act should include an application under Section 34 as well. The judgment and order of the High Court shall, therefore, stand set aside and the appeal is allowed to the extent indicated above. The respondent Corporation shall make a deposit of 75% of the amount awarded by the learned arbitrator by his award dated 30-6-2003 in court where the application for setting aside the award is now pending decision. Such deposit shall be made within three months from this date. In the event, such deposit is made the court shall decide the application for setting aside the award filed under Section 34 of the Arbitration Act as expeditiously as possible preferably within six months from the date of deposit by the Corporation.”

11. In **Goodyear India Limited (supra)** the Apex Court extended the time for making pre-deposit in regard to Section 19 of the Act of 2006. Relevant paras 11 and 12 of the judgment are extracted hereasunder :

“11. Having considered the submissions made, both on behalf of the petitioner and on behalf of the respondents, we do not see any reason to interfere with the views expressed, both by the learned Single Judge, as also the Division Bench with regard to Section 19 of the 2006 Act. It may not be out of place to mention that the provisions of Section 19 of the 2006 Act, had been challenged before the Kerala High Court in *Kerala SRTC v. Union of India* (2010) 1 KLT 65 , where the same

submissions were negated and, subsequently, the matter also came up to this Court, when the special leave petitions were dismissed, with leave to make the predeposit in the cases involved, within an extended period of ten weeks. We may also indicate that the expression “in the manner directed by such court” would, in our view, indicate the discretion given to the court to allow the predeposit to be made, if felt necessary, in instalments.

12. Having regard to the above, we are not inclined to entertain the special leave petitions filed by M/s Goodyear India Ltd. and the same are, accordingly, dismissed. However, in keeping with the other decisions rendered in these cases, we extend the time for predeposit by the petitioner, by a further period of twelve weeks. If such deposit is made, the appeal shall be treated to be in order and, thereafter, the same may be proceeded with.”

12. In Gujarat State Disaster Management Authority (supra), the Apex Court considering both the above judgments granted time for making pre-deposit. Relevant paras 13 to 15 of the judgments are extracted hereunder :

“13. On a plain/fair reading of Section 19 of the MSME Act, 2006, reproduced hereinabove, at the time/before entertaining the application for setting aside the award made under Section 34 of the Arbitration and Conciliation Act, the appellant-applicant has to deposit 75% of the amount in terms of the award as a pre-deposit. The requirement of deposit of 75% of the amount in terms of the award as a pre-deposit is mandatory. However, at the same time, considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that

there shall be undue hardship caused to the appellant-applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments.

14. An identical question came to be considered by this Court in Goodyear (India) Ltd. v. Norton Intech Rubbers (P) Ltd., (2012) 6 SCC 345. In paras 10 and 11, this Court observed and held as under : (SCC pp. 347-48)

“10. In his submissions, Mr Ramachandran has referred to the various decisions, all of which, however, are in the context of enactments in which discretion has been left to the appellate body to either waive or reduce the amount of pre-deposit, which factor is absent in the present case. In support of his contention, however, he referred to and relied upon the decision of this Court in Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd. (2010) 3 SCC 34 wherein while considering the question as to whether an application under Section 34 of the Arbitration and Conciliation Act, 1996, could be treated to be an appeal, a question incidentally arose as to whether if the same was to be treated as an appeal, would it be necessary to comply with the provisions of Section 19 of the 2006 Act. Their Lordships observed that the provision, no doubt, requires pre-deposit to be made before an application under Section 34 of the Arbitration Act is filed, but that they were not inclined to read that provision into the provision in question. The facts of the said case are different from the facts of this case and it would be difficult to import the ratio of the decision in the above case into the facts of this case.

11. Having considered the submissions made, both on behalf of the petitioner and on behalf of the respondents, we do not see any reason to interfere with

the views expressed, both by the learned Single Judge, as also the Division Bench with regard to Section 19 of the 2006 Act. It may not be out of place to mention that the provisions of Section 19 of the 2006 Act, had been challenged before the Kerala High Court in Kerala SRTC v. Union of India (2010) 1 KLT 65, where the same submissions were negated and, subsequently, the matter also came up to this Court, when the special leave petitions were dismissed, with leave to make the pre-deposit in the cases involved, within an extended period of ten weeks. We may also indicate that the expression “in the manner directed by such court” would, in our view, indicate the discretion given to the court to allow the pre-deposit to be made, if felt necessary, in instalments.”

15. In view of the above and considering the language used in Section 19 of the MSME Act, 2006 and the object and purpose of providing deposit of 75% of the awarded amount as a pre-deposit while preferring the application/appeal for setting aside the award, it has to be held that the requirement of deposit of 75% of the awarded amount as a pre-deposit is mandatory. Therefore, as such, both the High Court as well as the learned Additional District Judge (Commercial), Dehradun were justified in directing the appellant to deposit 75% of the awarded amount as a pre-deposit.”

13. In **M/s Docket Care Systems (supra)** the Division Bench of this Court had also extended time for making pre-deposit of 75% of the awarded amount so that the application under Section 34 is heard.

14. The Delhi High Court in **O.M.P. (Comm) 11 of 2023 (Central University of Jharkhand vs. M/s King Furnishing &**

Safe Co.) decided on 22.02.2024 held that there is no bar in filing a petition under Section 34 of Act of 1996. It can be filed without pre-deposit of 75% of the awarded amount. However, the said petition will not be entertained without deposit of 75% of the awarded amount. Thus, the Court had distinguished the two situation i.e. one, filing of a petition under Section 34, and, another is of its entertainment. According to the Court, the petition could only be entertained when pre-deposit of 75% of the awarded amount was made.

15. Here, in the instant case, the Court below on 08.11.2012 has rejected not only the application seeking extension of time for making pre-deposit but also on the same date has rejected the application under Section 34 on the ground that once the time was granted on 03.10.2012 for making pre-deposit, which the petitioners have failed, thus both the applications filed for seeking extension of time as well as application under Section 34 was rejected.

16. It is an admitted case that in 2014 the State had deposited 75% of the awarded amount through draft along with a recall application as well as delay condonation application for recalling the order dated 8.11.2012. The pre-deposit of 75% of the awarded amount has already been withdrawn by the claimant-respondent, but, the Court below has rejected the delay condonation application which, in consequence, led to dismissal of recall application.

17. In **Silpi Industries and others vs. Kerala State Road Transport Corporation and another (2021) 18 SCC 790**, the Apex Court held that in order to seek benefits of provision under Act of 2006, the seller should have registered

under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under the provisions of Act of 2006, no benefit can be sought by such entity, as contemplated under the Act of 2006. Relevant paras 42 and 43 of the judgment are extracted hereas under :

“42. Though the appellant claims the benefit of provisions under the Msmed Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the Msmed Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in GE T&D India Ltd. v. Reliable Engg. Projects & Mktg. 2017 SCC OnLine Del 6978, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of the Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under the Msmed Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the Msmed Act, no benefit can be sought by such entity, as contemplated under the Msmed Act.

43. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the

judgment in Shanti Conductors (P) Ltd. v. Assam SEB, (2019) 19 SCC 529 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of the appellant as the unit under the Msmed Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under the Msmed Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which the appellant entered into contract with the respondent.”

18. The entire thrust by the State was that supply of goods was made between 2002 and 2004. Act of 2006 came into effect from 02.10.2006. The question, which needs adjudication is as to whether reference made under Section 18 at the behest of the claimant-respondent is maintainable or not before the Facilitation Council as the entire supply was made prior to enforcement of Act of 2006.

19. Section 8(1) of Act of 2006 provides for filing of memorandum of micro, small and medium enterprises for those entrepreneurs who wants to establish them. Proviso to Section 8(1) states that any person who, before the commencement of the Act, had already established a small scale industry and obtained a registration certificate; and an industry engaged in the manufacture or production of goods

pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act 1951, shall within one hundred and eighty days from the commencement of this Act file the memorandum. Relevant Section 8(1) of Act of 2006 is extracted hereas under :

“8. Memorandum of micro, small and medium enterprises. (1) *Any person who intends to establish,--*

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established--

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of

Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.”

20. Thus, the question as to the applicability of Act of 2006 and validity of the award made by Facilitation Council in the year 2011 is still matter to be considered in proceedings under Section 34 of Act of 1996.

21. By the orders impugned, the doors for effective adjudication on merits has been closed down by the Courts below. The time for making pre-deposit of 75% of the awarded amount was granted once on 03.10.2012 and the Court below should have taken a lenient view as the matter was not being adjudicated nor any interim order was operating and time should have been extended so as to enable the State to have made the pre-deposit before the application under Section 34 was entertained and heard.

22. This Court finds that the very basis of the award made in the year 2011 has been assailed on the ground of competence of the Facilitation Council for entertaining it as the Act does not postulate any situation for entertaining and resolving any dispute for supplies made prior to enforcement of Act of 2006. The only saving is the proviso to Section 8(1) of Act of 2006.

23. In **Silpi Industries and others (supra)** the Apex Court had in clear terms held that no benefit can be sought by such entity which was not registered before the contract was entered between the parties.

24. In such a situation, I find that the matter needs to be heard on merit and State be directed to comply the mandatory provisions of Section 19 making a pre-deposit of 75% to the awarded amount by extending the time, as has been done by Hon'ble Apex Court in case of **Goodyear India Limited (supra), Snehadeep Structures Private Limited (supra) and Gujarat State Disaster Management Authority (supra)**.

25. Thus, looking to the facts of the case that award was made in the year 2011 for an amount of Rs.10,26,275.86, almost thirteen years have elapsed and the matter could not be heard on merit despite Rs.7,69,707/- has been deposited by the State and withdrawn by the claimant-respondent in the year 2014, to balance the equity, the State is hereby directed to deposit Rs.20,00,000/- within one month from today, which the claimant-respondent would be entitled to withdraw and the matter would be heard by the Court below on merits.

26. In view of the above, the order dated 08.11.2012 rejecting application seeking extension of time along with application under Section 34 of Act of 1996 as well as order dated 23.02.2017 rejecting delay condonation application as well as recall application are hereby set aside. The matter is remitted back to the District Judge, Mathura to hear the application filed by the petitioner-State under Section 34 of Act of 1996 subject to deposit of Rs.20,00,000/- (Rupees Twenty Lakhs only) within a period of one month from today. In case of default by the State in making deposit of the aforesaid amount within the stipulated time, the orders passed by the Court below would stand revived.

27. The entire exercise shall be carried out by the District Judge, post deposit by the State, within a period of three month.

28. In the result, the writ petition succeeds in part.

(2024) 12 ILRA 305
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.12.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 5495 of 2023

Atul Kumar Singh @ Atul Rai ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Kaustubh Singh, Malay Prasad

Counsel for the Opposite Party:
G.A.

Criminal Law - The Code of Criminal Procedure, 1973 - Section 177 – Territorial Jurisdiction - Section 177 Cr.P.C. provides that every offence shall ordinarily be inquired into and tried by a court in whose jurisdiction it was committed. The jurisdiction of a Criminal Court is determined by: (i) the offence and/or (ii) the offender. The question of territorial jurisdiction in criminal cases revolves around: (i) place of commission of the offence; (ii) place where the consequence of an act, both of which constitute an offence, ensues; (iii) place where the accused was found; (iv) place where the victim was found; (v) place where the property in respect of which the offence was committed was found; or (vi) place where the property forming the subject-matter of an offence was required to be returned or accounted for. In the instant case, the Applicant's argument was that

he was a resident of Varanasi and the deceased committed suicide at New Delhi. There was no allegation of any act committed at Lucknow which may be said to amount to an offence committed by the Applicant within the territorial jurisdiction of the Courts at Lucknow. Held: Part cause of action accrued in the territorial jurisdiction at Lucknow, as the victim and her friend had visited the house of the co-accused in Lucknow with regard to an earlier FIR lodged against the present Applicant and had given their live St.ments on Facebook. Before setting herself ablaze in front of the Hon'ble Supreme Court, New Delhi, the victim had St.d that there was a conspiracy between the present Applicant and co-accused, and had expressed apprehension that witnesses were being threatened, she was being instigated to commit suicide, and vital pieces of evidence were being destroyed by the accused persons. (Para 43)

Dismissed. (E-5)

List of Cases cited:

1. Y. Abraham Ajith & ors. Vs Inspector of Police, Chennai & anr., (2004) 8 SCC 100
2. Kaushik Chatterjee Vs St. of Har. & ors., (2020) 10 SCC 92
3. Rana Ayyub Vs Directorate of Enforcement, (2023) 4 SCC 357
4. V.C. Shukla Vs St. (Delhi Administration), (1980) 2 SCC 665
5. St. of Kerala Vs P. Sugathan & anr., (2000) 8 SCC 203
6. Bhagwan Swarup Lal Bishan Lal & ors. Vs St. of Mah., (1964) 2 SCR 378
7. St. (NCT of Delhi) Vs Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600
8. St. of Har. Vs Bhajan Lal, 1992 Sppl 1 SCC 335
9. Varala Bharath Kumar & anr. Vs St. of Telangana & anr., (2017) 9 SCC 413
10. S.S.Cheena Vs Vijay Kumar Mahajan & anr., (2010) 12 SCC 190
11. M. Arjunan Vs St. Represented by its Inspector of Police, (2019) 3 SCC 315
12. Ram Narayan Popli Vs Central Bureau of Investigation, (2003) 3 SCC 641
13. St. of Orissa Vs Debendra Nath Padhi, MANU/SC/1010/2004
14. St. of Raj. Vs Ashok Kumar Kashyap, (2021) 11 SCC 191
15. Sajjan Kumar Vs C.B.I., (2010) 9 SCC 368
16. R.A.H. Siguran Vs Shankare Gowda alias Shankara & anr., (2017) 16 SCC 126
17. Chitresh Kumar Chopra Vs St. (Govt. of NCT of Delhi), MANU/SC/1453/2009
18. Central Bureau of Investigation Vs Aryan Singh, AIR 2023 SC 1987
19. Rajeev Kourav Vs Baisahab & ors., MANU/SC/0163/2020
20. St. of U.P. Vs O.P. Sharma, (1996) 7 SCC 705
21. Amanullah & anr. Vs St. of Bihar & ors., (2016) 6 SCC 699

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

1. Heard Sri Vishwajeet Singh, learned Senior Advocate, assisted by Sri Kaustubh Singh, Sri Pankaj Singh, Sri Suryansh Singh and Sri Dileep Srivastava, learned counsel for the applicant/ petitioner and Sri V.K. Shahi, learned Additional Advocate General of U.P. assisted by Sri Anurag Verma, A.G.A.-I and Sri Ajeet Singh, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed for the following relief:-

“WHEREFORE, it is most respectfully prayed that this Hon'ble Court may very graciously be pleased to set-aside/quash the cognizance order dated 20.12.2021, passed by the learned Chief Judicial Magistrate, Lucknow, in Criminal Case No.97946 of 2021, under Sections 120-B, 167, 195-A, 218, 306, 504, 506 IPC which is annexed as Annexure No.1 and the chargesheet no.02 dated 27.08.2021 as annexed as Annexure No.2 respectively to this application; and subsequent proceedings of the Sessions Trial no.1188 of 2022 (State Vs Atul Singh alias Atul Rai) pending before the Court of Additional District Judge -19/ M.P.M.L.A. Court, Lucknow be also quashed.

Or,

to pass any order or direction, which this Hon'ble Court may deem just and proper to prevent the abuse of the process of the Court and to give effect to the provisions provided under the CrPC to secure the ends of justice.”

3. On the first date of admission i.e. 30.05.2023, this Court granted interim order, which reads as under:-

“1. Sri Malay Prasad assisted by Ms Saloni Mathur, Sri Piyush Shukla and Ms. Tanya Makkar, Advocates, for the applicant and Sri Manish Kumar Pandey, learned A.G.A. for the State, are present.

2. Heard learned counsel for the parties and perused the record.

3. The instant application has been filed under section 482, Cr.P.C. seeking quashing of the cognizance order 20.12.2021, passed by the learned Chief Judicial Magistrate, Lucknow, in Criminal

Case No., 97946 of 2021, under sections 120-B, 167, 195-A, 218, 306, 504, 506 I.P.C., the chargesheet no. 02 dated 27.08.2021 in pursuance thereof and subsequent proceedings of the Sessions Trial No. 1188 of 2022 (State v. Atul Singh alias Atul Rai) pending before the Court of Addl. District Judge-19/M.P.M.L.A. Court, Lucknow.

4. The aforesaid proceedings have been initiated on the basis of an F.I.R. lodged on 27.08.2021 bearing Case Crime No. 309 of 2021 at P.S. Hazratganj, Lucknow, against the applicant and co-accused Amitabh Thakur by a Senior Sub Inspector of Police stating that an F.I.R. bearing Case Crime No. 548 of 2019 under sections 376, 420, 504, 506, I.P.C., was registered against the applicant in P.S. Lanka, District Varanasi, in which a chargesheet has been submitted for mounting undue pressure on the victim. As many as seven cases were lodged against the victim from the side of the applicant. The victim has submitted applications alleging undue pressure being put on her by the accused persons and she committed self-immolation at New Delhi on 16.08.2021.

5. Learned counsel for the applicant has submitted that the applicant has already been acquitted in the said Case Crime No. 548 of 2019 lodged at P.S. Lanka, District Varanasi. Regarding self-immolation committed by the informant at New Delhi, a case bearing F.I.R.No. 113 of 2021, I.P.C. has been lodged in P.S. Tilak Marg, New Delhi.

6. The allegation leveled against the applicant in the F.I.R In question is that he had instigated the victim to commit suicide. The applicant is a resident of Varanasi and the deceased committed suicide at New Delhi. There is no allegation of any act committed at

Lucknow, which may be said to be amounting to an offence committed by the applicant within the territorial jurisdiction of the Courts at Lucknow.

7. Learned counsel for the applicant has placed reliance on section 177 of the Code of Criminal Procedure, which provides that "every offence shall ordinarily be inquired into and tried by a Court in whose jurisdiction it was committed."

8. The matter requires consideration.

9. Learned A.G.A. may file counter affidavit within 3 weeks. Rejoinder affidavit, if any, may be filed within 1 week thereafter.

10. List this case in the week commencing 10.07.2023.

11. Till the next date of listing, operation and implementation of the cognizance order 20.12.2021, passed by the learned Chief Judicial Magistrate, Lucknow, in Criminal Case No., 97946 of 2021, under sections 120-B, 167, 195-A, 218, 306, 504, 506 I.P.C., chargesheet no. 02 dated 27.08.2021 in pursuance thereof and subsequent proceedings of the Sessions Trial No. 1188 of 2022 (State v. Atul Singh alias Atul Rai) pending before the Court of Addl. District Judge-19/M.P.M.L.A. Court, Lucknow, shall remain in abeyance."

4. Notably, this Court while considering the fact that accused-applicant is a resident of Varanasi, the victim committed suicide at New Delhi and there is no allegation of any act committed at Lucknow, which may be said to be amounting to an offence committed by the applicant within the territorial jurisdiction of the courts at Lucknow, so in view of Section 177 Cr.P.C., which provides that every offence shall ordinarily be incurred into and tried by a court in whose

jurisdiction it was committed granted interim order.

5. Sri Vishwajeet Singh, learned Senior Advocate, has submitted that the applicant has neither abetted the act of suicide nor has played any role in any kind of instigation to the said persons, who had allegedly attempted to commit suicide in front of the Hon'ble Supreme Court and eventually succumbed to the burn injuries caused by such incident. Consequently, the aforesaid incident resulted in lodging of the F.I.R. in the present case which was registered as Case Crime No.309 of 2021 under Sections 120-B, 167, 195-A, 218, 306, 504 & 506 I.P.C. at P.S. Hazaratganj, District Lucknow on 27.08.2021. The aforesaid F.I.R. was lodged against the applicant as well as one Amitabh Thakur, who was an IPS officer and was posted as Inspector General of Police at that point of time.

6. Further submission is that the allegation in the aforesaid F.I.R. against the accused applicant was that Amitabh Thakur had taken money from the applicant herein namely Atul Rai for tarnishing the image of the prosecutrix. However, the prosecution failed miserably to bring forth even an iota of evidence in the case diary to this effect. The applicant has been in Jail ever since his arrest (he had surrendered) on 22.06.2019 and has not been released till date except for a period of five months from February 2024 till May 2024 when he was out on Medical Bail. Apart from this, he has been in continuous incarceration for the entire period when the incident of the alleged suicide had occurred on 16.08.2021.

7. Learned Senior Advocate has further submitted that the question of any physical contact between the applicant and

co-accused Amitabh Thakur has neither been established nor proved by the prosecution. Even prima facie the ingredients of Section 120-B I.P.C. has not been fulfilled and the prosecution has failed to produce any documentary or other evidence to show any kind of connection between the applicant and the co-accused Amitabh Thakur. In fact the applicant categorically submits that he neither knows Amitabh Thakur nor has ever met with him in person and therefore, they are not even acquainted to each other. Hence, under these circumstances, the present chargesheet and cognizance order are liable to be quashed by this Court under Section 482 Cr.P.C. exercising extra-ordinary powers.

8. Learned counsel for the applicant has informed that on 01.05.2019, one FIR bearing F.I.R. No.548 of 2019 was registered under Sections 420, 376, 504, 506 I.P.C. and Section 67-A of I.T. Act. In the aforesaid FIR, the allegation against the present applicant was that on 07.03.2018, the applicant raped the victim/ prosecutrix (since deceased).

9. The applicant had filed his nomination on 25.04.2019 as a joint candidate of the opposition on the post of Member of Parliament in General Election from Bahujan Samaj Party. Further, after winning in the General Assembly Election, the applicant surrendered before the learned Trial Court on 22.06.2019. On 05.03.2020, father of the applicant moved an application for conducting further investigation under Section 173 (8) Cr.P.C. In this application, it was categorically stated that there had been conspiracy behind prosecuting the applicant. In the aforesaid application, father of the applicant provided one audio clip which

allegedly shows that the complainant/ victim had lodged the F.I.R. for grabbing money and also for tarnishing the image of the applicant. Pursuant to the aforesaid application dated 05.03.2020, the Circle Officer had published a report dated 08.08.2020 wherein the veracity of audio recording had been verified by the Forensic Science Laboratory and the aforesaid recording clearly established, as per learned counsel for the applicant, that the conspiracy was hatched against the applicant with a motive to cancel his nomination. After the report dated 08.08.2020 having been published and audio recording circulated, the victim (since deceased) had given a representation dated 10.11.2020 to the Senior Superintendent of Police, Varanasi saying that her witnesses were threatened and co-accused Amitabh Thakur had taken money from the applicant for preparing false evidence to produce before the learned Trial Court. She also stated that co-accused Amitabh Thakur is spreading false news on social media against her and other witnesses. As per the F.I.R., in the present case, when the victim/prosecutrix felt ashamed on account of the conduct of the present applicant and co-accused Amitabh Thakur and both instigated the victim and her friend to finish themselves, both have committed suicide in front of the Hon'ble Supreme Court of India on 16.08.2021 making video of the incident making specific allegation against the applicant and co-accused Amitabh Thakur. After the aforesaid unfortunate incident, the Joint Committee, constituted for ascertaining the reason behind the suicide of both the aforesaid persons, had submitted its report on 27.08.2021. Pursuant to the Joint Committee report, the F.I.R. in the present case was lodged against the applicant wherein it has been alleged that co-accused

Amitabh Thakur in connivance with the applicant had published the report of the Circle Officer dated 08.08.2020 on the social media but moreover, Amitabh Thakur was preparing false evidence to produce before the learned Trial Court in the earlier FIR bearing FIR No.548 of 2019 (supra). On 06.08.2022, the Trial Court acquitted the present applicant in FIR No.548 of 2019 (supra). Learned counsel has informed that the criminal appeal against the acquittal order is pending consideration before the High Court.

10. Sri Singh has submitted that Section 177 Cr.P.C. reiterates the well-established common law rule referred to in Halsbury's Laws of England that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which on the evidence, the facts occur and which are alleged to constitute the crime. Therefore, in the present case, the crucial question is as to whether any part of the cause of action arose within the jurisdiction of the court concerned. In terms of Section 177 Cr.P.C it is the place where the offence has been committed and in essence it is the cause of action for initiation of the proceedings against the accused.

11. Learned counsel for the applicant has further submitted that the Apex Court in re; **Y. Abraham Ajith and Others Vs. Inspector of Police, Chennai and Anr., (2004) 8 SCC 100**, has been pleased to deal with the aforesaid issue and hold that the expression "cause of action" means every fact which it would be necessary for the complainant to prove if traversed in order to support his right or grievance to the judgement of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove such fact, comprises in

"cause of action". In other words, it is settled law that cause of action consists of bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. Hence it must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or arise. Therefore, in the present case, when the aforesaid legal principle is applied, the inevitable conclusion is that no part of cause of action arose in Lucknow and therefore, the learned Trial Court has no jurisdiction to deal with the matter.

12. Further submission of learned counsel for the applicant is that on the territorial aspect under Section 177 Cr.P.C, the Apex Court in re; **Kaushik Chatterjee Vs. State of Haryana and others, (2020) 10 SCC 92**, has been pleased to hold that while jurisdiction of civil court is determined by; (i) Territorial, (ii) Pecuniary limits, the jurisdiction of Criminal Court is determined by; (i) the offence and/or (ii) the offender. Similar view has been taken by the Apex Court in re; **Rana Ayyub Vs. Directorate of Enforcement, (2023) 4 SCC 357**, wherein the Apex Court in para-34 held as under:-

“34. As pointed out by this Court in Kaushik Chatterjee v. State of Haryana, (2020) 10 SCC 92, the question of territorial jurisdiction in criminal cases revolves around: (i) place of commission of the offence; or (ii) place where the consequence of an act, both of which constitute an offence, ensues; or (iii) place where the accused was found; or (iv) place where the victim was found; (v) place where the property in respect of which the offence was committed, was found; or (vi) place where the property forming the

subject-matter of an offence was required to be returned or accounted for, etc. according as the case may be."

13. So far as the offence of criminal conspiracy is concerned, learned Senior Advocate has stated that Section 120B of I.P.C. prescribed the Punishment for Criminal Conspiracy which by itself is an independent offence, punishable separately from the main offence. In other words, the offence of Criminal Conspiracy can be established by direct evidence or by circumstantial evidence.

14. Further submission is that Section-10 of the Evidence Act introduces the doctrine of agency and will be attracted only when the court is satisfied that there is a reasonable grounds to believe that two or more persons have conspired together to commit an offence or an achievable ground, i.e. there should be prima facie evidence that the person was a party to the conspiracy before his acts can be used against the co-conspirator.

15. Learned Senior Advocate has further submitted that it is well settled law that a conspiracy is hatched in secrecy and prosecution cannot be burdened to establish the same with direct piece of evidence. The prosecution can discharge its onus by relying upon the circumstances to establish existence of conspiracy. However, the circumstances relied upon by the prosecution have to be of a definite character which unerringly pointing towards the guilt of the accused. Hence, the prosecution has to produce evidence not only to show that the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy, the Court has to guard itself against the danger of unfairness to the

accused. By means of evidence in conspiracy, which is otherwise inadmissible in the Trial of any other substantive offence, the prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to cogent and convincing evidence against each one of the accused charged with the offence of conspiracy.

16. Further submission of learned counsel for the applicant is that perusal of Section 120-A of the I.P.C. would make it manifestly clear that for imputing a person as a "conspirator" there has to be existence of "an agreement" between two or more persons either to do "an illegal act" or to do "legal act through illegal means". Since, legislature has not provided any deeming provision to draw presumption in favor of existence of conspiracy, the prosecution cannot be absolved of the responsibility of bringing sufficient circumstances pointing towards existence of an agreement amongst the conspirators to do an "illegal act" or "a legal act through illegal means". Apart from commission of "acts", prosecution is also vested with a responsibility to bring evidence on record of the crime committed in pursuance of "an agreement" made between the accused persons who were parties to the alleged conspiracy. Hence, it is a well settled proposition of law that an offence of conspiracy cannot be deemed to have been established on mere suspicion, surmises or inferences which are not supported by cogent or acceptable evidence.

17. In support of his aforesaid arguments, reliance has been placed by the

learned counsel for the applicant upon the judgment of the Apex Court in re; **V.C. Shukla Vs. State (Delhi Administration), (1980) 2 SCC 665**, the Apex Court has been pleased to hold that to prove criminal conspiracy there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence; when the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. More importantly, as in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubts. Further, for establishing a charge of Criminal Conspiracy, the circumstances in a case, when taking together on their face value, should indicate the meeting of the minds between the conspirator for the intended objects of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted, and illegal acts done were in furtherance of the object of conspiracy hatched. In other words, for the offence of conspiracy, some kind of physical manifestation of agreement is required to be established.

18. In the case of **State of Kerala Vs. P. Sugathan & Anr., (2000) 8 SCC 203**, the Apex Court has been pleased to hold that criminal conspiracy can be established on the

basis of circumstantial evidence meaning thereby that circumstances should give rise to a conclusive inference of an agreement between two or more persons to commit an offence and such circumstances should be prior in time than actual commission of offence. Since, conspiracy is a continuing offence and any act committed by any of the conspirators during subsistence of the conspiracy would attract the ingredients of Section 120 B of the I.P.C.

19. The Apex Court in re; **Bhagwan Swarup Lal Bishan Lal and Ors. Vs. State of Maharashtra, (1964) 2 SCR 378**, has been pleased to hold in para 8 of the aforesaid judgment that the essence of conspiracy is that there should be an agreement between person to do one or other of the acts described in Section. The said agreement may be proved by direct evidence or may be inferred from act and conduct of the parties.

20. In the case of **State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600**, the Apex Court has been pleased to hold in para 101 with regard to criminal conspiracy that "one more principle which deserves notice is that the cumulative effect of the proved circumstances should be taken into account in determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances. Of course, each one of the circumstances, should be proved beyond reasonable doubt. Lastly, in regard to appreciation of evidence relating to the conspiracy, the Court must take care to see that the acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution.

21. Learned Senior Advocate has, therefore, submitted that lodging the FIR against the present applicant, filing charge

sheet against him and taking cognizance by the learned Trial Court are abuse of the process of the Court, therefore, in view of the dictum of the Apex Court in re; **State of Haryana Vs. Bhajan Lal, 1992 Sppl 1 SCC 335**, charge sheet and cognizance order may be quashed. Learned Senior Advocate has submitted that the Apex Court in re; **Varala Bharath Kumar & Anr. Vs. State of Telangana & Anr., (2017) 9 SCC 413**, has been pleased to hold in paragraphs 6 & 7 that the extraordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Where allegations made in the First Information Report/the complaint or the outcome of investigation as found in the Charge Sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out the case against the accused; where the allegations do not disclose the ingredients of the offence alleged; where the uncontroverted allegations made in the First Information Report or complaint and the material collected in support of the same do not disclose the commission of offence alleged and make out a case against the accused; where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the power under Article 226 of the Constitution of India or under Section 482 of Code of Criminal Procedure may be exercised. Further, inherent jurisdiction under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when

such exercise is justified by the tests specifically laid down under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The court must be careful and see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage.

22. Sri Vishwajeet Singh, learned Senior Advocate, has further submitted that the law governing Section 306 of the I.P.C. is well settled and deals with the abetment of suicide. The basic ingredients to constitute an offence u/s 306 I.P.C are suicidal death and abetment thereof. Similarly, abetment of a thing is defined under Section 107 I.P.C. The scope and ambit of Section 107 I.P.C. and it is co-relation with Section 306 I.P.C. has been discussed repeatedly by the Apex Court. In the case of **S.S.Cheena Vs. Vijay Kumar Mahajan & Anr., (2010) 12 SCC 190**, it has been observed in para 25 as under:-

"25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have

been intended to push the deceased into such a position that he committed suicide."

23. Similarly in another case of **M. Arjunan Vs. State Represented by its Inspector of Police, (2019) 3 SCC 315**, the Apex Court while explaining the necessary ingredients of Section 306 of the I.P.C. in detail, observed as under:-

"7. The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, Insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied the accused cannot be convicted under Section 306 IPC."

24. In the backdrop of the aforesaid facts and circumstances, learned counsel for the applicant has stated that the impugned F.I.R. No.0309 of 2021 (supra), which has been filed at Lucknow and charge sheet has also been filed against the present applicant and co-accused Amitabh Thakur on 27.08.2021 and the learned Trial Court took cognizance of the aforesaid charge sheet on 20.12.2021 is patently illegal and unwarranted in view of Section 177 Cr.P.C. Therefore, pursuant to the charge sheet and cognizance thereof, the trial should not be conducted at Lucknow.

25. *Per contra*, Sri V. K. Shahi, learned Additional Advocate General of U.P., assisted by Sri Anurag Verma, learned A.G.A., has submitted that since

after suicide of aforesaid two persons on 16.08.2021, the State Government constituted Joint Committee on 27.08.2021 at Lucknow and pursuant to the report of the Joint Committee, FIR No.0309 of 2021 (supra) has been lodged at Lucknow. The victim (since deceased) met with co-accused Amitabh Thakur at Lucknow requesting him not to defame her circulating the report dated 08.08.2020 of the Circle Officer on the social media and had said to him that if he would do the character assassination of the victim, she will have no other option to commit suicide and for that, co-accused Amitabh Thakur and present applicant would be responsible inasmuch as it is the present applicant, who may be beneficiary if co-accused Amitabh Thakur prepares false evidences against the victim to produce in the trial proceedings relating to FIR No.548 of 2019 (supra). The applicant and co-accused Amitabh Thakur got success in the aforesaid plan as the victim alongwith her friend committed suicide on 16.08.2021 and the learned Trial Court acquitted the present applicant on 06.08.2022.

26. Therefore, Sri Shahi has submitted that in the aforesaid circumstances, the FIR could have been lodged at Lucknow, thereafter the charge sheet may be filed and cognizance might be taken by the learned Trial Court at Lucknow. Sri Shahi briefly referred Sections 177, 178, 179, 180 & 460 Cr.P.C., which read as under:-

"177. Ordinary place of inquiry and trial.— Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial.—
(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

179. Offence triable where act is done or consequence ensues.—When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

180. Place of trial where act is an offence by reason of relation to other offence.—When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, the first-mentioned offence may be inquired into or tried by a Court within whose local jurisdiction either act was done.”

460. Irregularities which do not vitiate proceedings.—If any Magistrate not empowered by law to do any of the following things, namely:—

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190.

27. He has also referred Section 462 Cr.P.C., which reads as under:-

“462. Proceedings in wrong place.—No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a

wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.”

28. Sri Shahi has apprised that the applicant approached this Court seeking bail by filing Bail Application No. 5473 of 2022, which was rejected by this Court vide order dated 07.06.2022. The applicant again approached this Court seeking bail by filing the Second Bail Application No.1564 of 2023, which was rejected vide order dated 14.03.2023. Subsequently, the applicant filed the Third Bail Application No.12425 of 2023, which was also rejected by this Court vide order dated 17.05.2024. The applicant then assailed the order dated 17.05.2024 before the Apex Court, but the same was rejected vide order dated 03.06.2024. The rejection of the bail applications by this Court as well as by the Hon'ble Supreme Court, indicates the prima facie complicity of the applicant in the offence.

29. While rejecting the first bail application of the present applicant vide order dated 07.06.2022 passed in Criminal Misc. Bail Application No.5473 of 2022, this Court briefly considered the facts and criminal history of the applicant. Relevant paragraphs of the order dated 07.06.2022 read as under:-

“4. It is stated in para 38 of the affidavit that out of 23 cases, only 12 are still pending against the accused-applicant. The close scrutiny of the averments of para 38 of the affidavit would reveal that though the accused-applicant has secured acquittal in some of the cases against him but some of the heinous cases including murder and rape etc., are still pending against him in the Courts.

7. On 10.11.2020, the victim gave an application to the Senior Superintendent of Police, Varanasi alleging that co-accused-Amitabh Thakur, an Ex IPS officer was manufacturing false documents/evidence against the victim and her friend to favour of present accused-applicant on monetary consideration. It was alleged that prosecutrix's dignity, honour and image were being besmirch and tarnished. The accused and co-accused were abating and drawing her close to commit suicide. She was being continuously harassed physically and mentally and subjected to cruelty to change her stand before the Court. The accused-applicant and his henchman were employing all kinds of undue pressure on her to change her stand before the Court and turn hostile. She made allegations against the co-accused-Amitabh Thakur, who in active connivance with the present accused-applicant, extended threat to her life. She also said that she would be compelled to commit suicide because of the accused-applicant and co-accused-Amitabh Thakur.

8. The victim and her friend-Satyam Prakash Rai, thereafter, on 16.08.2021 attempted to commit suicide outside the Gate No.6 of the Supreme Court and went live on Facebook making serious allegations against the accused-applicant and co-accused-Amitabh Thakur. Statements made by two victims live on Facebook have been treated as dying declarations.

9. The Director General of Police constituted a Two Members Committee consisting of Director General, U.P. Police Recruitment and Promotional Board and Additional Director General, Women and Child Security Organization, Lucknow. The said Committee submitted its report on 27.08.2021. On the basis of said report, a

written complaint was given by Sub Inspector Daya Shankar Dwivedi at Police Station Hazratganj, which is the basis of the FIR in question registered against the accused-applicant and co-accused.

10. Report of the two members team on the basis of which the FIR in question has been registered would mention that Bharat Singh, father of the accused-applicant gave an application on 03.03.2020 to S.S.P. Varanasi requesting him to get further investigation conducted under Section 173(8) Cr.P.C. in FIR No.548 of 2019 (supra) registered against the accused-applicant.

11. Then, Senior Superintendent of police, Varanasi marked the said application to the then Circle Officer, Bhelupur, Mr.Amresh Kumar Singh. Mr.Amresh Kumar Singh prepared a report on the application and in last paragraph of his report said that the FIR No.548 of 2019 (supra) was falsely lodged in conspiracy of the prosecutrix, her friend, Satyam Prakash Rai, Angad Rai and Vijay Shankar Tiwari and recommended for fresh investigation under Section 173(8) Cr.P.C. The case was pending in the Court but the Circle Officer, Amresh Kumar Singh made available the said report to co-accused-Amitabh Thakur and other persons under Right to Information Act despite the case being pending in the Court. This report was made public to defame the victim/prosecutrix and tarnish her character and dignity. It was made public to weaken the case against the accused-applicant. The Report of C.O. Bhelupur was a preliminary report on the application for further investigation, and final decision for further investigation was yet to be taken but the said report was made public in order to put undue pressure on the prosecutrix and her friend so that they should not support the prosecution case against the accused-applicant.

12. It is alleged that when the accused-applicant and his goons were not successful in breaking down/winning the victim and the witness, they put all kind of pressure and tortured them physically and mentally. Circle Officer, Bhelupur also assisted the accused-applicant. The victim and her friend were so much harassed and tortured that they became desperate as they perceived that they would not get justice. They had fears about their lives. Their dignity, character and image were being tarnished and besmirch. Under these circumstances, they went to Supreme Court, highest seat of justice and attempted suicide outside the Supreme Court gate and later on they died during the course of treatment. Co-accused-Amitabh Thakur ex-IPS officer has been granted bail by this court vide order dated 14.03.2022 but the case of the accused-applicant is different from the co-accused."

30. Further submission of Sri Shahi is that the applicant after rejection of third bail application, approached this Court by filing a petition for Habeas Corpus bearing No.235 of 2024, seeking his release. However, after a short period of time, the petition was dismissed as withdrawn vide order dated 19.11.2024.

31. Sri Shahi has submitted that registration of the FIR in the instant case was preceded by an inquiry conducted by a two-member committee (Annexure No.CA-4).

32. Further submission is that the present applicant is having checkered criminal history of 23 cases and that criminal history was elaborately considered by this Court while rejecting first and second bail applications.

33. The victim and her friend had visited the house of co-accused Amitabh

Thakur in Lucknow and had given their live statements on Facebook (Annexure No.CA-5).

34. Further submission is that the victim in her statement, before setting herself ablaze, has stated that there was a conspiracy between the present applicant and co-accused Amitabh Thakur, she had expressed apprehension that witnesses were being threatened, she was being instigated to commit suicide and vital pieces of evidences were being destroyed by the accused persons (Annexure No.CA-3).

35. On the point of criminal conspiracy, Sri Shahi has referred the dictum of the Apex Court in re; **Ram Narayan Popli Vs. Central Bureau of Investigation, (2003) 3 SCC 641**, wherein the Apex Court has observed that the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

36. Sri Shahi has submitted that the power of this Court enshrined under Section 482 Cr.P.C. is an inherent power to secure the ends of justice or to prevent any abuse of the process of any Court. This is an extra-ordinary power of the High Court like Article 226 of the Constitution of India but at the same time, this Court must be much careful and cautious before invoking this power to ensure that if this power is not invoked, the litigant would suffer irreparable loss and injury and it would be

manifest injustice and abuse of the process of the law. Therefore, the Apex Court has observed in catena of cases that this power should be invoked very sparingly and cautiously.

37. Reliance has also been placed by Sri Shahi upon the judgments of the Apex Court in re; **State of Orissa Vs. Debendra Nath Padhi**, MANU/SC/1010/2004, **State of Rajasthan Vs. Ashok Kumar Kashyap**, (2021) 11 SCC 191, **Sajjan Kumar Vs. Central Bureau of Investigation**, (2010) 9 SCC 368, **R.A.H. Siguran Vs. Shankare Gowda alias Shankara and Anr.**, (2017) 16 SCC 126, **Chitresh Kumar Chopra Vs. State (Govt. of NCT of Delhi)**, MANU/SC/1453/2009, **Central Bureau of Investigation Vs. Aryan Singh**, AIR 2023 SC 1987 and **Rajeev Kourav Vs. Baisahab and Ors.**, MANU/SC/0163/2020. Sri Shahi has submitted that the Apex Court in re; **Rajeev Kourav (supra)** has held that exercise of power under Section 482 Cr.P.C. to quash a criminal proceedings is permissible only when an allegation made in the FIR, or the charge sheet does not constitute the ingredients of the offence/offences alleged. The evidence produced by the accused in his defense cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is equally trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 Cr.P.C. for quashing criminal proceedings.

38. Therefore, Sri Shahi has submitted that in view of the settled provisions of law as mentioned herein above, assuming, though not conceding any defect whatsoever, in the investigation, is not

sufficient to unsettle and disturb the cognizance taken by the Trial Court and the chargesheet submitted by the police. Bare perusal of the live statements of the victim and her friend before their death clearly carve out the complicity of the applicant in such heinous and gruesome offences. Therefore, the instant application is liable to be dismissed on multiple grounds.

39. Having heard learned counsel for the parties and having perused the material available on record vis-a-vis the dictums of the Apex Court referred by the parties, I am also of the considered opinion that the court should not, except in extra-ordinary circumstances, exercise its jurisdiction under Section 482 Cr.P.C., so as to quash the prosecution proceedings after they have been launched.

40. The Apex Court in re; **State of U.P. v. O.P. Sharma**, (1996) 7 SCC 705, in paras 12 & 13 has observed as under:-

“12. In State of Bihar v. Rajendra Agrawalla [Crl. A. No. 66 of 1996, decided on 18-1-1996] this Court observed as under:

“It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged.

At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out.”

13. In *Mushtaq Ahmed v. Mohd. Habibur Rehman Faizi* [JT (1996) 1 SC 656] this Court held as under:

“... According to the complaint, the respondents had thereby committed breach of trust of government money. In support of the above allegations made in the complaint copies of the salary statements of the relevant periods were produced. In spite of the fact that the complaint and the documents annexed thereto clearly made out a, prima facie case for cheating, breach of trust and forgery, the High Court proceeded to consider the version of the respondents given out in their petition filed under Section 482, CrPC vis-à-vis that of the appellant and entered into the debatable area of deciding which of the version was true, — a course wholly impermissible... .”

41. The Hon’ble Apex Court in re; **Amanullah and Another v. State of Bihar and Others**, (2016) 6 SCC 699, while considering the scope of Section 482 Cr.P.C. has observed in paras 25 to 29 as under:-

“25. A careful reading of the material placed on record reveals that the learned CJM took cognizance of the offences alleged against the accused persons after a perusal of the case diary, charge-sheet and other material placed before the court. The cognizance was taken, as a prima facie case was made out against the accused persons. It is well settled that at the stage of taking cognizance, the court should not get into the merits of the case made out by the police, in the charge-sheet filed by them,

with a view to calculate the success rate of prosecution in that particular case. At this stage, the court's duty is limited to the extent of finding out whether from the material placed before it, the offence alleged therein against the accused is made out or not with a view to proceed further with the case.

26. The proposition of law relating to Section 482 CrPC has been elaborately dealt with by this Court in *Bhajan Lal* case [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . The relevant paras 102 and 103 of which read thus : (SCC pp. 378-79)

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do

not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the

court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

27. Further, this Court in Rajiv Thapar v. Madan Lal Kapoor [Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330 : (2013) 3 SCC (Cri) 158] has laid down certain parameters to be followed by the High Court while exercising its inherent power under Section 482 CrPC, in the following manner : (SCC pp. 347-49, paras 29-30)

"29. The issue being examined in the instant case is the jurisdiction [Madan Lal Kapoor v. Rajiv Thapar, 2008 SCC OnLine Del 561 : (2008) 105 DRJ 531] of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/ complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound,

reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/ complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one : whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two : whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in

the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three : whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four : whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied)

28. After considering the rival legal contentions urged by both the parties, case law referred to supra and the material placed on record, we are of the view that the High Court has exceeded its jurisdiction under Section 482 CrPC. It has erred in quashing the cognizance order passed by the learned CJM without appreciating the material placed before it in the correct perspective. The High Court has ignored certain important facts, namely, that on 17-10-2008, Appellant 1 was allegedly threatened by the accused Mukhtar for which FIR No. 104 of 2008 was registered against him for the offences punishable under Sections 25 and 26 of the Arms Act, 1959. Further, there are

statements of various witnesses made under Section 164 CrP3C, before a Judicial Magistrate, to the effect that the deceased has been murdered by none other than her husband Mukhtar. The evidence collected by the IO by recording the statements of the prosecution witnesses, filed along with the charge-sheet was duly considered by the learned CJM before taking cognizance and therefore, the same should not have been interfered with by the High Court in exercise of its inherent power under Section 482 CrPC.

29. Further, the High Court has failed to take into consideration another important aspect that the case at hand relates to the grave offence of murder and that the criminal proceedings related thereto should not lightly be interfered with, which is a well-settled proposition of law.”

42. From the material available on record, I am not convinced that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised in this case.

43. So far as the question of territorial jurisdiction is concerned, on the basis of material available on record, I am of the opinion that part cause of action accrued in the territorial jurisdiction at Lucknow as the victim and her friend had visited the house of co-accused Amitabh Thakur in Lucknow with regard to earlier FIR No.548 of 2019 (supra) lodged against the present applicant and had given their live statements on Facebook and before setting herself ablaze in front of the Hon’ble Supreme Court, New Delhi, the victim had stated that there was a conspiracy between the present applicant and co-accused Amitabh Thakur and had expressed apprehension that witnesses were being threatened, she was being instigated to

commit suicide and vital pieces of evidences were being destroyed by the accused persons.

44. The other grounds taken by the learned counsel for the applicant e.g. criminal conspiracy, abetment of suicide, the same shall be decided by the learned Trial Court after evaluating the evidences, but this Court does not find any substance to invoke extraordinary inherent jurisdiction enshrined under Section 482 Cr.P.C.

45. It is made clear that the observations made herein-above shall not affect the trial in any manner.

46. Accordingly, the instant application fails and is **dismissed**.

47. However, learned Trial Court is directed to conduct and conclude the trial, expeditiously, without giving any unnecessary adjournment to any of the parties.

48. No order as to costs.

(2024) 12 ILRA 322

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 20.12.2024

BEFORE

**THE HON’BLE MRS. MANJU RANI
CHAUHAN, J.**

Application U/S 482. No. 22134 of 2023

With

Application U/S 482. No. 41154 of 2023 & No.
21921 of 2023

Ramandeep Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Pavan Kishore, Rahul Agarwal

Counsel for the Opposite Parties:

G.A., Dharmendra Singh Chauhan

Criminal Law - Repealing Act, 1999 - Indian Penal Code 1860-Section 420-

Surplus land in the revenue records-whose possession was handed over to the Bareilly Development Authority -allegation that 2/3rd portion was illegally sold by successors/ legal heirs of erstwhile tenure holders in favor of M/s S.K. Associates - subsequently M/s S.K. Associates sold various to different individuals-FIR lodged-chargesheet impugned- civil dispute into criminal offence-no forged documents--no criminal offence is made out- after the Repealing Act, 1999 possession of the property in question was still with the legal heirs of original tenure holders -their names were mutated in the revenue records - initially ceiling proceedings stood abated and the applicants purchased the property by means of sale deed in the year 2003 -prior to which names of legal heirs of original tenure holders have already been recorded-no fraud, cheating or manipulation has been done by the applicants- revenue records are not documents of title - entire proceedings quashed.

Application allowed. (E-9)**List of Cases cited:**

1. Mohd. Wajid & ors. Vs St. of U.P. & ors.(2023) SCC Online SC 951
2. Vishal Noble Singh Vs St. of U.P. & ors.(2024) 1 ACR 544
3. Kunti & anr. Vs St. of U.P. & ors.(2023) 6 SCC 109
4. Naresh Kumar & anr. Vs St. of Karn. & anr.(2024) INSC 196
5. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors.(2007) 12 SCC 1
6. Mohd. Ibrahim & ors. Vs St. of Bihar & anr.(2009) 8 SCC 751

7. Ranbeer Singh Vs St. of U.P. & ors.(2021) 14 SCC 626

8. St. of Haryana Vs Bhajan Lal; (1992) Supp(1) SCC 335

9. Ramesh Chandra Gupta Vs St. of U.P. & ors.; (2022) SCC Online SC 1634;

10. Indian Oil Corporation Ltd. Vs NEPC India Ltd.; (2006) 6 SCC 736

11. Prashant Bharti Vs St. of NCT of Delhi reported in (2013) 9 SCC 293

12. Parbatbhai Ahir Vs St. of Guj. (2017) 9 SCC 641

13. St. of Haryana Vs Bhajan Lal (1992) AIR 604

14. R.P. Kapur Vs St. of Pun. (1960) AIR 862

15. Monica Kumar (Dr.) & anr. Vs St. of U.P (2008) 8 SCC 781

16. Anand Kumar Mohatta Vs St. (Govt. of NCT of Delhi) (AIR) 2019 SC 210 / 2018 SCC Online SC 2447

17. St. of Karnataka v. L. Muniswamy (1977) 2 SCC 699

18. Indian Oil Corporation Vs NEPC India Ltd. & ors. (2006) 6 SCC 736

19. G. Sagar Suri Vs St. of U.P.(2000) 2 SCC 636 : 2000 SCC (Cri) 513

20. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra & ors.2021 SCC OnLine SC 315

21. Paramjeet Batra Vs St. of Uttarakhand & Ors. (2013) 11 SCC 673

22. Prof. R.K. Vijayasathya & anr. Vs Sudha Seetharam & anr.(2019) 16 SCC 739 : 2019 INSC 216

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Rahul Agarwal, Advocate assisted by Mr. Pavan Kishore, Mr. Atul Khaneja, Mr. Venu Gopal, learned counsel for the applicants, Mr. Dharmendra Singh Chauhan, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA-I assisted by Mr. Mayank Awasthi, learned counsel for the State.

2. The applications under Section 482 Cr.P.C. Nos.22134 of 2023 and 21921 of 2023 have been filed by the applicants seeking to quash the charge sheet dated 06.12.2022 and cognizance order dated 9.12.2022 as well as the entire proceedings of Case No.6501 of 2022 (State vs. Satveer Singh and others), arising out of Case Crime No.0949 of 2022, under Sections 447, 420, 467, 468, 469, 471, 120B IPC and Section 28(1) of U.P. Urban Planning & Development Act 1973, Police Station-Izzat Nagar, District-Bareilly, pending before the court of Chief Judicial Magistrate, Bareilly.

3. The application under Section 482 Cr.P.C. No.41154 of 2023 has been filed by the applicant seeking to quash the entire proceedings of Crime No.949 of 2022 (State vs. Jaswar @ Jaswir and others), under Sections 447, 420, 467, 468, 469, 471, 120B IPC and Section 28(1) of U.P. Urban Planning & Development Act, 1973, Police Station-Izzatnagar, District-Bareilly, pending before the court of Chief Judicial Magistrate, Bareilly.

4. The brief facts of the case as placed by the counsels for the applicants are:-

(i) An FIR was lodged on 13.11.2022 by the opposite party no.2, i.e. Junior Engineer, Bareilly Development Authority, Bareilly against the applicants

with the allegations that Khasra No. 825, area 0.7714 hectare, Village Biharman Nagla, Tehsil Sadar, District Bareilly was registered as surplus land in the revenue records, whose possession was handed over to the Bareilly Development Authority on 16.11.1990. 2/3rd portion of the aforesaid Khasra No.825 was illegally sold on 20.03.2003 by successors/ legal heirs of erstwhile tenure holders in favour of M/s S.K. Associates for Rs. 3,80,750/- through a registered sale deed, though the circle rate value of the land was Rs. 25,70,000/-. Subsequently, M/s S.K. Associates sold various portions of Khasra No. 825 in favour of different individuals in the year 2021-2022. The difference in value itself indicates that the transaction was with a view to indulge into further sale and purchase of government land.

(ii) During the investigation, statement of complainant—Raman Kumar was recorded by the Investigating Officer on 13.11.2022, statements of Dalvinder Singh, Salim Ahmad and Julfikar Ahmad on 14.11.2022, statement of Ram Nath Singh—Lekhpal, Bareilly Development Authority on 14.11.2022, statement of Anurag Goyal, Accountant of Alliance Builders and Contractors Ltd. on 19.11.2022, statement of Anil Kumar—Tehsildar Sadar, District Bareilly on 21.11.2022 and statements of Brahma Nand Sharma—Revenue Inspector, and Naresh Chandra—Lekhpal, Tehsil Sadar, District Bareilly were recorded on 21.11.2022.

(iii) The complainant—Junior Engineer concerned, Raman Kumar in his statement as recorded on 13.11.2022 reiterated the version of the FIR.

(iv) Statement of Ram Nath Singh, Lekhpal, Bareilly Development Authority was recorded on 14.11.2022. Apart from reiterating the allegations in the FIR, the Lekhpal has stated that there were

seven sale deeds beginning from 15.03.2021 to 27.06.2022 that were entered into by M/s S.K. Associates in respect of Gata No. 825 for a total consideration of Rs.3,13,66,000/-. The entire money was being earned by illegal sale/purchase of government land.

(v) Statement of two of the purchasers of property, namely, Saleem Ahmed and Zulfigar, to whom M/s S.K. Associates had sold parcels of Gata No. 825, were also recorded on 14.11.2022. These purchasers have also been made an accused in the matter. The statement of Saleem Ahmad and Zulfigar only mention that they contacted Ramandeep to purchase the land and had given money to him. Ramandeep had called one Dalvinder and asked him to give them land of M/s S.K. Associates. They executed the sale deeds, unaware of the history of the land.

(vi) The statement of Dalvinder, the Power of Attorney holder of M/s S.K. Associates, who had executed the sale deeds in favour of the subsequent purchasers of land and has been made an accused was also taken on 14.11.2022. Dalvinder has stated before the Investigating Officer that he had executed the sale deed of Gata No. 825 on the strength of Power of Attorney of M/s S.K. Associates, but the money towards sale consideration was taken by Ramandeep Singh, Amandeep Singh, Harvinder Singh, Satveer Singh, Yuvraj Singh etc. and he was also given a share of the amount. He took the name of several other persons and mentioned that the company M/s Alliance Builders and Contractors Pvt. Ltd. and the firm M/s S.K. Associates and M/s Ashish Enterprises functioned out of the same premises.

(vii) The statement of Anurag Goel, Accountant of M/s S.K. Associates was taken on 19.11.2022, wherein he has

stated that a company in the name of M/s Alliance Builders & Contractors is 95% partner of M/s S.K. Associates. Both M/s Alliance Builders & Contractors and M/s S.K. Associates shared the same office premises and he was the Accountant for both M/s S.K. Associates and also M/s Alliance Builders. The first two applicants (Ramandeep Singh and Amandeep Singh) are Directors of M/s Alliance Builders and the six Directors of M/s Alliance Builders and Contractors Pvt. Ltd. were the persons controlling M/s S.K. Associates. On the basis of the aforesaid statement, Ramandeep Singh and Amandeep Singh, subsequently, were included as an accused in the charge sheet filed by the Investigating Officer.

(viii) The statement of Anil Kumar, Tehsildar, Sadar, Bareilly was recorded on 21.11.2022 by the Investigating Officer. The Tehsildar, Sadar, Bareilly in his statement has pointed out that in the mutation record, at Page 969, Sl. No.28, the competent officer had passed an order dated 20.09.1997 directing that the name of "the State of U.P." be entered in the revenue record against Gata No.825 area 7714.06 square meters. The Registrar Kanoongo had also signed on the Parvana Amaldaramad in the mutation register on 20.09.1997, but the then Lekhpal had not issued the necessary direction to enter the name of "the State of U.P." in the Khatauni. It is clear that the then Lekhpal had not carried out the order dated 20.09.1997 passed by the competent authority and had not entered the name of "the State of U.P." on any copies of the Khatauni. Further, in the Khatauni for 1405 fasli, it was recorded that the name of the erstwhile tenure holders be deleted and the name of "the State of U.P." be registered on account of the land having been declared surplus. However, when the Khatauni for the Fasli

year 1406 to 1411 was being prepared, the direction to record the name of “the State of U.P.” was interfered with and the land was bifurcated such that four plot numbers including Gata No. 825, area 0.5334 hectare were taken out and the name of the erstwhile tenure holders were recorded thereon while the name of “the State of U.P.” was recorded only on 0.239 hectare land of Gata No. 825. This made it evident that when the Khatauni for Fasli year 1406 - 1411 was being prepared, Gata No. 825/0.711 hectare was divided into two and registered against Khata No. 00227 and 00370 without complying with the order dated 20.07.1997 passed by the competent officer as recorded in the mutation register. This ought to have been carried out by the then Lekhpal.

(ix) The same statement was reiterated by Brahma Nand Shukla, Revenue Inspector, Tehsil Sadar, District Bareilly, and Naresh Chandra, Lekhpal Tehsil Sadar, District Bareilly with the further addition that on 20.05.2003, mutation order was passed in favour of M/s S.K. Associates on the basis of Case No. 679 of 2003 instituted before the Court of Tehsildar, Bareilly on the basis of the sale deed dated 20.03.2003. In the proceedings pertaining to the said case, the statement of Lekhpal is recorded in which the then Lekhpal had suppressed necessary facts. Thereafter, by order dated 23.06.2008 passed under Section 34/35 (M/s S.K. Associates Vs. Jasveer Singh), the mutation order dated 22.05.2003 had been cancelled and this fact is recorded in the Khatauni for fasli year 1424 to 1429, but M/s S.K. Associates had continued to sell the land even thereafter. He has specifically named the then Lekhpal Bhagat Ram, Munish Chand, Satish Chandra Sagar, the original tenure holders and their successors and M/s S.K. Associates and its officers as the

persons responsible for suppressing the relevant facts pertaining to the order dated 20.09.1997 by the competent authority.

(x) On the basis of the aforesaid statements, charge-sheet was filed on 05.12.2022.

APPLICATION’S SUBMISSION.

5. Learned counsel for the applicants submits that the applicants, namely, Ramandeep Singh, Amandeep Singh, Hani Kumar Bhatiya, Arvinder Singh, Yuvraj Singh and Satveer Singh are the Directors of a reputed Company in the name and style of Alliance Builders and Contractors Ltd. having its registered office at Stadium Road, Bareilly, incorporated in the year 1996 and has been registered under the Companies Act, 1956.

6. In application U/s 482 No.-41154 of 2023, applicant—Munish Chandra Mishra joined his duties as Lekhpal in Village-Biharman Nagla, Bareilly in January, 2000 and posted till March, 2002. The aforesaid fact is clear from the inquiry report submitted by the Revenue Authorities as well as from the statements of Brahma Nand Sharma and Naresh Chandra as recorded by the Investigating Officer under Section 161 Cr.P.C. The inquiry report further mentions that Khatauni for 1406-1411 Fasli was prepared by one Bhagat Ram, the then Lekhpal of the area and it was his duty to maintain in the revenue records about the order dated 20.07.1997 in respect of the ceiling. It is also relevant to point out that as the revenue records were handed over to the applicant—Munish Chandra Mishra at the time of his joining in January, 2000, wherein there was no entries in respect of ceiling, therefore, he had no knowledge about the land in question being declared surplus under the Ceiling Act.

7. Learned counsel for the applicants submits that the applicants—Hani Kumar Bhatiya and Satveer Singh are named in the FIR, whereas the applicants—Ramandeep Singh, Amandeep Singh, Arvinder Singh, Yuvraj Singh and Munish Chandra Mishra are not named in the FIR. He further submits that the applicants have been falsely implicated in the present case due to ulterior motive. It is further submitted that dispute between the parties is essentially of civil nature, therefore, converting the civil dispute into criminal offence against the applicants is bad in the eyes of law on the given facts and circumstances of this case. In support of his submission, learned counsel for the applicants has relied upon the judgment of Apex Court in the case of **Mohd. Wajid and others vs. State of U.P. and others**, wherein the Apex Court has held as under:-

“30. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the

FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/ registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRs assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged.”

8. It is evident from a reading of the FIR and the consequent charge-sheet that the entire set of allegations revolve around the purchase and subsequent sale of land allegedly vested in the State of U.P., as a result of its having been declared surplus.

9. It may be noted that the proceedings in respect of the land of Gata No.825 area 0.7714 hectare having been declared surplus and the alleged possession memo dated 16.11.1990 on the basis of which possession of the land was alleged to have been taken from the erstwhile tenure

holders and allegedly handed over to Bareilly Development Authority (hereinafter referred as “B.D.A.”) respectively was challenged before this Court by M/s S.K. Associates by filing Writ Petition No.19391 of 2022. This Court entertained the said writ petition on 25.11.2022 and recorded the undertaking of the Bareilly Development Authority that no change in the nature of the land in question would be made during the pendency of the writ petition. However, eventually, the Division Bench of this Court by its judgment and order dated 25.01.2023 was pleased to dismiss the writ petition on the ground that M/s S.K. Associates being a subsequent purchaser had no locus to file the writ petition and that the land in question was in physical possession of the B.D.A.

10. The aforesaid judgment dated 25.01.2023 was challenged before the Hon'ble Supreme Court by filing **Special Leave Petition No. 10139 of 2023**. The Hon'ble Supreme Court, by order dated 12.05.2023 was pleased to issue notice on the Special Leave Petition and further direct that status quo on the nature and possession over the land in dispute would be maintained by the parties until further orders of the Court.

11. It is evident, therefore, that civil proceedings with respect to the vesting of the land in the State of U.P. and the alleged possession by memo dated 16.11.1990 in favour of Bareilly Development Authority is sub-judice. The Hon'ble Supreme Court would adjudicate upon the legality of the proceedings adopted to declare the land of Gata No.825 surplus under the U.P. Urban Land Ceiling Act and determine as to whether the possession of Gata No.825 was validly handed over to the Bareilly

Development Authority on 16.11.1990 (as claimed) or not? Dependent upon these findings, the authority of the successors/legal heirs of the erstwhile tenure holders to sell their 2/3rd share in Gata No.825 in favour of M/s S.K. Associates would be established.

12. In case, the Hon'ble Supreme Court reverses the judgment of the Hon'ble Allahabad High Court, the substratum of the allegations leveled in the FIR and the consequent charge sheet would collapse; no proceeding would survive against the accused.

13. Learned counsel for the applicants further submits that none of the offences for which cognizance has been taken is made out; the entire proceeding is an abuse of the process of law. In support of his contentions, he has relied upon the judgements of Apex Court in the cases of **Vishal Noble Singh Vs. State of U.P. and others, Kunti and another Vs. State of U.P. and others and Naresh Kumar and another Vs. State of Karnataka and another**, and in several other judgments, has consistently held that where ingredients of the offences are not made out, criminal proceedings against an accused should be quashed.

14. Elaborating their argument, they submit that the allegations in the FIR and the charge-sheet, when viewed from a conspectus of the statements given by the various witnesses during the course of investigation (referred to above), would indicate that none of the offences under which the charge-sheet has been submitted and taken cognizance thereof by the trial court, are made out against the applicants.

15. Further, perusal of the charge-sheet would indicate that all the

successors/legal heirs of the erstwhile tenure holders, the Directors and Managers of M/s Alliance Builders and Contractors Pvt. Ltd. and M/s S.K. Associates, as also the subsequent purchasers of Gata No. 825 have all been made accused in the proceedings before the trial court, on the broad allegation that they have entered into transactions of sale and purchase of government land.

16. That the then Lekhpals have been directly implicated for not giving effect to the order dated 20.09.1997 passed by the competent authority to record the name of “the State of U.P.” in the revenue records and for bifurcating the land of Gata No.825 into 2 portions in the Khatauni prepared for the subsequent period and reflecting the name of “the State of U.P.” against one portion and not against the other, there being no allegation levelled against the applicants that the applicants had in any manner manipulated the preparation of the Khatauni or influenced these Lekhpals.

17. It is further contended that even if these events are accepted to be true and correct, all this was done during 1997-2002, however, the firm M/s S.K. Associates came into picture only in the year 2003 upon purchase of the land from the successors/legal heirs of the erstwhile tenure holders. The allegations regarding suppression of facts, refusal/omission to sign the documents and mutate the name of “the State of U.P.” in the revenue records and bifurcate the land of Gata No. 825 into two portions is specifically against the Lekhpals from 1997 till 2002. The only allegation against M/s S.K. Associates is that it had purchased the land with circle rate value of Rs. 25,70,000/- for Rs. 3,80,750/- and after nearly 20 years, sold the said land by 7 different transactions for

a consideration of more than Rs.3 crores, thus profiting massively.

18. Further, at most, the statement of the Revenue Inspector, Tehsil Sadar, District Bareilly and Lekhpals, Tehsil Sadar, District Bareilly mention that despite order dated 23.06.2008 cancelling the mutation in favour of M/s S.K. Associates having been passed, M/s S.K. Associates continued to deal in the property. This statement that can, at worst, point to some wrong doing at the instance of M/s S.K. Associates.

19. However, the position in this respect is totally different:-

i) Firstly, revenue record is not a document of title. The order dated 23.06.2008 has no effect on the title of M/s S.K. Associates over the land in question.

ii) Secondly, the order dated 23.06.2008 was the outcome of a dispute between M/s S.K. Associates and one of the sellers of land in favour of M/s S.K. Associates on the allegation that the Power of Attorney holder of one of the sellers, Jagdish Prasad had executed the sale deed in favour of M/s S.K. Associates despite the Power of Attorney having been cancelled. The actual fact is that parallel to the proceeding in which order dated 23.06.2008 was passed, O.S. No. 2980 of 2008 had also been instituted by Jagdish Prasad praying for cancellation of the sale deed dated 20.03.2003 before the Civil Court, which was subsequently dismissed. Civil Appeal No. 155 of 2013 (Jagdish Prasad Vs. M/s. S.K. Associates and another) was preferred before the Additional District Judge-X, Bareilly, during the pendency of which a compromise was entered into between Jagdish Prasad and M/s S.K. Associates and an application for withdrawal of the

proceedings was filed on 18.11.2014. On 18.11.2014 itself, the application for withdrawal was allowed and the civil appeal was dismissed. As such, it is submitted that the order dated 23.06.2008 was of no effect.

iii) Thirdly, the order dated 23.06.2008 was not given effect to and the name of M/s S.K. Associates was not deleted as the tenure holder of Gata No.825Mi to the extent of 0.5340 hectare (being 2/3rd of 0.774 hectares) and finds mention in Khatauni for 1424–1429 fasli. Though the factum of the cancellation of the order dated 22.05.2003 by which the name of M/s S.K. Associates was first recorded as tenure holder is mentioned in the Khatauni and entry to this effect is made on 21.07.2008, but the name of M/s S.K. Associates is not deleted.

20. Merely because the name is not recorded as tenure holder on the Khatauni or that the entry by which the name was first recorded as tenure holder and subsequently being expunged would not mean that the title of the person claiming to be a tenure holder is affected in any manner. It only means that in case the person claiming to be the tenure holder wishes to alienate the land, the purchaser of the property would be put to notice of some dispute subsisting in respect of the said property and be obliged to carryout enhance due diligence to ascertain proper title and/or possession of the person claiming to be the title holder of the land. The prospective purchaser would make several enquiries and satisfy himself/herself fully before proceeding to enter into the transaction. In the present case, as the fact demonstrate, the purchaser of the property was satisfied that M/s S.K. Associates had the title to the property and have purchased different parcels of Gata No.825 at the

circle rate value of the properties. None of them has complained or accused M/s S.K. Associates of transferring land to which it did not have any title.

21. He further submits that on these allegations, none of the offences for which the applicants have been charged are made out.

22. In support of his submissions, learned counsel for the applicants has relied upon the following judgements of the Apex Court:-

*(i) The Hon'ble Supreme Court in the case of **Inder Mohan Goswami and another vs. State of Uttaranchal and Others**, has elaborated upon the ingredients of cheating under Section 420 IPC. Paragraphs nos. 40 to 42 of the aforesaid judgment read as under:-*

“40. Firstly, we shall deal with the section 420 IPC. Cheating is defined in section 415 IPC and is punishable under section 420 IPC. Section 415 is set out below:-

“415. Cheating. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.

Explanation. A dishonest concealment of facts is a deception within the meaning of this section.”

41. Section 415 IPC thus requires--

1. *deception of any person.*
2. (a) *fraudulently or dishonestly inducing that person-*
 - (i) *to deliver any property to any person; or*
 - (ii) *to consent that any person shall retain any property; or*
 - (b) *intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property.*

42. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning."

23. The Hon'ble Supreme Court in **Mohd. Ibrahim and Others vs. State of Bihar and Another** analyzed and elucidated the ingredients of Section 420 IPC. Paragraphs 18 to 21 of the judgment

in Mohd. Ibrahim (supra) are quoted herein below:-

"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) *deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;*

(ii) *fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and*

(iii) *such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.*

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) *to deliver any property to any person, or*

(ii) *to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).*

20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

21. *It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner."*

24. In the same judgement, the Hon'ble Supreme Court has further clarified that it is only for the purchaser of a property who has been conveyed a parcel of land by a seller, which parcel of land did not belong to the seller, that a complaint of cheating can be made. Paragraph 23 of the judgment is quoted as under:-

"When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed

the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint."

25. It is clear from the aforesaid that it is only the purchasers of the property from M/s S.K. Associates, who can complain that they have been cheated by the conveyance of a property in which M/s S.K. Associates held no title. It is not open to the State of U.P./Bareilly Development Authority, as the alleged owner of land, to accuse the applicants to have committed an offence under Section 420, IPC. Far from the purchasers of the property having made any allegation of cheating against M/s S.K. Associates, they have in fact been made an accused in the case before the trial court.

26. M/s S.K. Associates, in selling land which allegedly belonged to the State of U.P./Bareilly Development Authority, has not made any dishonest/false representation to the State of U.P./Bareilly Development Authority, or induced it to act in any manner to its prejudice. M/s S.K. Associates has not caused the State of U.P./Bareilly Development Authority to deliver any property (money) or otherwise caused any prejudice. The State of U.P./Bareilly Development Authority not being a purchaser of property under the sale deeds executed by M/s S.K. Associates, no complaint of cheating can be made at their instance, as held in paragraph 23 of **Mohd. Ibrahim (supra)**.

27. Moreover, as laid down in **Inder Mohan Goswami (supra)**, to constitute the offence of cheating, the intention to deceive should remain present from the very beginning of the transaction. In the present case, M/s S.K. Associates purchased the property in the year 2003, and sold it in

2021/2022, after nearly 18 years. When it purchased the property, the name of the successors/legal heirs of the erstwhile tenure holders was duly recorded in the revenue records; M/s S.K. Associates had no reason to suspect that it was purchasing land in which its vendors did not have title. It was after M/s S.K. Associates had entered into the sale transaction in 2021/2022 that for the first time, it was accused of conveying land that belonged to the Bareilly Development Authority.

28. Neither M/s S.K. Associates, nor its purchasers had any reason to suspect, far less any reason to believe, that land in which title belonged to Bareilly Development Authority was being sold. The statements given by the persons who have purchased property from M/s S.K. Associates do not make any allegation against M/s S.K. Associates. As a matter of fact, any prudent purchaser of property would carry out proper due diligence before parting with huge sums of hard-earned money towards purchasing a parcel of land, which is probably once in a lifetime transaction. As such, the very basic ingredient of an offence under Section 420 IPC, namely the intent to deceive from the very beginning, is absent in the present fact situation.

29. The Hon'ble Supreme Court, in **Inder Mohan Goswami (supra)**, has elaborated upon the ingredients of forgery under Section 467 IPC. Paragraphs 43 and 44 of the judgment read as under:-

"43. We shall now deal with the ingredients of section 467 IPC. Section 467 IPC reads as under:-

"467. Forgery of valuable security, will etc. Whoever forges a document which purports to be a valuable

security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

44. The following ingredients are essential for commission of the offence under section 467 IPC:

1. the document in question so forged;

2. the accused who forged it.

3. the document is one of the kinds enumerated in the aforementioned section.

The basic ingredients of offence under Section 467 are altogether missing even in the allegations of the FIR against the appellants. Therefore, by no stretch of the imagination, the appellants can be legally prosecuted for an offence under Section 467 IPC."

30. The Hon'ble Supreme Court in a recent judgment in **Ranbeer Singh Vs. State of U.P. and others** has followed the principle laid down in Mohd. Ibrahim (supra) and further elaborated upon forgery in paragraph no.24 of the judgment, which reads as under:-

"24. A fraudulent, fabricated or forged deed could mean a deed which was not actually executed, but a deed which had fraudulently been manufactured by forging

the signature of the ostensible executants. It is one thing to say that Bela Rani fraudulently executed a Power of Attorney authorizing the sale of property knowing that she had no title to convey the property. It is another thing to say that the Power of Attorney itself was a forged, fraudulent, fabricated or manufactured one, meaning thereby that it had never been executed by Bela Rani. Her signature had been forged. It is impossible to fathom how the investigating authorities could even have been prima facie satisfied that the deed had been forged or fabricated or was fraudulent without even examining the apparent executant Bela Rani, who has not even been cited as a witness."

31. As laid down by the Hon'ble Supreme Court in **Inder Mohan Goswami (supra)**, in the instant case, the sale deeds to which M/s S.K. Associates is a party are not forged documents. The genuineness of the documents executed by M/s S.K. Associates is not in doubt; the only question is as to whether M/s S.K. Associates can be said to have acquired title to the land and thereafter conveyed title in the very same land as a vendor. This is very different from the deed itself being forged or a fabricated document. The applicants cannot be said to have executed a forged document.

32. Both **Mohd Ibrahim (supra)** and **Randheer Singh (supra)** were cases where the accused were charged with conveying title in property which were not theirs, and thereby having committed an offence of forgery under Sections 467, 469 and 471 IPC. Like these judgments, in the present case also, there is no allegation that the applicants executed a forged document or in any manner prepared a falsified document. The applicants may have

entered into transactions claiming to be owner of land, which are eventually found not to be his, but that could not mean that the applicant has committed an act of forgery under the Indian Penal Code. The applicants cannot be said to have cheated the complainant in this case, namely, the Bareilly Development Authority.

33. As a matter of fact, if the allegations are correct, it is the applicants who have suffered and has been cheated by its sellers of the land in the year 2003 when it purchased the land. Far from being a perpetrator, the applicants are in fact a victim. The applicants firm, being a bona-fide purchaser for value without notice of the title of State of U.P./Bareilly Development Authority (assuming such title to be valid), cannot be accused of forgery in the facts of the present case.

34. As mentioned above, while the witnesses in their statements recorded during the course of investigation have directly named the then Lekhpals for not giving effect to the order dated 20.09.1997 passed by the competent authority to record the name of "the State of U.P." in the revenue records and for bifurcating the land of Gata No. 825 into 2 portions in the Khatauni prepared for the subsequent period and reflecting the name of "the State of U.P." against one portion and not against the other, there is no allegation levelled against the applicants, that they had in any manner manipulated the preparation of Khatauni or influenced these Lekhpals.

35. Further, as mentioned above, these events took place during 1997-2002, while the firm M/s S.K. Associates came into picture only in the year 2003. As such, it is submitted that the ingredients of forgery contemplated under Sections 467, 468, 469

and 471 IPC are not made out against the applicants in the present case.

36. They further submit that the applicants have also been accused of committing criminal trespass punishable under Section 447 of the Indian Penal Code. However, there is no allegation either in the FIR or in the charge sheet that the applicants have entered into Gata No. 825 to commit an offence or had intimidated, insulted or annoyed the officials of the Bareilly Development Authority in any manner. Further, as mentioned above, the question as to whether the property is in possession of Bareilly Development Authority is itself sub-judice, being the subject matter of adjudication before the Hon'ble Supreme Court. In such circumstances, when the possession of the State of U.P./Bareilly Development Authority is itself in dispute, the basic ingredient of Section 441 IPC namely, that the entry should be **“into or upon property in possession of another”** is not satisfied in the present case.

37. Learned counsel for the applicants further submit that in so far as offence under Section 28 of the Urban Planning & Development Act, 1973 is concerned, it pertains to development over land or building being carried out in contravention of the Master Plan, Zonal Development Plan or without obtaining the sanction of the development authority. 'Development' is defined in Section 2(e) of the Urban Planning & Development Act, as per which one has to build, engineer, mine, or undertake any other operations in, on, over or under the land, or make any material change in any building or land.

38. In the present case, the applicants are not carrying out any development over

any part of Gata No. 825. Mere alienation of portions of Gata No. 825 towards different purchasers does not amount to carrying out of development within the meaning of Section 2(e) of the Urban Planning & Development Act, 1973 and as such, does not attract Section 28 of the Urban Planning & Development Act, 1973.

39. Further, Section 28 would be attracted only where any person refuses to comply with an order passed by the Vice Chairman directing the immediate cessation or development activity being undertaken over the land. This order by the Vice Chairman has to be in writing and it is only then that Section 28(4) makes the continued development of failure to abide by the order punishable with fine upto Rs. 200/- per day. In the present case, there is no allegation either in the FIR or in the charge sheet that any order in writing was issued by the Vice Chairman and served on the applicants so as to attract the offence contemplated under Section 28(4) of the Urban Planning & Development Act, 1973.

40. Learned counsel for the applicants, therefore, submitted that the present criminal proceedings initiated against the applicants are not only malicious but also an abuse of the process of the court of law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicant that the proceedings of the above mentioned criminal case are liable to be quashed by this Court.

41. While opposing the stand as taken by learned counsel for the applicants, learned counsel for the opposite party no.2-Bareilly Development Authority places the following arguments on the basis of records of the case:-

(a) an area to the extent of 7714.06 Sq. Meters of land of Gata No.825, situated at Village Nagla Biharman, District Bareilly, came to be declared as surplus land under the provisions of Urban Land (Ceiling and Regulation), Act, 1976 (hereinafter referred as “the Ceiling Act 1976”) followed by publication of notification under Section 10(3) of the Ceiling Act 1976, dated 27.06.1990. Thereafter, notification U/s 10(5) of the Ceiling Act 1976, came to be published on 19.06.1993. Bareilly Development Authority (hereinafter referred as “B.D.A.”) came to be put in actual physical possession over the aforesaid land including other lands by the Competent Authority, Urban Land Ceiling, Bareilly vide possession memo dated 16.11.1990 and till date, B.D.A., Bareilly is in actual physical possession over the said subject land.

(b) He further submits that as per the settled legal position, after issuance of notification under Section 10(3) of the Ceiling Act 1976 (now replaced), the land covered under the notification under Section 10(3), absolutely vest with the State Government and any transaction subsequent thereto is null and void ab-initio.

(c) He further submits that before the commencement of Urban Land (Ceiling and Regulation) Repeal Act, 1999, itself, the actual physical possession over the subject land had already been handed over to the B.D.A. by the Competent Authority, Urban Land Ceiling, Bareilly vide possession memo dated 16.11.1990. Thus Urban Land Ceiling proceedings initiated against Tara Chand had already been concluded before the commencement of the Repealing Act of 1999, and as such, the benefit of Repealing Act cannot be extended to the applicants.

(d) He further submits that once the applicants are not able to demonstrate the actual possession of the said land was not handed over to the B.D.A., they are liable to be prosecuted for the offence under the relevant Sections in which the FIR has been lodged.

(e) The main allegations against the applicants are that they have entered into the sale consideration of land of Khasra No.825, area 2.0771 Sq. Meters situated at Village Nagla Biharman, District Bareilly, which has been declared as surplus land in Ceiling Act by committing forgery and manipulating the revenue records. Although the possession of land had already been transferred to B.D.A.

42. On the other hand, learned A.G.A. submits that perusal of F.I.R. as well as statements of the witnesses, goes to show that, prima facie case for the alleged offence is made out against the applicants. He next submits that this High Court may not quash the entire criminal proceedings under Section 482 Cr.P.C. at the pre-trial stage, for which he has relied upon the following judgments:-

(i) State of Haryana vs. Bhajan Lal; (1992) Supp(1) SCC 335

(ii) Ramesh Chandra Gupta vs. State of U.P. and Others; (2022) SCC Online SC 1634;

(iii) Inder Mohan Goswami and Anr. vs. State of Uttranchal &Ors. (2007) 12 SCC 1;

(iv) Mohd. Ibrahim and Others vs. State of Bihar; (2009) 8 SCC 751

(v) Indian Oil Corporation Ltd. vs. NEPC India Ltd.; (2006) 6 SCC 736

(vi) Ramdheer Singh vs. State of U.P. and Others; (2021) 14 SCC 626;

43. It is settled law that the evidence produced by the accused in his defence cannot be looked into by the Court, except in very exceptional circumstances, at the initial stage of the criminal proceedings. It is trite law that the High Court cannot embark upon the appreciation of evidence while considering the petition filed under Section 482 CrPC for quashing criminal proceedings. It is clear from the law laid down by this Court that if a *prima facie* case is made out disclosing the ingredients of the offence alleged against the accused, the Court cannot quash a criminal proceeding.

44. On the cumulative strength of the aforesaid submissions, learned A.G.A. as well as the learned counsel for the informant states that this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and hence the present application is liable to be rejected.

45. Replying to the submission as made by learned counsel for the opposite party no.2, learned counsel for the applicants submits that Gata No.825 situated in village Biharman Nagla, District Bareilly had total area of 7714.06 sq.mt. The aforesaid property had three joint tenure holders, namely, Thakur Das s/o Parumal, Tara Chand s/o Jhau Ram and Tula Ram s/o Ram Dayal, who had equal share in the aforesaid property.

46. The proceedings of urban ceiling were initiated against the tenure holder-Tara Chand which was registered as Case No.1820/122/82 (State of U.P. vs. Tara Chand), in which by an ex-parte order dated 04.04.1985 passed U/s 8(4) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred as "the Act of 1976"),

6932.23 sq.mts. of land of tenure holder-Tara Chand from Gata Nos.801, 1196, 1197, 1207, 825, 817, 818, 798 situated in village Biharman Nagla, District Bareilly was declared surplus.

47. On 30.10.1989, notice under Section 9 of the Act of 1976 was allegedly issued. On 25.10.1989, i.e. prior notice under Section 9 of the Act, Notification U/s 10(1) of Ceiling Act was issued. Thereafter, the notification under Section 10(3) of the Act of 1976 was allegedly issued on 27.06.1990.

48. On 19.06.1993, notice under Section 10(5) of the Act 1976 was allegedly issued or sent to the heirs of Tara Chand, however, the aforesaid notices were not served upon heirs of Tara Chand. Subsequently, no further action was taken by the respondents in the matter and no effort was ever made to take the possession over the land in question, i.e. the land declared to be surplus and the actual physical possession of the said declared surplus land including Gata No.825 was never taken by any authority whatsoever and was with legal heirs of the Tara Chand when the Repealing Act came into force.

49. The Act of 1976 was repealed by Urban Land (Ceiling and Regulation) Repealing Act, 1999 (the Act No.15 of 1999), which was adopted by "the State of U.P.", w.e.f. 18.03.1999.

50. According to Sections 3 & 4 of the Repealing Act, all the proceedings under the Principal Act shall stand abated if the possession of the land has not been taken by the State on the date of the application of the Repealing Act.

51. In the present case, as the actual physical possession of the aforesaid declared surplus land was never taken by

the State authorities, hence the proceedings under the Act of 1976 stood automatically abated under the provisions of the Repealing Act, 1999.

52. He further submits that the possession memo dated 16.11.1990 in respect of transfer of land to Bareilly Development Authority is merely sheer paper transaction and cannot be relied upon. The aforesaid paper is of 16.11.1990, when the notice U/s 10(5) of the Act of 1976 was not even issued, as such it is barred by Section 10(4) of the Act of 1976.

53. From the aforesaid fact that the Bareilly Development Authority was never in possession of the land in question. The firm, i.e. S.K. Associates was in possession of the land of Gata No.825 situated in village Biharman Nagla, District Bareilly which is evident from the Khasra Nos.1416 Fasli, 1417 Fasli, 1418 Fasli, 1419 Fasli, 1420 Fasli, 1421 Fasli, 1422 Fasli, 1423 Fasli, 1424 Fasli, 1425 Fasli, 1426 Fasli, 1427 Fasli and 1428 Fasli, which have already been annexed as Annexure No.28 of the application.

Analysis and Findings

54. I have given thoughtful consideration to the submissions made by the learned counsel for the parties and gone through the records of the present application.

55. Basic facts to be noted are that:-

(i) Gata No.825 situated in vill-Biharman Nagla, District Bareilly, total are 7714.06 sq. mt. had three joint tenure holders, namely, Thakur Das s/o Sri Parumal, Tara Chand s/o Jhau Ram and Tula Ram s/o Sri Ram Dayal, having equal

share, i.e. 1/3rd each in the aforesaid property. The aforesaid fact is mentioned in the Khatauni of 1382 Fasli.

(ii) Proceedings of urban ceiling were initiated against the tenure holder—Tara Chand in which by an ex-parte order dated 04.04.1985 passed under Section 8(4) of the Act 1976, 6932.23 sq. mts. of land of tenure holder—Tara Chand from several Gatas including Gata No.825 was declared surplus.

(iii) After death of Tara Chand, on the basis of inquiry report dated 17.12.1988, Ramdas and Amar Singh sons of Tara Chand were declared to be legal heirs of Tara Chand. Accordingly, their names were entered in the revenue records.

(iv) The notice U/s 9 of the Act of 1976 was issued on 30.10.1989, but neither draft statement nor notices were served upon the legal heirs of Tara Chand.

(v) Prior to the aforesaid notice U/s 9 of the Act 1976, the notification U/s 10(1) of the Act of 1976 was allegedly issued on 25.10.1985. Thereafter, on 27.06.1990, notification U/s 10(3) of the Act 1976 was issued vesting the aforesaid property in the State.

(vi) Thereafter, notice U/s 10(5) of the Act 1976 was sent to the legal heirs of Tara Chand, but the said three copies of the notice were found on record, therefore, it cannot be presumed that the notices were served upon them.

(vii) It appears that 2/3rd of the aforesaid Gata No.825 was purchased by M/s S.K. Associates, which is alleged to be connecting firm of company of the applicants, namely, M/s Alliance Builders and Contractors Pvt. Ltd. vide registered sale deed dated 20.03.2003 from Satveer Singh s/o Raghuvir Singh being power of attorney holder of Ram Das and Amar Singh sons of Tara Chand as well as Jasbir being power of attorney holder of Jagdish

Prasad and Sukhpal sons of Tularam and Smt. Sunder Devi w/o Tularam.

(viii) At the time of purchase, names of legal heirs of Tula Ram and Tara Chand from whom M/s S.K. Associates purchased the property was shown in the revenue records. The name of M/s S.K. Associates was mutated in the revenue records by order dated 25.05.2003 pursuant to the sale deed dated 20.03.2003.

(ix) One of the seller, namely, Jagdish Prasad, legal heir of Tula Ram having 1/8th share of the aforesaid Gata raised objection on the aforesaid sale deed and also disputed the power of attorney. Thus, the mutation order dated 20.05.2003 was recalled vide order dated 23.06.2008. Further, Jagdish Prasad s/o Tula Ram filed a civil suit being Original Suit No.290 of 2008 for cancellation of sale deed dated 20.03.2003 executed in favour of M/s S.K. Associates, however, later the matter was compromised with M/s S.K. Associates and the said sale deed dated 20.03.2003 executed in favour of M/s S.K. Associates through his power of attorney holder, was accepted.

(x) The relevant Khasara shows that M/s S.K. Associates was in possession over the property in question till 2021.

(xi) It appears that after the proceedings under ceiling Act, the land of the tenure holder, which was declared surplus was vested in the State and later possession of the same was given to Bareilly Development Authority (B.D.A.) on 16.11.1990. Accordingly, the order for mutating the name of Bareilly Development Authority over the land in question was passed, but was not given effect to by the concerned person. About the aforesaid fact of land in question being given to the B.D.A. came to the knowledge of applicants in the year 2021-22, when the revenue authorities tried to disturb the possession of M/s S.K. Associates.

Hence, they filed writ petition before this Court, which was dismissed, against which Special Leave to Appeal (C) No. 10139/2023 (S.K. Associates vs. State of U.P. and Others) was filed wherein the Apex Court vide order dated 18.05.2023 directed both the parties to maintain status quo in respect of the nature and possession over the land in question until further orders of the Court. Hence, the matter regarding the fact as to whether actual physical possession of the property in question was given to Bareilly Development Authority or not, is sub judice before the Apex Court.

(xii) The present FIR came to be registered during pendency of the civil writ petition filed by the applicants, i.e. M/s S.K. Associates.

56. Before looking into merits of the case, it would be appropriate to discuss the scope and ambit of Section 482 Cr.P.C. which is a very agitated and debatable issue. Nevertheless, there are some cases which have got wide acceptance in the legal fraternity and hence, are used as the minor guidelines/principles governing the cases of quashing criminal proceedings.

57. The Hon'ble Apex Court in the case of ***Prashant Bharti Vs. State of NCT of Delhi reported in (2013) 9 SCC 293*** has held that, in order to determine the veracity of prayer for quashing the criminal proceedings raised by an accused u/s 482 Cr.P.C., the following questions are to be raised before the High Court, if the answer to all the following questions was in affirmative, then the High Court should quash the proceedings by exercising its power u/s 482 Cr.P.C.

“1. Whether the material relied upon by the accused is sound, reasonable

and indubitable, i.e. material is of sterling and in impeccable quality?

2. Whether the material relied upon by the accused is sufficient to reject and over rule the factual assertions contained in the complaint, i.e. material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusation as false?

3. Whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or that the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

4. Whether proceeding with the trial would result in an abuse, of process of the Court and hence, would not serve the end of Justice?"

58. The Apex Court in the case of **Parbatbhai Ahir Vs. State of Gujarat**, referring to various cases has summarized following principles to govern powers of High Court under Section 482 Cr.P.C.:-

"15 The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While

compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or

predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

59. The power of this Court under Section 482 Cr.P.C. has been amiably elaborated in following two cases, which are considered to be authorities on the subject of quashing of criminal proceedings. Despite all the contradicting judgments of the Apex Court the following cases provides most accepted views:-

1). In the case of **State of Haryana Vs. Bhajan Lal**, the Apex Court in paragraph 102 has enumerated 7

categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court, which are quoted below:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence

but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

II). In the case of **R.P. Kapur Vs State of Punjab**, the Apex Court discussing the power of this Court under Section 482 Cr.P.C. observed in paragraph 6 as follows:-

"6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under Section 561-A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters

specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under Section 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this

category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. xxxxxxxx"

(Emphasis supplied)

60. Thus, the Hon'ble Apex Court has discussed 3 clauses of cases in which

criminal proceeding can be quashed. They are as follows:-

“(a) where there is a legal bar against institution or continuance of criminal proceedings;

(b) where the allegation in FIR do not disclose or constitute an offence, even if taken at face value and not their entirety.

(c) where the allegation made constitute an offence but there is no evidence which can prove them.”

61. Limitation of power under Section 482 Cr.P.C. has been discussed by the Hon'ble Apex Court and held in the case of **Monica Kumar (Dr.) and Anr. Vs State of U.P.** as well as many other judgements of the Apex Court, that Section 482 Cr.P.C. powers are to be ex-debito justitiae (as a matter of right) in a manner to ensure real and substantial justice, and the administration of justice is why Court exists.

62. In recent relevant judgement of the Apex Court in the case of **Anand Kumar Mohatta Vs. State (Govt. of NCT of Delhi)**, it was observed;

“18-It is a settled principle of law that the High Court can exercise jurisdiction u/s 482 Cr.P.C. even when discharge application is pending with the trial Court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegation are materialized in a charge sheet. On the contrary, it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent

abuse of process of the power of any Court."

63. This Court time and again has examined the scope of jurisdiction of the High Court under Section 482 Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 Cr.P.C. A three-Judges Bench of the Hon'ble Supreme Court in **State of Karnataka v. L. Muniswamy** held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated :

"7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object

and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

64. Further it has been held in various judgements that in proceeding u/s 482 Cr.P.C., the High Court will not enter into any finding of facts, particularly when the matter has been concluded by the concurrent finding of facts.

65. However, in the judgment of Apex Court in the case of **Indian Oil Corporation Vs. NEPC India Ltd. And Ors.**, the Apex Court observes the following principles:-

"1. The High Courts, should not exercise the inherent powers to repress a legitimate prosecution. The power to quash criminal complaints should be used sparingly and with abundant caution.

2. The criminal complaint is not required to verbatim reproduce of legal ingredients of the alleged offence. If the necessary factual foundation is laid in the criminal complaint, merely on the ground that a few ingredients have not been stated in detail, the criminal proceeding should not be quashed. Quashing of complaint is warranted only where complaint to bereft of even the basic facts which are absolutely necessary for making out the alleged offence.

3. It was held that a given set of facts may make out (a) purely a Civil wrong, or (b) purely or criminal offence or (c) a civil wrong as also a criminal offence. A commercial or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence."

66. As such, the High Court u/s 482 Cr.P.C. has very wide scope and is an essential part of the functioning in order to meet the end of justice, it must be noted that the power so assigned is so vast and can easily be misinterpreted. So, it becomes important for the Courts to use it wisely and according to the guidelines laid down by Hon'ble Apex Court.

67. Section 482 of Cr.P.C. has made its space in Cr.P.C. in order to not only enable the High Court to provide proper justice but also to curb the filing of fictitious complaints.

68. In the present case as forwarded by/from both the side, the Hon'ble Court may surely take judicial notice of certain facts as provided u/s 57 of the Evidence Act, 1872 and set the law in motion by delivering substantial justice and balance be struck between the statutory obligations of investigation and rights of affected parties.

69. Further, even the framers of legislation while enacting section 482 Cr.P.C. had started with a non-obstante clause and completed the section with "or otherwise to secure the ends of justice" which lays obligation upon the power of High Court to prevent the society from criminals and law-breakers and should be exercised to stop the public from filing fictitious complaints just to fulfill their personal grudges.

70. In the present case, a balance has to be struck while considering the rival submissions made by the parties in order to arrive at a judicious conclusion. The landmark judgments have been cited by both the parties considering which this Court has to arrive at a conclusion considering the guidelines and principles

setup by the Hon'ble Apex Court in various cases.

71. The main thrust of the counsel for the applicants while pressing their case is :-

(a) Firstly, the informant/complainant cannot be taken as a person aggrieved for the purpose of launching the criminal proceedings.

(b) Secondly, the criminal proceedings in question is liable to be quashed on the ground that there is a dispute between the parties, which is civil in nature and is sought to be given a criminal colour, only with a view to pressurize the applicants and to hide the irregularities.

(c) Thirdly, no offence under the relevant sections is made out.

72. As regards the first argument of learned counsel for the applicants regarding the fact as to who can be the person aggrieved for the purpose of launching the criminal proceedings and against whom such criminal proceeding can be lodged, this Court considering the observations as made in the case of **Mohd. Ibrahim's case (supra)**, finds that the sale deed has been executed by the legal heirs of original tenure holder in favour of M/s S.K. Associates (applicants) and further their names were recorded in the revenue records and, later sold the same to other persons, therefore, the applicants have not executed the sale deed to other, not having ownership of the property in question nor have forged or placed any forged document by selling the property. Thus, the State as well as B.D.A. cannot turn around to say that they have been cheated or fraud has been placed by the applicants while executing the sale deed in favour of others. Therefore, the authorities of State of U.P.

or B.D.A. were not the persons who were competent to lodge the complaint.

73. Be that as it may, it is only the subsequent purchaser, i.e. persons to whom M/s S.K. Associates, after acquiring title by means of sale deed executed in their favour by legal heirs of original tenure holder, have sold the land in question, could have lodged the complaint. Thus the informant was not the right person to lodge the FIR.

74. Before dealing with second issue regarding civil dispute being given criminal colour, it would be apposite to discuss settled position of law in this regard.

75. At this juncture, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.

76. The Hon'ble Apex Court in the case of **G. Sagar Suri v. State of U.P.** has observed that it is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to

exercise a great deal of caution. For the accused it is a serious matter. The Hon'ble Apex Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

77. The Court being conscious of the interplay between civil disputes and criminal proceedings, finds it appropriate to refer to a decision of the Apex Court in the case of **Mohd. Ibrahim vs. State of Bihar**, wherein it has been observed as under:-

"8. This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to settle civil disputes."

78. From the aforesaid, it is clear that any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. It is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.

79. In **Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others**, a three Judge Bench of this Court laid down the following principles of law:-

“57. From the aforesaid decisions of this Court, right from the decision of the Privy Council in the case of Khawaja Nazir Ahmad (supra), the following principles of law emerge:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into cognizable offences;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) However, in cases where no cognizable offence or offence of any kind is disclosed in the first information report the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, in the ‘rarest of rare cases’. (The rarest of rare cases standard in its application for quashing under Section 482 Cr.P.C. is not to be confused with the norm which has been formulated in the context of the death penalty, as explained previously by this Court);

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception and a rarity than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities. The inherent power of the court is, however, recognised to secure the ends of justice or prevent the abuse of the process by Section 482 Cr.P.C.

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. During or after investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan

Lal (supra), has the jurisdiction to quash the FIR/complaint; and

xv) When a prayer for quashing the FIR is made by the alleged accused, the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether or not the allegations in the FIR disclose the commission of a cognizable offence and is not required to consider on merits whether the allegations make out a cognizable offence or not and the court has to permit the investigating agency/police to investigate the allegations in the FIR."

80. The Courts have time and again cautioned about converting purely civil disputes into criminal cases and have noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Thus, the present dispute, which is entirely with respect to property and more particularly buying and selling thereof, cannot be doubted that a criminal hue has been unjustifiably lent to a civil natured issue.

81. In the case of **Paramjeet Batra v. State of Uttarakhand & Ors.**, this Court held:-

"12. While exercising its jurisdiction under Section 482 of the Code of the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of the facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see

whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."

82. Thus it is true that only because a civil remedy is available to the complainant in given set of facts, which make out a civil wrong as also criminal offence, itself cannot be a ground to quash the criminal proceedings.

83. It has been time and again held in several decisions of the Apex Court as well as High Courts that where a dispute which is essentially of a civil nature, is given a cloak of a criminal offence, then such disputes can be quashed, by exercising the inherent powers under Section 482 of the Code of Criminal Procedure.

84. What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than not, relating to land and/or money are given the colour of criminality, only for the purposes of exerting pressure on the party concerned, which, this Court reiterates, is nothing but abuse of the process of the court.

85. Be that as it may, where it appears that the offence in question is primarily civil or private, where the alleged offence has not been committed or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. The mere fact that the offence is covered under a 'special statute' (in the

present case under the Ceiling Act, 1976) would not refrain this Court from exercising its inherent powers under Section 482 Cr.P.C.

86. It is also to be noted that while no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant.

87. Thus, analyzing the second issue regarding civil dispute being given a criminal colour, this Court finds that the allegations against the applicants, in short, are that they have entered into sale consideration for a land situated at Khasra No.825 area 0.7714 hectares in Village-Biharman Nagla which was declared surplus land in ceiling proceedings by committing forgery and manipulating the revenue records. It is not disputed that prior to execution of sale deed dated 20.03.2003, names of legal heirs of Tara Chand as well as Tula Ram were entered in the revenue records. After execution of sale deed dated 20.03.2003 in favour of M/s S.K. Associates (applicants), it was mutated in the revenue records vide order dated 22.05.2003. On the basis of the aforesaid sale deed, deleting the name of erstwhile owners, i.e. legal heirs of original tenure

holders. It is also not disputed that an objection was raised by one of the seller, which was ultimately settled through compromise and the sale deed as well as possession of M/s S.K. Associate was affirmed after which till 2021, the applicants were in actual possession over the property in question.

88. As the revenue authorities tried to disturb the possession of the applicants over the property in question, writ petition was filed before this Court in the year 2022, in which initially the Division Bench of this Court directed the parties to maintain status quo and finally the writ petition was dismissed vide order dated 25.01.2022 on the ground that M/s S.K. Associates being subsequent purchaser has no locus to file writ petition and the land was in physical possession of B.D.A. Against the aforesaid order, Special Leave to Appeal has been filed before the Hon'ble Apex Court, wherein interim order has been granted in favour of M/s S.K. Associates directing both the parties to maintain status quo in respect to nature and possession over the land in question. Thus, the question as to who is in actual possession over the property in question is still pending consideration before the Hon'ble Apex Court.

89. Thus the case which started from initiation of proceedings under ceiling Act, wherein as per the case of opposite party no.2, the land declared surplus was vested in State and later, transferred to B.D.A., actual possession was being given to the authorities is a question which is pending consideration before the Hon'ble Apex Court. Unless it is decided that the M/s S.K. Associates has played fraud in purchasing the aforesaid property from the legal heirs of original tenure holders having

knowledge of the fact that the aforesaid land was declared surplus and vested in State and later transferred to B.D.A., it cannot be said that the applicants have committed any criminal offence. Even otherwise, matter regarding possession is under consideration before the Hon'ble Apex Court. In case, the same is decided in favour of applicants, allegation regarding criminal offence against applicants would have no legs to stand as the decision will be binding upon criminal court proving that the applicants have committed no criminal offence.

90. It has not been the case of the informant that the applicant have manipulated records or have played fraud in getting the sale deed executed in the year 2003, no criminal offence is made out against the applicants.

91. This Court finds that the allegations made in the FIR regarding the land in question being entered as ceiling surplus land in revenue records, is also contrary to the records of current Khatauni of 1424-1429 Fasli.

92. In the present case, M/s S.K. Associates purchased the property in question from original tenure holders after which their names were mutated in the revenue records and subsequently, sold the property by means of sale deeds to others. About the fact that the ceiling proceedings in which surplus land of the tenure holders were vested in State and then transferred to Bareilly Development Authority came to their knowledge of the applicants in the year 2021-22, therefore, it cannot be said that any criminal offence has been committed by the applicants as they were bona fide purchaser of the property in question from the original tenure holders.

93. So far as the next argument as placed by learned counsel for the applicants no offence under the relevant section is made out, this Court finds that even if the allegations as made in the FIR are presumed to be true in entirety, they did not disclose the ingredients of any forgery or cheating and there is no such credible material to prove the aforesaid offence. Thus no offence under the relevant section is made out.

94. For attracting the offence of 'cheating' as defined under Section 415 of IPC and punishable under Section 420 of IPC, it is necessary that the FIR should make out a case of "intentional inducement", "dishonesty" or "fraudulence". Further, for the offence of 'cheating', there should not only be cheating, but as a consequence of such cheating, the accused should also have dishonestly induced the person deceived to deliver any property to a person. Neither the FIR nor the charge-sheet contain a whisper with respect to any inducement, fraud or dishonesty by the applicants.

95. The Hon'ble Apex Court, in the case of **Prof. R.K. Vijayasathya and Another vs. Sudha Seetharam and Another** has culled out the ingredients to constitute the offence under Sections 415 IPC are as follows:-

"16. The ingredients to constitute an offence of cheating are as follows:-

16.1. There should be fraudulent or dishonest inducement of a person by deceiving him:

16.1.1. The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or

16.1.2. The person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and

16.2. In cases covered by 16.1.2. above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property.”

96. Thus, fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

97. The ingredients to constitute an offence under Section 420 IPC are as follows:-

“19.1. A person must commit the offence of cheating under Section 415; and

19.2. The person cheated must be dishonestly induced to

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.”

98. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC.

99. From the above, it is clear that for attracting the provision of Section 420 of IPC, the FIR/complaint must show that the ingredients of Section 415 of IPC are made out and the person cheated must have been dishonestly induced to deliver the property to any person; or to make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. In other words, for

attracting the provisions of Section 420 of IPC, it must be shown that the FIR/complaint discloses:-

(i) the deception of any person;

(ii) fraudulently or dishonestly inducing that person to deliver any property to any person; and

(iii) dishonest intention of the accused at the time of making the inducement.

100. Perusal of the FIR as well as the charge-sheet, reveals that the allegations with regard to inducement is missing and no role of inducement at all has been attributed to the applicants, who are bona fide purchaser of the property in question.

101. In the present facts of the case, the applicants are bona fide purchaser of the property in question after paying consideration to the legal heirs of original tenure holders without notice to the title of State of U.P. or B.D.A. (assuming such title to be true) are victims, hence cannot be accused of forgery in the facts of the present case.

102. The opposite party no.2 had no point of time raised any such allegations against the applicants that they have fabricated or manipulated the records or have played any fraud while purchasing the land in question from the original tenure holders nor while executing the sale deed further in favour of other persons. Even if it is presumed that in ceiling proceedings, the land in question was declared surplus land and vested in the State, thereafter transferred to B.D.A., it was the original tenure holders, who had got their names mutated in the revenue records, after which the same was purchased by the applicants. The applicants had no role to play in

getting the names of legal heirs of original tenure holders mutated in revenue records. The applicants had no concern with the fact that even if after notice to the legal heirs, any order was passed recording the name of State Authorities in the revenue records and the said order was not complied.

103. Even during investigation, witnesses have stated that the concerned Lekhpals have not given effect to the order dated 20.09.1997 passed by the competent authority, but nothing has been alleged against the applicants for any manner of manipulation and such event took place in the year 1997-2002, while the applicants' firm, i.e. M/s S.K. Associates came into picture in the year 2003, at the time of purchasing the property in question from the legal heirs of original tenure holders. Thus, the allegation as made by the opposite party no.2 against the applicants has no legs to stand.

104. Be that as it may, the applicants have acquired title by means of sale deed executed in their favour by legal heirs of original tenure holders, whose name was already mutated in revenue records, therefore, have not committed any forgery, hence no offence under IPC sections is made out.

105. Moreover, revenue records are not documents of title; nor would any findings pursuant to revenue proceedings under Revenue Code confer any rights, title or interest upon the respondents in relation to the subjudice property. Title can only be determined by a civil court of competent jurisdiction.

106. Needless to point out that the matter regarding possession over the property

in question is pending consideration before the Hon'ble Apex Court. Thus, it cannot be said that the applicants have committed any forgery or cheated the informant or person to whom they have sold the property. Even otherwise, the subsequent purchaser from M/s S.K. Associates (applicants) have not turned up to lodge any FIR regarding any such cheating being done by the applicants.

107. In the present facts of the case, this Court is satisfied to record that there was no criminality on the part of the accused as the civil dispute has to be converted into a criminal one, thus continuation of criminal proceedings against the applicants would amount to an abuse of the process of law.

108. As already discussed above that the Revenue Officials tried to create disturbance in peaceful possession of the applicants over the property in question, therefore, writ petition was filed, whereas the present FIR has been lodged after filing of the aforesaid writ petition only for the purpose of exerting pressure upon the applicants.

109. In the present case, there is unexplained delay in ascertaining any dispute regarding possession of the property in question as the sale deed has been executed in favor of the applicants in the year 2003, since then, they were in actual possession over the property in question. For the first time after filing of the writ petition, the opposite party no.2 has proceeded to lodge the present case, which itself proves that the opposite party no.2 has resorted to criminal proceedings in dispute, which is civil in nature for oblique reasons.

110. Further, it could be gainfully said that it is only the purchaser in the sale deed, who would be considered to be the person to feel cheated by the seller. Here, in the

present case, the applicants are bona fide purchaser, who have subsequently sold the property to other persons, who have not turned up to make any such allegation of being cheated or fraud being played, hence, have not come forward to lodge the FIR.

111. As pointed out earlier that the ceiling proceedings were initiated against the original tenure holder—Tara Chand and consequently, an ex-parte order dated 04.04.1985 was passed U/s 8(4) of the Act of 1976, by means of which the said land in dispute was declared surplus land. Thereafter, notice U/s 10(5) of the Act of 1976 was alleged to have been issued to the legal heirs of Tara Chand on 19.06.1993 to take possession of the land in question. However, the possession of the land concerned continued with the legal heirs of Tara Chand and their names were mutated in the revenue records. The Act of 1976 was repealed by the Urban Land (Ceiling and Regulation) Repealing Act, 1999. Hence, by virtue of Sections 3&4 of the Repealing Act, 1999, the alleged proceedings under the Act of 1976 stood abated by operation of law. The case set up by the opposite party no.2 is that the orders were passed by the Competent Authority for recording the name of “the State of U.P.” in revenue records, which was not given effect to by the competent person, thus at the utmost, it cannot be said that the legal heirs of original tenure holders have conspired with the person concerned for manipulating the records or it may also be the case that after the Repealing Act, 1999, as possession of the property in question was still with the legal heirs of original tenure holders and their names were mutated in the revenue records as in view of the Repealing Act, 1999, initially ceiling proceedings stood abated and the applicants purchased the property by means of sale

deed in the year 2003 prior to which names of legal heirs of original tenure holders have already been recorded, no fraud, cheating or manipulation has been done by the applicants.

112. This Court also finds that there is no allegation regarding any development being carried out or that there is violation of any order of any competent authority under Urban Planning & Development Act, 1973, thus offence under Section 28 of Act of 1973 is not made out.

113. From the averments made in para 54 of the application, it is evident that Bareilly Development Authority had filed Civil Misc. Writ Petition No.11392 of 1998 (Bareilly Development Authority vs. Competent Authority Urban Ceiling and Others) before this Court in respect to some recovery in which they have mentioned that land of Gata No.797 area 2,402.74 sq. mt. of Village-Biharman Nagla was transferred and the possession of the same was given to them, to which no specific denial has been given by Bareilly Development Authority. From the aforesaid, it is clear that they have not spoken about transfer and possession of land in Gata No. 825, had it been so, same would have been specifically mentioned in the writ petition filed by Bareilly Development Authority.

114. As regards the applicant—Munish Chandra Mishra, it has already been discussed from the record and is clear that he was not the Lekhpal at the relevant point of time nor anything has been stated against him by the witnesses.

115. Keeping in mind that criminal prosecution is a serious matter; it affects the liberty of a person, no greater damage can be done to the reputation of a person

than dragging him in a criminal case, continuance of prosecution would be nothing but an abuse of the process of law and will be a mental trauma to the applicants, it becomes necessary for this Court to invoke inherent powers under Section 482 Cr.P.C. in present facts and circumstances of his case.

116. Therefore, in view of above discussion, this Court finds a good ground for quashing the impugned charge-sheet, cognizance/summoning order as well as entire proceedings of the aforesaid case.

117. Accordingly, the charge sheet dated 06.12.2022 and cognizance order dated 9.12.2022 as well as the entire proceedings of Case No.6501 of 2022 (State vs. Satveer Singh and others), arising out of Case Crime No.0949 of 2022, under Sections 447, 420, 467, 468, 469, 471, 120B IPC and Section 28(1) of U.P. Urban Planning & Development Act 1973, Police Station-Izzat Nagar, District-Bareilly, pending before the court of Chief Judicial Magistrate, Bareilly are hereby **quashed**.

118. These applications under Section 482 Cr.P.C. are, accordingly, **allowed**. There shall be no order as to costs.

119. A copy of this order be sent to the lower court forthwith.

(2024) 12 ILRA 354

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 12.12.2024

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Misc. Bail Application No. 3800 of 2024

Mohd. Hasnain

...Applicant

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Ravi Singh, Mohd. Jabir, Pranjali Krishna, Suhaib Ashraf

Counsel for the Opposite Party:

G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 37(1)(b)(ii) - Constitution of India, 1950 - Article 21 - Second bail application - FIR registered on 22.11.2023 - First bail application rejected vide order dated 17.01.2024 - Charge sheet filed on 23.02.2024 - Charges framed on 07.08.2024 - Till date only PW-1 examined - Plea of parity. (Para 3)

Held, applicant languishing in jail since 22.11.2023, till date only single witness examined that too when status of trial was summoned - In one of case u/s 8/21, NDPS Act, applicant has been acquitted - In another case under same section of NDPS Act, it was noticed that approximately one and half years passed, till date trial has not commenced - Criminal history of earlier cases, in view of Judgment of Apex Court in Rabi Prakash (infra), cannot come in way of consideration for grant of bail and stringent condition under charged section should not given weightage over fundamental rights guaranteed to accused - Since, three similarly situated co-accused persons granted bail, applicant cannot be treated differently. (Para 13, 15)

Bail application allowed. (E-13)

List of Cases cited:

1. Rabi Prakash Vs St. of Odisha, 2023 SCC OnLine SC 1109, (Para 3, 4)

2. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2022) 10 SCC 51, (Para 98)

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

1. Heard Shri Pranjal Krishna, learned counsel for the applicant and learned A.G.A for the respondent State.

2. This is the second bail application. The first bail application of the applicant was rejected vide order dated 17.01.2024 passed by this Court in Criminal Misc. Bail Application No. 15322 of 2023.

3. Learned counsel for the applicant while pressing the present second bail application on fresh grounds submits that the FIR was registered on 22.11.2023; first bail application of the applicant was rejected vide order dated 17.01.2024; □ charge sheet was filed on 23.02.2024; after the status report was called by this Court, charges were framed on 07.08.2024, however, till date only PW-1 could be examined. The applicant is languishing in jail since 22.11.2023 without any fault of his own.

4. Learned counsel for the applicant submits that first bail application was rejected on the ground that apart from the criminal history of other cases, the applicant has a criminal history of two cases under NDPS Act and therefore, the satisfaction with regard to section 37 of NDPS Act could not be recorded to the extent that he will not commit the same offence in future.

5. It has been further submitted that so far as criminal history of two cases of NDPS is concerned, in one case crime No. 746/2011, under Section 8/21 of NDPS Act, P.S. Badosarari, District Barabanki, the applicant has been acquitted and in the second case i.e. case crime No. 305/2022, under Section 8/21

of NDPS Act, which was registered in the year 2022, although, the applicant is on bail, however, still, after expiry of two and half years, even the trial has not commenced.

6. It has been further submitted that the delay in trial is on the part of the prosecution. The applicant cannot be put to suffer for this delay and therefore, with regard to the conditions under Section 37(1)(b)(ii) of NDPS Act will not come in the way of consideration of the application of the applicant for grant of bail. In support of his argument, he has relied on the judgment of the Hon'ble Supreme Court passed in the case of "**Rabi Prakash v. State of Odisha, 2023 SCC OnLine SC 1109**". Emphasis is on paragraphs 3 and 4.

7. Learned counsel for the applicant further submits that the Apex Court in the case of Rabi Prakash (supra) after considering the long period of incarceration has held that *"prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act"* and therefore, in this case also, the applicant is liable to be granted bail.

8. It has been further submitted on behalf of the applicant that co-accused persons namely Mohd. Yusuf and Nurul Hasan have been granted bail by the learned Additional District and Sessions Judge (NDSP Act), Barabanki. The bail orders are on record as Annexure No. 7 collectively to the bail application. Likewise, another co-accused namely Mohd. Rashid has also been granted bail by

the coordinate Bench of this Court vide order dated 11.01.2024 passed in Criminal Misc. Bail Application No. 344 of 2024.

9. Learned counsel for the applicant further submits that on the basis of criminal history of NDPS cases as well as in the case crime No. 305/2022, the fundamental rights guaranteed under Article 21 of the Constitution cannot be ignored and they shall not be affected by Section 37 of NDPS Act as held by the Apex Court in the judgment of **Rabi Prakash (supra)**.

10. It has been further submitted on behalf of the applicant that since number of named accused persons have been granted bail, therefore, the applicant should be granted parity. In support of his contention, he has relied on the judgment of the Apex Court passed in the case of **Satender Kumar Antil Vs. Central Bureau of Investigation and another, (2022) 10 SCC 51**.

11. Perused the record.

12. The Apex Court in the case of Rabi Prakash (supra) while considering the prolonged incarceration vis-a-vis conditions under Section 37(1)(b)(ii) of the NDPS Act has held as under:-

"3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there

are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

13. In this case, the applicant is languishing in jail since 22.11.2023 and till date only single witness has been examined that too when status of trial was summoned by this Court. So far as case crime No. 746/2011, under Section 8/21 of NDPS Act is concerned, the applicant has been acquitted. In case crime No. 305/2022, under Section 8/21 of NDPS Act this Court has noticed that approximately one and half years have passed, however, till date trial has not commenced. Criminal history of those cases, in view of the Judgment of the Apex Court in the case of Rabi Prakash (supra), cannot come in the way of consideration of the application of the applicant for grant of bail and stringent condition under Section 37(1)(b)(ii) NDPS Act should not be given weightage over the fundamental rights guaranteed to the accused under Article 21 of the Constitution of India.

14. Perusal of the record further shows that three similarly situated co-accused persons have been granted bail. The Apex Court in the case of Satender Kumar Antil (supra) (paragraph 98) has held as under:-

"98. Uniformity and certainty in the decisions of the court are the

foundations of judicial dispensation. Persons accused with same offence shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India."

15. In view of the law laid down by the Apex Court in the case of Rabi Prakash (supra), the twin condition under Section 37(1)(b)(ii) of the NDPS Act cannot come in the way of fundamental rights guaranteed to the accused under Article 21 of the Constitution of India considering his long incarceration and slow progress of the trial. Likewise, as held by the Apex Court in the case of Satender Kumar Antil (supra), since three co-accused persons have been granted bail by this case, the applicant cannot be treated differently.

16. In view of the discussions made herein above, the bail application of the applicant is **allowed**.

17. Let the applicant, Mohd. Hasnain, involved in Case Crime/FIR No. 478/2023, under Sections 8/21C/29/60(3) of NDPS Act, Police Station - Jaidpur, District - Barabanki, be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

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

(ii) The applicant will not pressurize/ intimidate the prosecution witness.

(iii) 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.

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

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

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

(2024) 12 ILRA 357
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Criminal Misc. Bail Application No. 38698 of
2024

Anupam Shukla @ Anupama Tripathi

...Applicant

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Utsav

Counsel for the Opposite Party:

G.A., K.K. Rao, Pradeep Kumar Srinette

Criminal Law - Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 3(1) & 19(4) - Indian Penal Code, 1860 - Section 386 - Instant case imposed upon applicant on basis of solitary case mentioned in Gang Chart - Allegation against applicant was that she along with co-accused was operating gang and habitual to commit offence - According to prosecution, complainant lodged criminal case against her with allegation that threats were extended to complainant for illegal demand of money - Applicant challenged FIR, interim protection granted to her - Further submits that though interim protection granted to her, Investigating Officer illegally arrested her and sent her to jail - Thereafter, she moved bail application, enlarged on bail - All FIRs lodged against her with mala fide intention for purpose of harassment - Languishing in jail since 4.9.2024, no likelihood of early conclusion of trial. (Para 2, 3)

Informant submitted that applicant and other gang members whenever found investigation was not in their favour, they moved application u/s 156(3) Cr.P.C. against investigating officer, all accused are gangster, operating well organized gang - Apart from instant case, applicant had 4 criminal history, out of which only one case has been mentioned in gang chart - Three other cases are of extortion. (Para 5)

Held, totality of circumstances and gravity of offence go against applicant - The instant case registered against applicant does not seem to be misuse of act as she and other co-accused persons had long criminal history. (Para 7, 8)

Thus, no reasonable ground to believe that applicant was not guilty of such

offences and not likely to commit any offence in future while on bail - Not a fit case for bail, rejected. (para 9, 10)

Bail application rejected. (E-13)

List of Cases cited:

Mohd. Afzal Vs St. Of U.P, (Criminal Misc. Bail application No. - 38698 of 2024), decided on 11.11.2024

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

1. Heard Shri Utsav, learned counsel for the applicant, learned AGA for the State-respondents, Shri K. K. Rao, learned counsel for the informant in predicate offence and perused the record.

2. The present bail application under Section 439 Cr.P.C. has been filed on behalf of applicant Anupam Shukla Alias Anupama Tripathi under Section 439 of The Code of Criminal Procedure, with a prayer to release her on bail in Case Crime No. 339 of 2024, under Sections 2, 3(1) Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, registered at Police Station Civil Lines, District Prayagraj, during pendency of the trial.

3. It has been submitted by learned counsel for the applicant that the applicant is innocent and has been falsely implicated in this case due to ulterior motive. Present case has been imposed upon the applicant on the basis of solitary case mentioned in the Gang Chart. Learned counsel for the applicant submits that the allegation against the applicant is that the applicant along with co-accused Apurva Sonkar is operating a gang and the applicant is a member of the said Gang and is habitual to commit offence under Chapter 17 and 22 of the IPC. Learned counsel for the applicant

submits that according to the prosecution story, the complainant has lodged a criminal case, being Case Crime No. 340 of 2023 under Section 386 against the applicant with the allegation that threats were extended to the complainant for illegal demand of money. The applicant had challenged the aforesaid FIR before this Court, in which interim protection was granted to the applicant by this Hon'ble Court. Learned counsel for the applicant submits that though this Court had granted interim protection to the applicant, but the Investigating Officer illegally arrested the applicant and sent her to jail. Thereafter, applicant moved bail application before this Court and she was enlarged on bail by this Court. Learned counsel for the applicant submits that applicant is having criminal history of four cases including the present case. All the FIRs were lodged against the applicant with mala fide intention for the purpose of harassment. It is next submitted that there is also no possibility of the applicant either fleeing away from the judicial process or tampering with the witnesses. The applicant, who is languishing in jail since 4.9.2024 undertakes that he will not misuse the liberty, if granted. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

4. Per contra learned A.G.A. has opposed the prayer for bail of the applicant.

5. Shri K. K. Rao, learned counsel for the informant in predicate offence has also vehemently opposed the prayer for bail and submits as under:-

(i) that the Applicant is a habitual offender and similar nature of crimes are being committed by the applicant and other

gang members. Applicant being a lady is taking the benefit of being a woman by lodging false F.I.R. under section 376 I.P.C. against the innocent and respectful persons of the society. Applicant and other gang members whenever found that the investigation is not concluded in their favour, they use to given application U/s 156(3) Cr.P.C. against the investigating officer of that case.

(ii) that section 2(b) of the Uttar Pradesh gangsters and anti-social activities (prevention) act, 1986 defines the term "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. Applicant and other co-accused persons operate an organized gang and commit offences punishable under Indian penal code. The very purpose of the gang is to ill financial gains by committing innumerable crimes of serious nature.

(iii) that the offence committed by the applicant and other co-accused comes within the preview of section 2(b)(iv) of the Uttar Pradesh gangsters and anti-social activities (prevention) act, 1986 "preventing or attempting to prevent any public servant or any witness from discharging his lawful duties".

(iv) that the applicant and all the accused are gangster and they are operating a well organized gang. All the accused are cunning criminals and with gang leader Apurva Sonkar, in a planned manner they extort money from people by luring them with the promise of getting government job for their own and their families economic and material benefits. These people, in order to evade to return the money, commit

heinous crime, like extortion by getting registered false case and earn illegal money.

(v) that the investigating officer during the investigation of case crime no. 179/2020 had mentioned the finding in supplementary case diary No. 11 that the applicant during the investigation being annoyed with earlier investigating officer, has filed an application U/s 156(3) Cr.P.C. against the earlier investigating officer namely Rajesh Yadav C.O. City-IV leveling the charges U/s 4 S.C./S.T. act. It was further mentioned that the applicant whenever finds that the investigation is not concluded in her favor, she used to file an application U/s 156(3) Cr.P.C. against that investigating officer. Details of some of the cases in which application under section 156(3) has been filed by the applicant and co-accused against the police officials are as below:-

1. Application U/s 156(3) Cr.P.C. filed by gang leader Apoorva Sonkar registered as Misc. case No. 404/2022 U/s 4 (d), (e), (f), (g) S.C./S.T. act against Rajesh Yadav C.O. City-IV (investigating officer of case crime No. 0066/2020)

2. Application U/s 156(3) Cr.P.C. filed by Applicant Anupam U/s 166, 166(a), 166(b), 167, 175, 177, 198, 197, 199, 217, 218, 219, 354, 504, 506, 120-B I.P.C. against S.H.O. and 3 other police persons of P.S. Phaphamau.

3. Application U/s 156(3) Cr.P.C. filed by gang leader Apoorva Sonkar registered as Misc. case No. 10614/2023 U/s 4 (d), (e), (f), (g) S.C./S.T. act, 166(a), 166(b) I.P.C. against Chirag Jain I.P.S., Investigating officer of case crime No. 0066/2022 (During investigation of case crime No. 0066/2022)

4. Application U/s 156(3) Cr.P.C. filed by gang leader Apoorva Sonkar

against Sanjay Kumar Patel, Clerk Samaj Kalyan Vibhag S.C./S.T. department.

(vi) that the applicant namely Anupam Shukla has filed an application U/s 156(3) Cr.P.C. against 7 named persons namely Dharmendra Kumar Sonkar, Rajendra Kumar Sonkar, Rohit Kumar Sonkar, Robin Sonkar, Pankaj Sonkar, Neeshu Sonkar, Tarachand and 4-5 unknown persons leveling allegations for the offences punishable under sections 376, 392, 323, 504, 506 and 307 I.P.C. It is pertinent to mention that the First Information report has been lodged against Neeshu Sonkar who is a practicing advocate. The fact is that Dharmendra Kumar Sonkar had lodged First Information Report against the gang members of present case and to exert pressure in order to effect compromise, applicant Anupam Shukla has given the aforesaid false and fabricated application U/s 156(3) Cr.P.C.

(vii) that apart from the present case, applicant has a history of 4 other criminal cases to his credit out of which only one case has been mention in the gang chart. Three other cases are of same nature i.e. Extortion. The applicant and other co-accused persons are professional criminals and there are several criminal cases of extortion, cheating and fraud lodged by different persons against them in different police stations of district Prayagraj.

(viii) that the applicant and other gang members had lodged several false cases against the innocent persons of Prayagraj, details of which are as below:-

1. *Case Crime No. 179/2020 U/s 147, 504, 506, 354(KA) I.P.C., U/s 66 I.T. act and section 3(2)(5A) S.C./S.T. Act P.S. George Town dated 26.05.2020. Final Report has been submitted.*

2. *Case Crime No. 385/2022 U/s 147, 504, 506, 354(KA) I.P.C. P.S.*

*Phaphamau dated 19.11.2022 lodged by the applicant against predicate victim, his wife and other persons. **Final Report has been submitted.***

3. Case Crime No. 472/2020 U/s 147, 504, 506, 354(KA) I.P.C., U/s 66 I.T. act P.S. Phaphamau dated 23.06.2020 lodged by the applicant against the wife of predicate victim and other persons. **Final Report has been submitted.**

4. Case Crime No. 66/2022 U/s 392, 307, 323, 504, 506, 406, 376 I.P.C. P.S. Mahila Thana dated 14.07.2022 lodged by the Gang Leader Apoorva Sonkar against predicate victim and other persons. **Final Report has been submitted.**

5. Case Crime No. 45/2022 (lodged against retired police personal), under section 354-B, 323, 504, 506, 452, 392 I.P.C. P.S. Mahila Thana, Prayagraj lodged by the Gang Leader Apoorva Sonkar against Jai Prakash Dubey and entire family.

6. Case Crime No. 244/2023 u/s 376D, 392, 323, 504, 506, 307 IPC PS Kudganj lodged by the applicant against Dharmendra Sonkar and other persons.

(ix) That some of the criminal history of the applicant and co-accused who formed the gang, are as under:-

1. Case Crime No. 304/2019 U/s 419, 420, 467, 468, 471, 493, 354(Kha), 504, 506, 190, 51 I.P.C., P.S. Cantt.

2. Case Crime No. 422/2020 U/s 147, 323, 504, 506, 406 and 3(2)(Va) Kydganj.

3. Case Crime No. 152/2023 U/s 419, 420, 504, 506, 406, 294 P.S. Daraganj.

4. Case Crime No. 555/2023 U/s 420, 406, 506 I.P.C. P.S. Dhoomanganj.

5. Case Crime No. 204/2023 U/s 392, 384, 342, 323, 504, 506 I.P.C. P.S. Daraganj.

6. Case Crime No. 242/2023 U/s 147, 323, 504, 506, 342, 384 I.P.C. and section 3(2)(Va) S.C/S.T act P.S. Kydganj.

7. Case Crime No. 243/2023 U/s 147, 323, 504, 506, 341, 324, 392 I.P.C. P.S. Kydganj.

8. Case Crime No. 340/2023 U/s 386, 506 I.P.C. P.S. Civil Lines.

9. Case No. 515/2020 U/s 138 N.I. Act P.S. Atarsuiya.

10. Case No. 754/2020 U/s 138 N.I. Act P.S. Kotwali.

11. Case No. 801/2021 U/s 138 N.I. Act P.S. Kydganj.

12. Case No. 545/2019 U/s 138 N.I. Act P.S. Cantt.

13. Case No. 742/2020 U/s 138 N.I. Act P.S. Kotwali.

14. Case No. 755/2019 U/s 138 N.I. Act.

(x) Learned counsel for the first informant/complainant has cited certain case law in order to substantiate his arguments, the relevant paragraphs of the case law which are as under:-

Criminal Misc. Bail Application No. 8930 of 2023 (Mohd. Afzal Vs State Of U.P.)

Relevant paragraphs of the case law:-

20 (I). Ashok Kumar Dixit vs. State of UP :

151. We are unable to uphold the submission. The impugned Act is designed to deal with a class of crime which is entirely distinct from the ordinary offences, and the accused involved may be such as against whom it may be difficult to collect evidence sometimes. Consequently, if the Legislature made a provision for larger period of remand than contemplated by sub-s. (2) of S. 167, Cr. P.C., it may not be possible to hold sub-s. (2) of S. 19 to be ultra vires on that ground.

152. Further first remand is granted by the Judicial Magistrate or by the Executive Magistrate which cannot exceed more than sixty days. Any further remand is granted only by the special Judge after satisfying himself as to the desirability of granting further time to the investigating officer for completing the investigation. The discretion to grant remand for a period of sixty days is thus vested in a Judicial Officer, namely, the Special Judge who may disallow further remand asked for by the investigating agencies, if grounds for the same are not made out. Power of further remand is not with any executive authority. We therefore, do not see any unconstitutionality in S. 19(2) of the Act.

153. Arguments were also advanced before us challenging the validity of Cl. (e) of S. 2, U.P. Act. 7 of 1986, in so far as it provided that even a person in whose welfare the public servant is interested would be a member of his family. Clause (e) provides: 4 AIR 1987 All 235 [6] "Member of the family of a public servant means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested."

154. We find that the aforesaid definition of member of the family of a public servant is extremely vague and incapable of being worked out. How could a person in whom a public servant is interested be a member of his family. This definition including any person in whose welfare the public servant if interested is extremely vague, and, as such is liable to be held as unreasonable. As a result whereof, we hereby find that the phrase "and a person in whose welfare the public

servant is interested" is unconstitutional on the ground of being unreasonable and violative of Art. 14 of the Constitution. However, since this clause is capable of being severed from the remaining, it is not correct to argue that the whole of cl. (e) of S. 2 would have to be struck down.

155. These petitions had been filed mainly on the ground that U.P. Act 7 of 1986 was ultra vires the Constitution. We have not been able to find substance in any one of the grounds of attack of the Act. So far as our power to quash the investigation and the proceedings pending before the Special. Judges challenged in some of the writ petitions before us, are concerned, we are of opinion that this is not possible to be done in these cases. Judicial opinion seems to be settled and we have several authorities of the Supreme Court where interference by the Court into police investigation has been disapproved. This question arose in connection with an application under S. 561A Criminal P.C. in an appeal in *State of West Bengal v. S.N. Basak*, AIR 1963 SC 447. Kapoor, J. quoted with approval the observations of the Judicial Committee in the case of *Emperor v. Khwaja Nazir Ahmad*, AIR 1945 PC 18, where the Privy Council observed:

"The functions of the judiciary and the police are complementary not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to interfere in an appropriate case when moved under S. 491, Criminal P.C. to give directions in the nature of habeas corpus."

156. This view was followed by the Supreme Court in *State of West Bengal v. Sampat Lal*, (1985) 1 SCC 317 : AIR

1985 SC 195 and Eastern Spinning Mills Shri Virendra Kumar Sharda v. Rajiv Poddar, 1989 Supp (2) SCC 385 : AIR 1985 SC 1668. In this case, the Supreme Court observed: [7] "We consider it absolutely unnecessary to make a reference to the decision of this Court and they are legion which have laid down that save in exceptional cases where non-interference would result in miscarriage of justice, the Court and judicial process should I not interfere at the stage of investigation of offences."

157. Of course, the decisions cited above were in connection with S. 482, Cr. P.C., but the scope of interference under Art. 226 of the Constitution is narrower. The power of superintendence of the High Court under Art. 226 being extraordinary is to be exercised sparingly and only in appropriate cases. The power to issue certiorari cannot be invoked to correct an error of fact which a superior Court can do in exercise of its statutory power as a Court of appeal. The High Court cannot in exercising its jurisdiction under Art. 226 convert itself into a Court of appeal when the legislature has not chosen to confer such a right.

158. The High Court's function is limited to see that the subordinate court or Tribunal or authority functions within the limits of its power. It cannot correct errors of fact by examining the evidence.

159. In a writ petition filed under Art. 32 of the Constitution, the argument made on behalf of the petitioner of that case that there I was no material whatsoever to warrant the framing of charges, hence, the entire proceedings were liable to be quashed. The Supreme Court in Raghubir Singh v. State of Bihar, (1986) 4 SCC 481 : AIR 1987 SC 149, repelled that argument by saying: "It was strenuously contended by Sri Jethmalani

that there was no material whatsoever to warrant the framing of charges for any of the offences mentioned in the charge sheet other than S. 165A. We desire to express no opinion on this question. It is not a matter to be investigated by us in a petition under Art. 32 of the Constitution. We wish to emphasise that this Court cannot convert itself into the Court of a Magistrate or a Special Judge to consider whether there is evidence or not justifying the framing of charges".

160. For the reasons given above, all the writ petitions fail and are dismissed with costs. Interim order shall stand vacated.

(II). Dharmendra Kirthal vs. State of UP :

45. It is apposite to note here that there is a distinction between an accused who faces trial in other courts and the accused in the Special Courts because the accused herein is tried by the Special Court as he is a gangster as defined under Section 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. It is a crime of a different nature. Apart from normal criminality, the accused is also involved in organised crime for a different purpose and motive. The accused persons under the Act belong to an altogether different category. The legislature has felt that they are to be dealt with in a different manner and, accordingly, the trial is mandated to be held by the Special Courts in an expeditious manner. The intention of the legislature is to curb such kind of organised crimes which have become epidemic in the society.

(III). State of Maharashtra vs. Vishwanath Maranna Shetty :

29. While dealing with a special statute like MCOCA, having regard to the provisions contained in sub-section (4) of Section 21 of this Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite *mens rea*. In view of the above, we also reiterate that when a prosecution is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, these provisions cannot be ignored while dealing with such an application. Since the respondent has been charged with the offence under MCOCA, while dealing with his application for grant of bail, in addition to the broad principles to be applied in 6 (2012) 10 SCC 561 [14] prosecution for the offences under IPC, the relevant provision in the said statute, namely, sub-section (4) of Section 21 has to be kept in mind. It is also further made clear that a bare reading of the non obstante clause in sub-section (4) of Section 21 of MCOCA that the power to grant bail to a person accused of having committed offence under the said Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 but also subject to the restrictions placed by clauses (a) and (b) of subsection (4) of

Section 21. Apart from giving an opportunity to the prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The satisfaction contemplated in clauses (a) and (b) of sub-section (4) of Section 21 regarding the accused being not guilty, has to be based on "reasonable grounds". Though the expression "reasonable grounds" has not been defined in the Act, it is presumed that it is something more than *prima facie* grounds. We reiterate that recording of satisfaction on both the aspects mentioned in clauses (a) and (b) of sub-section (4) of Section 21 is *sine qua non* for granting bail under MCOCA.

30. The analysis of the relevant provisions of MCOCA, similar provision in the NDPS Act and the principles laid down in both the decisions shows that substantial probable cause for believing that the accused is not guilty of the offence for which he is charged must be satisfied. Further, a reasonable belief provided points to existence of such facts and circumstances as are sufficient to justify the satisfaction that the accused is not guilty of the alleged offence. We have already highlighted the materials placed in the case on hand and we hold that the High Court has not satisfied the twin tests as mentioned above while granting bail.

(IV). Collector of Customs v. Ahmadaliev Nodira :

8. In the aforesaid background, this does not appear to be a case where it could be reasonably believed that the accused was not guilty of the alleged offence. Therefore, the grant of bail to the accused was not called for. The impugned

order granting bail is set aside and the bail granted is cancelled. The respondent-accused is directed to surrender to custody forthwith. Additionally, it shall be open to the trial court to issue notice to the surety and in case the accused does not surrender to custody, as directed, to pass appropriate orders so far as the surety and the amount of security are concerned. It is made clear that no final opinion on the merit of the case has been expressed in this judgment, and whatever has [16] been stated is in the background of Section 37 of the Act for the purpose of bail.

(V). Kamlesh Pathak v. State of UP :

17. Section 12 of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 provides that trial under the Act of any offence by special court shall have precedence over the trial of any other case against the accused in any other court and shall be concluded in preference to the trial of such other case and accordingly trial of such other case shall remain in abeyance. The validity of the aforesaid Act was in question before the Hon'ble Supreme Court in the case of Dharmendra Kirthal v. State of U.P., (2013) 8 SCC 368. The Apex Court after detail analysis, upheld the constitutional validity of Section 12 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 by holding that it does not infringe any of the facets of Articles 14 and 21 of the Constitution of India.

18. Accordingly, it goes without saying that the case against the applicant under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 shall have precedence over the trial of any other case against the accused.

6. I have heard learned counsel for the parties and perused the record.

7. Along with the present case, other FIRs have been registered against the applicant and other co-accused persons, as such, inference can be drawn against the applicant that he along with other co-accused persons is operating an organized gang. The totality of circumstances and the gravity of offence mentioned in the said FIRs go against the applicant.

8. The instant case registered against the applicant does not seem to be misuse of the act as the applicant and other co-accused persons associated with the applicant have a criminal long criminal history.

9. Thus, there is no reasonable ground for this Court to believe that the applicant is not a guilty of such offences and applicant is not likely to commit any offence in future while on bail, as is the requirement of Section 19 (4) of the U.P. Gangster Act.

10. Considering the submissions of learned counsel for the parties, nature of allegations, gravity of offence and all attending facts and circumstances of the case, the Court is of the opinion that it is not a fit case for bail. Hence, bail application of the applicant is hereby **rejected**.

11. It is made clear that observation made hereinabove are limited to the facts brought in by the learned counsel for the parties pertaining to the disposal of the bail application and the aforesaid observations shall have no bearing on the merits of the case during trial.

(2024) 12 ILRA 366
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 43186 of
2024

Smt. Veerbala Yadav **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:
Amarjeet Choudhary, Atharva Dixit

Counsel for the Opposite Party:
G.A., Rajiv Lochan Shukla, Sai Girdhar

Criminal Law - Bharatiya Nyaya Sanhita, 2023 - Sections 103(1), 238(B), 324(6), 3(5) & 127(6) - Bharatiya Sakshya Adhiniyam, 2023 - Section 119 - FIR lodged by informant and had apprehension that some unknown persons have committed murder of his father. (Para 4)

Contention by accused that FIR was delayed by more than one day, no explanation given - After inquest proceedings and post-mortem examination of deceased, FIR was instituted - Her name was not mentioned in FIR - St.ment of owner of offending car or CCTV footage does not implicate applicant, as she was not seen in car at time of dumping of dead body of deceased - On information of squealer, applicant along with co-accused persons arrested - St.ment of star witness was recorded belatedly, who had seen deceased person going on motorcycle and mentioned that woman as pillion rider on motorcycle - No test identification parade of applicant. (Para 7, 8, 11, 12, 13)

St. contended that complicity of applicant was established by two star witnesses, who have seen applicant and deceased person and two accused persons going in car, said witnesses are not interested witnesses, post-mortem report also nullifies theory of accident - St.ment of one person was recorded by IO, who St.d on date of incidence, deceased asked his mobile for making phone call, on call female person was talking to deceased - Said number was of applicant and she had committed offence in collusion with co-accused persons. (Para 19, 20, 21, 24)

Held, recovery memo of car and other documents from possession of applicant and co-accused persons was clinching evidence against them, declined to release applicant on bail. (Para 25)

Bail application rejected. (E-13)

List of Cases cited:

1. Vinod Kumar Vs St. of Pun. 2015 (3) SCC 220
2. Hussain & anr. Vs U.O.I.(2017) 5 SCC 702

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

1. List has been revised. Supplementary affidavit filed by learned counsel for the applicant is taken on record.

2. Heard Sri Manish Tiwari, learned Senior Advocate, assisted by Sri Atharva Dixit, learned counsel for the applicant, Sri Rajiv Lochan Shukla, learned counsel for the informant as well as Ms. Ifrah Islam, learned State Law Officer and perused the material placed on record.

3. Applicant seeks bail in Case Crime No. 289 of 2024, U/S 103(1), 238(B), 324(6), 3(5), 127(6) of B.N.S., 2023, Police Station Mainather, District Moradabad, during the pendency of trial.

PROSECUTION STORY:

4. The FIR was instituted against unknown persons by the informant stating that his father had left his house on 16.8.2024 at about 8.00 pm on his motorcycle no. UP 21 BL 1907 and the informant was informed in the night of 17.8.2024 at 00.30 am that he had met with an accident and his dead body is lying at District Hospital.

5. On receiving the said information, the informant alongwith his family members rushed to the hospital and found the dead body of his father there and observed that he had certain marks on his neck and his tongue was protruding out and he had also observed that both his hands were also supposedly tied with something and there was also a mark of injury on his head, as such, he had apprehension in his mind that some unknown persons have committed his murder and in order to conceal the said dead body, had dumped it near NH-24 Chandausi cut. He has categorically stated in the FIR that his father has not met with any accident but he has been murdered.

ARGUMENTS ON BEHALF OF APPLICANT:

6. The applicant is absolutely innocent and has been falsely implicated in the present case with a view to cause unnecessary harassment and to victimize her. She is a widow and has nothing to do with the said offence.

7. The FIR is delayed by more than one day and there is no explanation of the said delay caused.

8. The inquest proceedings and the post-mortem examination of the deceased

were conducted on 17.8.2024 itself and the FIR has been subsequently instituted. Even that FIR does not mention the name of the applicant therein.

9. Subsequently, certain evidence has been garnered by the investigating officer, as he has found in CCTV footage that one i-10 Car bearing no. UP 16 DA 6222 was seen in it and two persons were seen throwing the said dead body of the deceased near the Highway.

10. Further delving into the identity of the said vehicle, it was found that the owner of the said vehicle was one Haroon Iqbal and his statement was taken and he has categorically stated that he did not use the said vehicle, as he had already sold the same to Manoj, who happens to be a co-accused person, although the transfer papers were not already completed.

11. Even then the statement of Haroon Iqbal or the CCTV footage does not implicate the applicant, as he is not seen in the said i-10 car at the time of dumping. Only two persons (implied as male persons mentioned as Aadmi) were found dumping the said dead body. On the information of a squealer, the said car was recovered and from the said i-10 car no. UP 16 DA 6222, the applicant alongwith co-accused persons Manoj and Anil was arrested.

12. It is a clear cut case of false implication and subsequently, three relatives of the informant have been roped as witnesses. The star witness is one Pushpendra, whose statement was recorded belatedly i.e on 27.8.2024, who had seen the deceased person going on a motorcycle and he has mentioned that he had seen a woman as a pillion rider on the said motorcycle.

13. There is no identification of the applicant being seen as a pillion rider of the said motorcycle, as it is vaguely been stated that the deceased was driving the said motorcycle alongwith a woman, as such, there being no test identification parade of the applicant, it is a clear cut case of false implication.

14. The statement of two more witnesses Arun Kumar and Yogesh has been recorded by the investigating officer on 28.8.2024, who are stated to have seen the applicant and the two other co-accused persons Manoj and Anil in the said i-10 car.

15. The said Yogesh has been stated to be panch witness at the time of the recording of the statement, as such, his statement cannot be relied. As the statement of both these witnesses have been recorded belatedly after 10 days of the institution of the FIR, the witnesses are interested ones, as they are the relatives of the informant, which is an admitted fact.

16. The said witness Pushpendra has categorically stated that he had identified the accused persons only after seeing in the newspaper, as such, the said averment cannot be taken into consideration. The said evidence taken by the prosecution is not palatable, as such, the applicant being a lady, is entitled for bail. There is no motive for her to commit the said offence.

17. The applicant is languishing in jail since 26.8.2024 having no criminal history and in case, the applicant is released on bail, he will not misuse the liberty of bail.

ARGUMENTS ON BEHALF OF STATE/OPPOSITE PARTY:

18. The bail application has been opposed on the ground that there is cogent and clinching evidence against the applicant.

19. Learned counsel for the informant has stated that the delay in institution of the FIR is but natural, as the informant did not want to falsely implicate any innocent person. He had no first hand knowledge of the offence being committed by the applicant, but gradually, as the statement of the witnesses were recorded by the investigating officer, the complicity of the applicant is established, especially by the two star witnesses namely, Arun Kumar and Yogesh, who have categorically seen the applicant and the deceased person and two accused persons going in the said i-10 car.

20. The said witnesses are not interested witnesses. There is a vast difference between the witnesses being relative witnesses and interested witnesses. The defence has failed to establish as to what interest the said witnesses carried to falsely implicate the applicant.

21. The modus operandi of the applicant is but evident from the circumstances itself, whereby the case of homicide is tried to be shown as accident, as the mobile was found broken but the motorcycle escaped any injury, whatsoever, coupled by the fact that the post-mortem report also nullifies the theory of the accident.

22. There are three phones being used by the applicant and the CDR of only one phone has been collected by the investigating officer, as such, the informant had given an application to S.S.P., Moradabad, on 7.11.2024 to establish the

C.D.Rs. and details of the two other suspected numbers of the applicant i.e. 9719191011 and 8868801979. Further investigation is being carried on regarding the two mobile numbers of the applicant.

23. Learned counsel has brought forward two documents, which are already on record as Annexure-1, which indicates that the applicant was in constant touch with the co-accused person Manoj Kumar and one other suspected member Ram Kumar Singh. □

24. The statement of one Sunil Karnwal was also recorded by the investigating officer, who stated that on 16.8.2024 at about 7.00 pm, the deceased person had asked him to give his mobile to him, as he had to make a phone call and he called from his mobile no. 9411432500 to one 9719191011 and a female person was talking to the deceased person from the other side. The said number 9719191011 is that of the applicant and it was she, who had lured the deceased person and had got the offence committed in collusion with the co-accused persons Manoj and Anil.

25. Learned counsel has placed reliance on the details of the statements of the said witnesses coupled by the recovery memo of the said car from which one aadhar card, one credit card and a blank cheque were recovered from the possession of the applicant and the two other co-accused persons. The said recovery has been made on 26.8.2024, as such, the illustration A of Section 119 of B.S.A. is applicable to the instant case, as the said recovery is in close proximity of the offence committed. The said recovery has been videographed, as such, it is the clinching evidence against the applicant. Had it been planted, the videography would not have been conducted.

ARGUMENTS IN REBUTTAL ON BEHALF OF APPLICANT:

26. The said statement of Sunil Karnwal is farce, as the broken mobile of the deceased was found and if he carried a mobile, why would he use the mobile of the said witness.

CONCLUSION:

27. After hearing the parties and taking into consideration the rival submissions, the evidence and the circumstantial evidence tendered at Bar and the fact that it has not been established as to why would the investigating officer or the witnesses falsely implicate the applicant, I do not find it a fit case for bail. Without expressing any opinion on the merits of the case, this Court is not inclined to release the applicant on bail.

28. The bail application is, accordingly, **rejected**.

29. However, it is directed that the aforesaid case pending before the trial court be decided expeditiously, in view of the principle laid down in the recent judgements of the Supreme Court in the cases of **Vinod Kumar vs. State of Punjab 2015 (3) SCC 220** and **Hussain and Another vs. Union of India (2017) 5 SCC 702**, if there is no legal impediment.

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

that the cases which are pending for more than 2 years, the undertrials shall be released on bail forthwith to the satisfaction of the respective trial courts. Persons facing trial for Kidnapping, Theft, Cheating, Arms Act, Counterfeiting, Customs, under Section 326 I.P.C., under Section 324 I.P.C., Riots and under Section 354 I.P.C. who are in jail for a period of more than one year, shall be released on bail forthwith to the satisfaction of the trial courts concerned. There may be cases where the undertrial persons may not be in a position to furnish sureties etc. In those cases, the trial courts may be in a position to furnish sureties etc. In those cases, the trial courts may consider -- keeping in view of the facts of each case especially the period spent in jail - - releasing them on bail by furnishing personal bonds."

8. Considering the facts and circumstances of the case, the judgment passed by Apex Court in the case of **R.D. Upadhyay (supra)**, nature of offence, evidence, complicity of the accused, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

9. Let the **applicant Pushpendra Giri** involved in Case Crime No. 530 of 2022, under sections 323, 307/34 I.P.C. and Section 3/25/27 Arms Act, Police Station Soron, District Kasganj be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:-

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

ii. The applicant will not pressurize/intimidate the prosecution witness.

iii. The applicant will appear before the trial court on the date fixed, unless personal presence is exempted and/or the applicant shall make himself available for interrogation by a police officer as and when required.

iv. The applicant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.

v. 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.

vi. The applicant shall not leave India without the previous permission of the Court.

vii. In the event, the applicant changes his residential address, the applicant shall inform the court concerned about new residential address in writing.

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

11. The trial court is directed to proceed with the trial without granting unnecessary adjournments to any of the party.

(2024) 12 ILRA 372
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 602 of 2019

Lavkush **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Dinesh Kumar Gupta, Pragyan Kumar Mishra, Sharad Mayank Pandey

Counsel for the Respondent:

G.A.

Criminal Law - Criminal Law - Criminal Procedure Code, 1973 - Sections 145, 157, 161, 161(1), 162, 162(1), 162(2), 164, 172(2), 173(2), 207 & 313 - Indian Penal Code, 1860 - Sections 34, 120-B & 302 - Arms Act, 1959- Section 25 - Evidence Act, 1872- Sections 27, 32, 145, 155(3) & 165 - Appeals – against conviction & sentence – offence of murder – FIR – informant lodged alleged that his brother (accused person) was a vagabond & drunkard having illicit relationship with wife of his neighbour and when his mother used to dissuade him from having relationship with neighbour accused brother shot his mother dead – investigation – recovery - charge-sheet against accused person and neighbour – Session trial – neighbour was acquitted but accused were conviction & sentenced – Appeals - Evaluation of evidences – court finds that, - (i) PW-3 (informant) was not an eye witness and evidence of eye witnesses i.e. PW-1 & PW-2 are not reliable as there are improvements in their St.ments amount to contradiction, (ii) ocular evidence is not supported by the medical evidence as such court not satisfied with the truthfulness of the ocular evidence, (iii) prosecution failed to

bring on record, the report of the ballistic expert to whom the recovered *Tamancha* and cartridge were sent for examination, as such there is no evidence to connect the weapon allegedly used by the accused with the pellets recovered from the body of the deceased, (iv) recovery of *Tamancha* is also not accordance with provisions of Section 27 of the Evidence Act, (v) Trial court committed an error while acquitting neighbour in relying upon a part of the same evidence and convicting the accused-appellant, - Held, - prosecution has failed to substantiate the charges levelled against the accused-appellant beyond all reasonable doubts by adducing consistent, cogent and reliable evidence - therefore, accused-appellant is legitimately entitled to avail the benefit of doubt – appeal stand allowed – directions issued, accordingly. (Para – 69, 70, 71, 72)

Appeal allowed. (E-11)

List of Cases cited:

1. Sessions Judge Nellore Referring & ors. Vs Intha Ramana Reddy; reported in ILR (1972) AP 683 (1972) CRILJ1485.
2. Shri Gopal & anr. Vs Subhash & ors.; reported in 2004 (13) SCC 174,
3. St. of Rajasthan Vs Rajendra Singh 1998 SCC (Cri) 1605,
4. Munna Pandey Vs St. of Bihar; reported in 2023 SCC Online SC 1103,
5. Rahul Vs St. of Delhi, Ministry of Home Affairs & anr. reported in (2023) 1 SCC 83,
6. Subramanya Vs St. of Karn.; reported in A.I.R. 2022 SC 5110,
7. Ramanand @ Nandlal Bharti Vs St. of U.P.; reported in A.I.R. 2022 SC 5273,
8. Gurcharan Singh & anr. Vs St. of Pun., reported in 1963 AIR (SC) 340,
9. Ram Singh Vs St. of U.P. reported in 2024 AIR (SC) 1176.

(Delivered by Hon'ble Manish Kumar
Nigam, J.)

1. This criminal appeal has been filed against the judgment dated 28.08.2017 and order of conviction dated 30.08.2017 passed by learned Addl. Sessions Judge, Court no.2, Muzzafarnagar (hereinafter referred as 'trial court') whereby the learned trial court in Sessions Trial No. 279 of 2012 (State Vs. Lavkush and another) arising out of Case Crime No. 468/2011, has convicted Lavkush (appellant-accused) s/o late Bhagmal for the offence punishable under Section 302 I.P.C. and sentenced him for life imprisonment and has ordered him to pay a fine of Rs. 20,000/-. It has further been provided that in case of default of payment of fine, the appellant has to further undergo imprisonment for a period of six months. In Sessions Trial No. 280/2012 (State Vs. Lavkush) arising out of Case Crime No. 470/2011, under Section 25 of Arms Act, the court sentenced the appellant to undergo two years of rigorous imprisonment with fine of Rs. 3,000/- and in default of the payment of fine, to suffer additional imprisonment of three months. All the sentences were directed to run concurrently. By the same judgment dated 28.08.2017, learned trial Court acquitted the other co-accused, namely, Smt. Meena, under Sections 302/34 and 120-B of I.P.C.

2. The factual matrix of the case, which are relevant for present criminal appeal are that informant, namely, Sonu s/o late Bhagmal submitted a written complaint Ex.Ka-1 on 16.11.2011 on which the First Information Report Ex.Ka-2 was registered in Case Crime No.468 of 2011 under Section 302 I.P.C. at P.S. Bhopa, Jansath, District-Muzzafarnagar against one Lavkush. On the same day at 22:30 hours another F.I.R. bearing Case Crime No. 470 of 2011, Ex.Ka-

4, was also lodged by Sri Sanjay Verma, Station Officer, P.S.- Bhopa, against Lavkush under Section 25 of Arms Act, 1959.

3. As per the First Information Report Ex.Ka-2, the informant stated that his brother, namely, Lavkush, was a vagabond and drunkard. He was having illicit relationship with Mrs. Meena, wife of his neighbour Ajeet, resident of Rahmatpur, P.S.-Bhopa. His mother used to dissuade Lavkush from having relationship with Meena, and for this reason his brother shot his mother dead in the night of 16.11.2011. Ravinder, s/o Jaipal and Gajendra Kumar s/o Dharampal had seen his brother running away from the spot after shooting his mother.

4. After the First Information Report was lodged, the police investigated the crime and after collecting the evidence, charge sheet Ex. Ka-6 was submitted under Section 173(2) Cr.P.C against Lavkush and Smt. Meena under Sections 302 and 120- B I.P.C. in Case Crime No. 468 of 2011. Another charge sheet Ex. Ka 18 was submitted against Lavkush under Section 25 of Arms Act.

5. The learned Magistrate after taking cognizance and complying with the provisions of Section 207 Cr.P.C. committed the case for trial to the court of Sessions. On commencement of trial, learned Sessions Court on 27.04.2012 framed charges against Smt. Meena under Sections 302/34 and 120-B I.P.C. and Lavkush under Sections 302, 120-B of I.P.C. and Section 25 of Arms Act. The charges were explained and read over to accused persons, who denied the charges and pleaded not guilty.

6. During trial, statement of eight persons were recorded by the prosecution,

namely, Ravindra Kumar P.W.-1, Gajendra Kumar P.W.-2, Sonu (informant/ brother of accused-appellant) P.W.-3, Rakesh Kumar (Constable Clerk, P.S.-Bhopa) P.W.-4, Vijendra Singh Bhadana (Station Officer, P.S.-Bhopa) P.W.5, Sanjay Verma (Station Officer, P.S.-Bhopa) P.W.-6, Yashpal Singh (Sub Inspector, P.S.-Bhopa) P.W.-7 and Dr. Arun Kumar (Medical Officer, District Hospital, Muzzafarnagar) P.W.-8. The statements of the accused persons Smt. Meena and Lavkush were recorded under Section 313 Cr.P.C.

7. The prosecution produced Written Report Ex. Ka-1, chik F.I.Rs. Ex.Ka-2 and Ex.Ka-4, memo of possession of country made pistol and empty cartridges Ex.Ka-15, memo of possession of blood stained & plain earth Ex.Ka-14, memo of possession of blood stained 'chadar' from cot Ex.Ka-13, post- mortem report Ex.Ka-19, Panchayatnama Ex.Ka-7, charge sheets Ex.Ka-6 & Ex. Ka-18, order of District Magistrate Ex. Ka-19 A, and site plans with index Ex.Ka-17, Ex. Ka-16 and Ex.Ka-12 as documentary evidence during the trial.

8. After considering the entire evidence, the learned Sessions Judge acquitted Smt. Meena under Sections 302/34 and 120-B I.P.C. and convicted Lavkush (accused-appellant) under Section 302 I.P.C, whereby he was sentenced with life imprisonment along with fine of Rs. 20,000/- and in case of default, six months additional imprisonment. He was also convicted by the learned trial court under Section 25 of Arms Act whereby he was sentenced to undergo two years of rigorous imprisonment with fine of Rs. 30,000/- and in default of the payment of fine, to suffer additional imprisonment of three months.

9. Heard Sri Sharad Mayank Pandey, learned counsel for the accused-appellant, Ms. Manju Thakur, learned A.G.A. for the State and perused the material on record.

10. Learned counsel for the accused-appellant vehemently assailed the order of conviction and made the following submissions:-

(i) Accused-appellant is innocent and has not committed the alleged offence.

(ii) The order of conviction is based on conjecture and surmises.

(iii) P.W.3, the informant, Sonu, has turned hostile and has not supported the prosecution case.

(iv) P.W.1 Ravindra Kumar and P.W. 2 Gajendra Kumar are inimical witnesses, whose testimonies are not reliable.

(v) Statements of P.W. 1 and P.W. 2 are also not reliable for the reason that there are contradictions in their evidence.

(vi) The prosecution case as well as evidence of the eye-witnesses are not supported by the medical evidence and therefore, cannot be relied upon.

(vii) The recovery of Tamancha (country made pistol) on the pointing out of the accused is hit by Section 27 of the Evidence Act and as such cannot be relied upon.

(viii) There is no evidence of the ballistic expert to connect the Tamancha (country made pistol) which was recovered on the pointing out of the accused with the pellets found in the body of the deceased.

(ix) The prosecution has failed to examine Vijay Pal, the scribe of the First Information Report, especially when P.W. 3 has not supported the prosecution version.

(x) The prosecution has failed to prove that the accused-appellant has committed offence beyond reasonable doubt.

11. Per contra, learned AGA for the State refuted the submissions made by the learned counsel for the appellant and made the following submissions:-

(i) Trial Court rightly relied upon the statements of P.W. 1 and P.W.2, the eye-witnesses of the incident for convicting the accused as P.W.3, Sonu, the informant, who was not an eye-witness to the incident was won over by the defence.

(ii) Recovery of 12 bore country made pistol and cartridges, Ex. Ka-15, on information given by the accused-appellant Lavkush supports the statement given by P.W. 1 and P.W. 2.

(iii) Post mortem report of deceased Saroj, Ex. Ka-19, shows entry wounds of bullet which corroborates the prosecution version.

(iv) Prosecution has proved the guilt of the accused beyond reasonable doubt and accused has been rightly convicted by the courts below.

(v) And it was lastly submitted that the trial court rightly passed the judgment convicting the accused-appellant after considering the entire evidence and the appeal has no merits and is liable to be dismissed.

12. With the help of learned counsel for the appellant and learned A.G.A. for the State, we have perused the record of the case.

13. P.W. 1- Ravindra Kumar had stated in his examination-in-chief that complainant-Sonu and his brother Lavkush were known to him. The incident was of

16.11.2011. At about 04:00 A.M., P.W.-1 went to the house of one Raju to call him. House of complainant was near the house of Raju. Name of Sonu's mother was Saroj and son of Saroj, Lavkush was a drunkard man and was having illicit relationship with Meena. Mother of Lavkush Saroj used to discourage Lavkush from meeting Meena, but Lavkush never cared and used to beat his mother for this. Husband of Meena was working with his younger brother Dheeraj Pal. P.W. 1 further deposed that when he came down from the house of Raju, he heard a sound of firing and thereafter he went to the house of Saroj and witnessed that Lavkush was holding a Tamancha (country made pistol), Meena was holding hands of Saroj and Lavkush had shot Saroj in the presence of the witness and thereafter, Lavkush ran away and Saroj died immediately after she was shot. It was also stated by P.W. 1 that Gajendra, son of Dharam Pal (P.W. 2) was along with him at the time of the incident. Lavkush killed his mother as she forbade Lavkush to go to Meena. P.W. 1 stated that Investigating Officer (Daroga Ji) recorded his statement and he told everything to him. In cross-examination, P.W.-1 stated that his statement was taken by the Investigating Officer in the afternoon on 16.11.2011. At the time when his statement was taken by Investigating Officer, other witness Gajendra was not present. Investigating Officer recorded his statement and thereafter, the Investigating Officer read over the same to the witness. P.W. 1 stated in his cross-examination that the house of the deceased-Saroj was South facing and the witness had not seen the house from inside and had seen only the Verandah, which was visible from outside. The house of Raju son of Ram Singh was near the house of the deceased. P.W. 1 stated that in front of the house of the deceased, there

was a Gali, which on southern side merged with the main road, the width of the Gali was 5-6 feet and the length of the Gali was 50 meters. At the time of incident Sonu (complainant) was working at Haridwar. He had not given information of the incident to Sonu and he did not know who had given this information to Sonu. P.W. 1 deposed he heard the sound of fire at about 04:15 to 04:30 A.M. Total two fires were shot and he heard the first shot and the second shot was fired in front of him and the duration between the two shots was about one minute. When he heard the first shot, he was on the east-south gate of the house of the deceased. After hearing the shot, he did not go inside the house. At the time of second shot, P.W. 1 stated that he was at the gate of the house of the deceased and the distance of the charpai (bed) was about 3 to 4 meters. Meena was on the northern side of the charpai whereas Lavkush (accused) was on the southern side. The head of the deceased was towards west and the legs on the eastern side. After the shots were fired, the accused ran away from the site and thereafter other persons from village came. When the second shot was fired, it was only P.W.1 and Gajendra (P.W. 2) who were present at the spot and there was no other person. It had also been stated by P.W. 1 that he did not know whether the deceased was in the Sahen (courtyard) or in the Verandah, later on he said that she was in the Verandah. House of the deceased consisted of two rooms and a Verandah, rooms were west facing and the Verandah was also west facing. Near the house of the deceased there was no electricity pole, in the neighbouring house an electric bulb was lit. It had also been stated by P.W.1 that he had not seen Meena and Lavkush in any compromising situation. There were only rumors in the village regarding the same. P.W. 1 admitted

that accused- Lavkush had lodged an F.I.R. against P.W.1, Gajendra, the other witness, P.W.2 and against one Ram Pal at P.S.-Bhopa on 14.04.2007 for forceful entry into his house and for beating his mother and the accused. The said allegation was found to be false later on in investigation. P.W.1 stated that he had not told the Investigating Officer that at 04:00-05:00 A.M. he was going towards his agricultural field. How the Investigating Officer wrote this he could not tell. P.W. 1 had further stated that Meena was waiting outside the Gali and after the incident Meena went to her home. P.W. 1 stated he had not stated to the Investigating Officer that Meena went along with Lavkush. P.W. 1 stated that Meena was holding the hands of the deceased and Lavkush was holding Tamancha and if this fact had not been written by the Investigating Officer, then he did not know the reason. It had also been stated by P.W. 1 that he had stated to the Investigating Officer that Lavkush shot Saroj and if this fact was not noted by the Investigating Officer in his statement, he could not tell the reason. It was also stated by P.W. 1 that after the incident, he remained at the spot for 10 to 15 minutes and thereafter, went for his work.

14. P.W. 2- Gajendra Kumar stated in his examination-in-chief that on the date of incident at about 04:00 to 04:30 A.M., he along with Guddu had gone to call the driver. House of Raju was near the house of the deceased-Saroj. P.W.2 and Guddu had gone to the house of Raju. P.W. 2 stated when he along with Guddu came out from the house of Raju, then they heard a sound of fire from the house of Saroj (deceased). P.W. 2 stated that when P.W. 2 reached the house of Saroj, then at that time, Meena was holding the hands of Saroj and Lavkush had fired a shot from the

Tamancha, which he was holding in his hand. P.W. 2 stated that after the incident, they remained there for 5 to 7 minutes. Lavkush ran away with the Tamancha (country made pistol) and Meena went to her house. P.W. 2 and Guddu had also gone for their work. P.W. 2 stated that the house of the deceased was west facing and towards the east, the house of Raju and that of other persons were situate. P.W. 2 stated that he cannot tell the month and date of incident. P.W. 2 stated that he was working with P.W.1- Ravindra, 14 months back but now he did not work with P.W. 1. P.W. 2 stated that total two fires were shot and when the first fire was shot, then P.W. 2 as well as P.W. 1 started from the house of Raju, second shot was fired three minutes after the first shot and at that time, they were in front of the house of the deceased. P.W. 2 stated where they were standing; Saroj was at a distance of about 5 to 7 steps in the Verandah. There was boundary wall around the house of the deceased and also a gate but the height of the boundary wall was not 10-12 feet but was of the height of a person. P.W. 2 stated that he heard the sound of the first shot and the second shot was fired in front of him and at the time of incident, there was nobody except P.W. 1 and P.W. 2. He did not know the names of the neighbours, who came immediately after the incident. P.W. 2 stated that P.W. 1 and P.W. 2 had seen the incident from outside the house of the deceased and they did not go inside the house. At the time of incident Lavkush and Meena were inside the house of the deceased. P.W. 2 stated that both P.W. 1 and P.W. 2 had seen the incident in the light of electric bulb, which was in the Verandah of the house of the deceased. When the shot was fired, Lavkush was on the east of the charpai and Meena was on the west. Meena did not have any firearm but she caught hold of

both hands of the deceased from the back. He did not remember at what distance the shot was fired. The incident was of winters; deceased was not having any Lihaf (quilt) and was lying on her back. P.W. 1 and P.W. 2 had no talk with Saroj. It had also been stated by P.W. 2 that P.W. 1 and P.W. 2 touched the deceased with their hands and found that she was dead. After the incident, Lavkush ran away towards the south, Meena went to her house and the persons there tried to apprehend Lavkush, but could not catch him. P.W. 2 stated that P.W. 1 and P.W. 2 told Sonu (complainant) of the incident when they met him in the afternoon of the date of the incident. P.W. 2 stated that he had not given statement to the Investigating Officer (Daroga Ji) that on 16.11.2011, in the morning he was going towards his agriculture field. P.W. 2 stated that he had not stated to the Investigating Officer that he heard sound of fire while he was on his way to his field. It was also denied by P.W. 2 that he had not given statement to the Investigating Officer that both P.W. 1 and P.W. 2 had seen Lavkush coming out of the house with Tamancha (country made pistol) in his hand. P.W. 2 stated that he never saw Lavkush and Meena in compromising position and this he stated on the basis of rumors in the village that they were having illicit relationship. P.W. 2 stated that he told the Investigating Officer that at the time of incident, bulb was on in the house of the deceased. P.W. 2 stated that he stated to the Investigating Officer that he along with Ravindra-P.W. 1 had seen the shot being fired.

15. P.W. 3 Sonu (complainant) had not supported the prosecution version and was cross-examined by A.D.J.C. In his cross-examination, P.W. 3 stated that the time consumed in coming from house of

Raju to his house is approximately 20 minutes and it was also stated that there was no electricity in the neighbouring houses. At the time of incident P.W. 3, was at Haridwar and came to know about the incident at about 08:00 A.M. He started from Haridwar at about 09:00 A.M. and reached his village at about 12:00 Noon. The complaint which was given at the police station was not written by P.W. 3 and he put thumb impression on the Tehrir (complaint) written by Vijay Pal (scribe).

16. P.W.-4 Rakesh Kumar, was the clerk and had prepared the First Information Report.

17. P.W.- 5 Vijendra Singh Bhadhna, Inspector, was the Investigating Officer who had done investigation from 19.01.2012.

18. P.W.- 6 Sanjay Verma (S.I.) was the Investigating Officer. In his statement, P.W. 6 stated that he recorded the statement of Ravindra on 16.11.2011. Aforesaid witnesses informed him that (accused) Lavkush was having illicit relationship with Smt. Meena. Deceased, who was the mother of the accused used to dissuade the accused from having such relationship. Witness informed P.W. 6 that on the date of incident, witnesses were going to their agriculture field when they heard at about 04:30 A.M., the sound of fire from the house of the deceased and when they reached the house of the deceased, they saw Lavkush along with Meena. Lavkush having *Tamancha* along with Meena had gone to the house of Meena and from there, they ran away. P.W. 6 stated that the witnesses found Saroj was dead on the *charpai* (bed) in her Verandah. P.W. 6 proved the recovery of *Tamancha* on pointing out of the accused and proved the

Fard Baramdagi (memo of recovery). On cross-examination by the accused, P.W. 6 stated that he had taken statement of witness- Ravindra on 16.11.2011. P.W. 6 stated that witness Ravindra gave the statement that in the morning, he was going towards his agriculture field and heard sound of fire from the house of Saroj (deceased) and when he went near the house, he saw Lavkush coming out with *Tamancha* in his hand and Meena was waiting for Lavkush outside his house in the Gali. P.W. 6 stated that Ravindra gave the statement that Gajendra, son of Dharam Pal, also came and both of them had seen Meena and Lavkush going from the place of incidence. P.W. 6 stated in his cross-examination that witness Ravindra had not given statement that on date of incident at about 04:00 A.M he had gone to call Raju to his house. Witness had not given the statement that when the witness came out from the house of Raju then they heard the sound of fire from the house of the deceased and hearing the same, when he went to the house of the deceased, he saw Lavkush was having *Tamancha* in his hands and Meena was holding hands of Saroj and Lavkush had fired shot in his presence. P.W. 6 stated that P.W. 1 Ravindra had not given the statement that Meena was holding hands of Saroj and Lavkush was having a *Tamancha*. P.W. 1 had not given the statement that Lavksuh fired in his presence. P.W. 6 further stated that witness Gajendra had given statement that on 16.11.2011, he was going to his agricultural field in the morning. It was further stated that the witness stated that on his way, he heard two shots of fire coming from the house of the deceased. Witness stated that Ravindra (P.W. 1) was walking in front of him and this witness stated that when they reached house of the deceased, they saw Lavkush coming out from the

house along with fire arm. It was also stated by P.W. 6 that witness Gajendra stated that Meena asked Lavkush "*Kam ho gaya*" (work has been done?) to which Lavkush replied in the affirmative and after seeing them, they ran away from the spot. P.W. 6 stated that Gajendra had not stated that on the date of incident, he along with Guddu at about 04:00 A.M. went to call Raju, driver, to his house. This witness also did not state that when they came out from the house of Raju, they heard the sound of fire from the house of Saroj and when they reached the house of the deceased, they saw Meena holding hands of Saroj and Lavkush was having fire arm in his hand and shot Saroj in their presence. P.W.-6 also stated that witness Gajendra had not stated that at the time of incident, Lavkush and Meena were present in the house of deceased and the incident was seen by both P.W. 1 and P.W. 2, in the light of bulb and this witness had also not stated that there was a bulb in the Verandah of the house of the deceased. P.W. 6 also stated that Gajendra, P.W. 2 had not stated that when the fire was shot at that time, Lavkush was on the east of the *Charpai* (bed) and Meena was on the west. Witness Gajendra had not stated that Meena was holding hands of Saroj from the back and the witness had not given statement that they touched Saroj. P.W. 6 stated witness Ravindra came to the place of the incident after the police reached the spot. It was stated by P.W. 6 that site plan was prepared by P.W. 6 as per the actual situation. House of the deceased was south facing and there was a Gali in the South. In the western side, there is an open space which had not been shown in the site plan. It was also stated by P.W. 6 that there was a boundary wall which was about 10 feet high and surrounded the house of the deceased. There was light in the house of the deceased but the same was

not shown by P.W. 6 in site plan. It was also stated by P.W. 6 that the house of Raju was not nearby to the house of the deceased. It was also stated by P.W. 6 ,when the witnesses reached spot 'W' at that point, the shot was fired and saw the accused coming out of the house along with *Tamancha*. Spot 'W' is about 20-25 steps away from the place of incident. It was also stated by P.W. 6 that he had not seen the house of Raju and Ram Singh and nor recorded their statement. It was also stated by P.W. 6 at the place of occurrence no *Khokha Kartoos* (empty shells) or *chhare* (pellets) were found. It was also stated by P.W. 6 that the *Tamancha* (country made pistol) and *Kartoos* (cartridge) which was recovered were not sent by P.W. 6 to the expert for examination.

19. P.W. 7 Yashpal is also a police witness, who stated that the *Tamancha* and cartridges recovered were sent for the examination to expert but the report of expert was not on record.

20. P.W. 8 Arun Singh has conducted the post-mortem and has proved the post-mortem report.

21. The accused-Lavkush in his statement recorded under Section 313 Cr.P.C. denied the incident and stated that P.W. 1 and P.W. 2 in year 2007 had beaten the accused and his mother and had looted Rs. 30,000/- from the house of the accused regarding which an application was given with the police and medical examination was also done.

22. Learned counsel for the appellant submitted that there were gross contradictions in the testimony of P.W.1 and P.W.2, who were the only eye-witnesses of the incident. The so called

eye-witnesses were not eye-witnesses at all, rather, they were interested witnesses having previous enmity with the appellant. Learned counsel for the appellant further submitted that the version as mentioned in the First Information Report, in the statements recorded under Section 161 Cr.P.C. and the statements which were made before the Court by the P.W. 1 and P.W. 2 are altogether inconsistent. There are several material omissions which were not explained by the prosecution witnesses in their testimony.

23. The defence had proved the contradictions and omissions in the testimony of the eye-witnesses i.e P.W. 1 and P.W. 2 but the same were brushed aside by the trial court as minor contradictions.

24. Per contra, learned A.G.A. submitted that the contradictions if any in the evidence of P.W. 1 and P.W. 2 were minor and which were due to lapse of time and human error. It has also been submitted by learned A.G.A. that there are no material omissions which could lead to the conclusion that the evidence of the eye-witnesses was not trust worthy.

25. Elaborating his submissions, learned counsel for the appellant referred to the First Information Report and submitted that the only allegation in the First Information Report was that Ravindra and Gajendra (P.W. 1 and P.W. 2, respectively) had seen the accused coming out of the house of the deceased after Saroj was shot dead. Learned counsel for the appellant has further drawn attention of this Court to the statement of P.W. 1- Ravindra Kumar given before the Investigating Officer under Section 161 Cr.P.C., wherein he stated that in the morning, he was going

towards his agriculture field at about 04:30 to 05:00 A.M. and heard the sounds of firing from the house of Saroj (deceased) and when he reached the house of the deceased Saroj, he saw Lavkush (accused) coming out of house holding a *Tamancha* in his hand and thereafter he went inside the house of Meena and thereafter, Meena and Lavkush went together whereas in his statement before the Court, P.W. 1 stated that P.W. 1 had gone to the house of Raju along with Gajendra to call Raju and while returning from there he heard the sounds of firing and thereafter, he went to the house of the deceased where he saw that Lavkush was holding a *Tamancha* (country made pistol) in his hand and Meena was holding the hands of the deceased and Lavkush had shot the deceased, in his presence and thereafter, Lavkush ran away from the scene. Learned counsel for the appellant has further submitted that P.W. 2 gave statement in the same line as P.W. 1. It is submitted by learned counsel for the appellant that before the Investigating Officer, P.W. 1 only stated that he had seen the accused coming out of the house of the deceased and had not disclosed this fact to Investigating Officer that he had seen the accused firing the deceased. This is a material contradiction which had not been explained by P.W. 1. Learned counsel for the appellant also invited the attention of this Court to the statement of P.W. 1 as given before the court wherein he had stated that the Investigating Officer (*Daroga Ji*) had taken his statement and the same was read over by the Investigating Officer to P.W. 1. In his cross-examination when the P.W. 1 was confronted regarding this omission, he only stated that he gave the statement before Investigating Officer that Meena was holding the hands of the deceased and Lavkush was having a *Tamancha* in his hand, but why this fact

was not written by the Investigating Officer, he could not tell any reason for the same. He also stated in his statement that he had stated before the Investigating Officer that accused Lavkush shot Saroj but if such statement was not recorded by the Investigating Officer, he could not give any reason for the same. It is further submitted by learned counsel for the appellant that at the stage of trial, the entire prosecution story had changed and there were a lot of improvements as to what had been stated in the First Information Report, in the statement under Section 161 Cr.P.C. and in the statement made before the court and that too without any proper explanation and such an omission would amount to material contradiction in the evidence of the witness and therefore, same cannot be relied upon. Learned counsel for the appellant drew the attention of this Court to the statement made by P.W. 2 before the Investigating Officer under Section 161 Cr.P.C., wherein P.W. 2 stated that he along with P.W. 1 had seen, after hearing the sound of fire, accused coming out of the house of the deceased but in statement in-chief before the Court, the P.W. 2 deposed that when they reached the house of the deceased after hearing the first shot, they found Meena was holding hands of the deceased and the accused shot the deceased and thereafter they ran away. P.W. 2 had not explained why he had not informed the Investigating Officer regarding this fact that he had seen the accused firing upon the deceased. This omission on the part of the witnesses to state before the Investigating Officer about the fact that they had seen the accused firing the deceased is a material contradiction and therefore, cannot be relied upon by the prosecution.

26. *Per contra*, learned A.G.A. has submitted that by merely not stating before

the Investigating Officer by P.W. 1 and P.W. 2 that they had seen the accused shooting the deceased is not such an omission which may shake their testimony, especially, when they have deposed before the court and their statements were consistent as to the fact that they had seen the deceased being shot by the accused. It is further submitted by learned A.G.A. that in the cross-examination, P.W. 1 and P.W. 2 have not been confronted with their statements made before the Investigating Officer as contemplated under Section 145 Cr.P.C. and therefore, the same is not relevant.

27. Replying to the submissions made by learned A.G.A., it has been submitted by learned counsel for the appellant that though the witnesses were confronted with their previous statements recorded under Section 161 Cr.P.C. regarding the material omission and even if, the same is not in true compliance of Section 145 Cr.P.C. it was the duty of the court in view of Section 165 of Evidence Act to find out the truth by himself and this duty cannot be abdicated by the Judge, specially when the defence had failed to cross-examine the witnesses properly in accordance with the mandate of Section 145 Cr.P.C. It has also been submitted that Section 172(2) of Cr.P.C. enables the Court to send for police diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid in the trial and in this regard, learned counsel for the appellant relied upon a judgment of Andhra Pradesh High Court in ***Sessions Judge Nellore Referring and Others vs Intha Ramana Reddy***; reported in ***ILR (1972) AP 683 (1972) CRILJ1485***.

28. Learned counsel for the appellant has drawn the attention of this Court to the statement of P.W. 6, the Investigating

Officer, who stated that on 16.11.2011, he recorded the statement of P.W. 1, Ravindra s/o Jai Pal, and Vijay Pal s/o Charan Singh and witnesses had stated that on the date of the incident, witnesses were going towards their agricultural field and heard the sound of fire at about 04:30 A.M. from the house of the deceased and when they reached the house of the deceased, then they saw Lavkush holding *Tamancha* in his hand and Meena coming out of the house of the deceased and they went to the house of Meena and from there they ran away. Witnesses had also stated that when they saw Saroj, she was lying dead on the *charpai* (bed). In the cross-examination, P.W. 6 had stated that witness Ravindra (P.W.1) stated when he heard the sound of fire from the house of Saroj, he came nearby to the house of deceased, he saw the accused Lavkush coming out of the house along with a *Tamancha* and Meena was waiting for him in the Gali. Witness stated that Gajendra s/o Dharam Pal (P.W. 2) also came along with P.W. 1 Ravindra and both of them saw Meena and Lavkush going from the place of incidence. P.W. 6 stated that the witness Ravindra had not stated before him that on the date of incident at about 04:00 A.M., he had gone to call Raju to his house. P.W. 1 had also not stated that when he came out of the house of Raju, he heard the sound of fire from the house of Saroj and on hearing the sound, witnesses went to the house of Saroj where they saw Lavkush holding *Tamancha* (country made pistol) and Meena was holding the hands of the deceased and that Lavkush shot the deceased in his presence. P.W. 6 also stated that P.W. 1 had not stated that Meena was holding hands of Saroj and Lavkush was holding *Tamancha*. P.W. 6 further stated that P.W. 1 had not stated that Lavkush shot Saroj in front of him.

29. P.W. 6 in his statement stated that Gajendra (P.W. 2) stated that on 16.11.2011, he was going towards his agricultural field in the morning but no time was mentioned by the witness P.W. 2. P.W. 6 also stated that P.W. 2 stated that on the way to agricultural field, he heard sound of two fires from the house of deceased Saroj. P.W. 2 stated that Ravindra (P.W. 1) was going few steps ahead of P.W. 2 and further stated as both P.W. 1 and P.W. 2 reached the house of Saroj, they saw Lavkush coming from the house of deceased with *Tamancha* in his hand and Meena was standing a few steps outside the house and thereafter, they ran away. P.W. 6 stated that P.W. 2 had not stated that on the date of incident at about 04:00 A.M., he along with Guddu (Ravindra-P.W. 1) went to call Raju. P.W. 2 had also not stated that when P.W. 2 and Guddu came out from the house of Raju, then they heard the sound of fire and thereafter, they saw inside the house of Saroj and saw Meena holding the hands of Saroj and Lavkush shot Saroj with Katta (country made pistol) in their presence. P.W. 2 had also not stated that at the time of incidence, Lavkush and Meena were present in the house and both the witnesses had witnessed the incident in the light of an electric bulb. P.W. 6 further stated that P.W. 2 had not given the statement that there was a bulb in the Verandah of the house of the deceased and the bulb was on. P.W. 2 had also not stated that when fire was shot Lavkush was on the east of *charpai* (bed) and Meena was on the west. P.W. 2 had also not stated that Meena was not having any weapon and was holding hands of the deceased Saroj from the back. P.W. 2 had also not stated that both the witnesses touched the deceased Saroj and found her dead. P.W. 6 stated that P.W. 1 Ravindra reached the place of

incidence after sometime when P.W. 6 reached the spot.

30. Relying upon the statement of P.W. 6, learned counsel for the appellant contended that both the eye-witnesses have improved their statements before the court, as they deposed that they had seen accused shooting the deceased in their presence, that co-accused Meena was holding the hands of the deceased when Lavkush shot the deceased, they had gone to the house of Raju to call him and while coming out of house of Raju, they heard the sound of fire and after hearing the same, they reached the spot where they saw accused Lavkush shot the deceased. In their statement before the police under Section 161 Cr.P.C., it had only been stated by P.W. 1 and P.W. 2 that while going to their agricultural field in the morning of the date of incident they heard sound of fire coming from the house of deceased and when they reached the house of deceased, they saw accused Lavkush coming from the house with a *Tamancha* (country made pistol) in his hand and the accused Lavkush along with Meena, who was standing in the Gali ran away from the spot. It is also contended by counsel for the appellant that when P.W. 1 was contradicted with his statement under Section 161 Cr.P.C. to the statement made in the court, he only said that he had informed the Investigating Officer, but if the same was not written, he cannot give any reason for the same. It is further contended by counsel for the appellant that in his statement, P.W. 1 had admitted that his statement was recorded by the Investigating Officer and was read over to him after recording the same, therefore, the statement of P.W. 1 to the effect that he had informed the Investigating Officer of the facts which were for the first time stated in his statement before the court and if they

are not recorded by the Investigating Officer, he cannot give any reason for the same, cannot be believed.

31. It is further contended by counsel for the appellant that there is no explanation by the witnesses as to the facts, which were stated for the first time before the court why the same were not stated before the Investigating Officer and this will amount to material contradiction and will be fatal to the prosecution case. In this regard, learned counsel for the appellant relied upon judgment of Apex Court in case of **Shri Gopal and Another Vs. Subhash and Others**; reported in **2004 (13) SCC 174**, wherein it has been held by the Apex Court that omission by the prosecution witnesses to state before the police about exhortation by all accused in the facts and circumstances of the case, such omission would amount to contradiction. Paragraph Nos. 17, 18 and 19 of the judgment in case of *Shri Gopal and Another* (supra) are quoted as under:-

"17. Keeping in view the aforementioned principles, the question is required to be considered for arriving at a conclusion as to whether there had been a common object on the part of the respondents in committing the alleged offence.

18. In Tahsildar Singh and another Vs. State of U.P. [AIR 1959 SC 1012], this Court held that in terms of Section 145 of the Indian Evidence Act attention of witnesses can be drawn to such statements which would amount to contradiction. It was held: "The right of both accused and the prosecution is limited to contradictions." It was, thus, held that omission to make a statement in terms of Section 161 of the Code of Criminal Procedure would not attract the provisions

of Section 145 of the Indian Evidence Act. However, by reason of Code of Criminal Procedure explanation has been inserted to Sub-Section (2) of Section 162 which is in the following terms:

"An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

19. From the records, it appears that PW 1, PW 5 and PW 10 did not make any allegation as regard the alleged exhortation on the part of all the accused. It further appears that PW 3, PW 4 and PW 8 stated before the police that there had been such exhortations by the respondents herein. Such omission on the part of PW 3, PW 4 and PW 8, in the facts and circumstances of the case, being very material would amount to contradiction."

32. In case of ***State of Rajasthan Vs. Rajendra Singh 1998 SCC (Cri) 1605*** in paragraph No. 7 of the judgment, the Hon'ble Supreme Court has held as under:-

"7. It was submitted by the learned counsel for the State that as many as six witnesses were found injured and that would establish their presence at the place of the incident. In our opinion this contention is of no help to the appellant because their evidence has not been discarded on the ground that they were not present. Their evidence was discarded because they were found not telling the truth before the court. It was also submitted by the learned counsel that the evidence of PWs 1 to 4 stood corroborated by two

independent witnesses, namely Ramjilal and Jeevan Singh. P.W.8 Ramjilal had stated that he had gone to the spot on hearing sound of a gun shot and tried to snatch away the gun from the respondent. But he was contradicted by his police Statement wherein he had not stated anything regarding snatching of the gun. this omission on such a vital point has to be regarded as a contradiction and it creates a serious doubt about the truthfulness of his version. P.W. 9 Jeevan Singh had stated that he had also rushed to the spot on hearing the sound of a gun shot. He further stated that he had made an attempt to save Harveer and in doing so he had received an injury. He had not so stated before the police. This also shows that this witness had made a material improvement before the Court in order to make his evidence acceptable."

33. *Per contra*, learned A.G.A. submitted that in cross-examination, it has been stated by P.W. 1 that the facts referred above in the preceding paragraphs were stated by P.W. 1 to the Investigating Officer and if he has not recorded the same in his statement under Section 161 Cr.P.C., he cannot give any reason for the same. It has been further contended by learned A.G.A. that even assuming the said facts were not stated by P.W. 1 before the Investigating Officer, the omission to state such facts is not material as in his statement-in-chief, he had categorically stated the detail of the manner of assault by the accused and the same had also been corroborated by the evidence of other eye-witness P.W. 2.

34. Learned counsel for the appellant further submitted that in case, there were omissions which were material to the prosecution case, the same ought to have

been explained by the prosecution and it was the duty of the prosecuting agency to get an explanation for the said omissions from the witness and even if the prosecution failed to perform his duty, it was incumbent upon the trial court to have called for an explanation from the prosecution witnesses, in the interest of justice, as to the important material facts and also with what the witnesses of prosecution had said during the police investigation.

35. In this connection, it will be useful to refer the judgment of the Hon'ble Supreme Court in case of **Munna Pandey Vs. State of Bihar**; reported in **2023 SCC Online SC 1103**. Paragraphs Nos. 40, 41, 42, 43 and 48 of the judgment in case of Munna Pandey (supra) are quoted as under:-

“40. Neither the defence counsel nor the public prosecutor nor the presiding officer of the Trial Court and unfortunately even the High Court thought fit to look into the aforesaid aspect of the matter and try to reach to the truth.

41. It was the duty of the defence counsel to confront the witnesses with their police statements so as to prove the contradictions in the form of material omissions and bring them on record. We are sorry to say that the learned defence counsel had no idea how to contradict a witness with his or her police statements in accordance with Section 145 of the Evidence Act, 1872 (for short, ‘Evidence Act’).

42. The lapse on the part of public prosecutor is also something very unfortunate. The public prosecutor knew that the witnesses were deposing something contrary to what they had stated before the police in their statements recorded under

Section 161 of the CrPC. It was his duty to bring to the notice of the witnesses and confront them with the same even without declaring them as hostile.

43. The presiding officer of the Trial Court also remained a mute spectator. It was the duty of the presiding officer to put relevant questions to these witnesses in exercise of his powers under Section 165 of the Evidence Act. Section 162 of the CrPC does not prevent a Judge from looking into the record of the police investigation. Being a case of rape and murder and as the evidence was not free from doubt, the Trial Judge ought to have acquainted himself, in the interest of justice, with the important material and also with what the only important witnesses of the prosecution had said during the police investigation. Had he done so, he could without any impropriety have caught the discrepancies between the statements made by these witnesses to the investigating officer and their evidence at the trial, to be brought on the record by himself putting questions to the witnesses under Section 165 of the Evidence Act. There is, in our opinion, nothing in Section 162 CrPC to prevent a Trial Judge, as distinct from the prosecution or the defence, from putting to prosecution witnesses the questions otherwise permissible, if the justice obviously demands such a course. In the present case, we are strongly of the opinion that is what, in the interests of justice, the Trial Judge should have done but he did not look at the record of the police investigation until after the investigating officer had been examined and discharged as a witness. Even at this stage, the Trial Judge could have recalled the officer and other witnesses and questioned them in the manner provided by Section 165 of the Evidence Act. It is regrettable that he did not do so.

48. *In our opinion, in a case of the present description where the evidence given in a Court implicates persons who are not mentioned in the first information report or police statements, it is always advisable and far more important for the Trial Judge to look into the police papers in order to ascertain whether the persons implicated by witnesses, at the trial had been implicated by them during the investigation.*"

36. The Hon'ble Supreme Court in Case of **Rahul Vs. State of Delhi, Ministry of Home Affairs and Another** reported in (2023) 1 SCC 83 in paragraph Nos. 44 and 45 has held as under:-

" 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 the case of *State of Rajasthan vs. Ani and Others* thus: - (SCC pp. 166-167 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 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* [(1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1036] : (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."

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 Appellants-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 Indian Evidence Act for eliciting the truth in the cases before them, howsoever heinous or otherwise they may be. "

37. Under Section 161 of the Criminal Procedure Code, 1973 (for short, 'CrPC'), the police have the power to record statements of the witnesses during the investigation. Section 162 of CrPC deals with the use of such statements in evidence. Section 162 reads thus:

"162. Statements to police not to be signed: Use of statements in evidence.-

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any

purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the reexamination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation. An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

The basic principle incorporated in sub-Section (1) of Section 162 is that any statement made by a person to a police officer in the course of investigation, which is reduced in writing, cannot be used for any purpose except as provided in Section 162. The first exception incorporated in sub-Section (2) is of the statements covered by clause (1) of Section 32 of the Indian Evidence Act, 1872 (for short, 'Evidence

Act'). Thus, what is provided in sub-Section (1) of Section 162 does not apply to a dying declaration. The second exception to the general rule provided in sub-Section (1) of Section 162 is that the accused can use the statement to contradict the witness in the manner provided by Section 145 of the Evidence Act. Even the prosecution can use the statement to contradict a witness in the manner provided in Section 145 of the Evidence Act with the prior permission of the Court. The prosecution normally takes recourse to this provision when its witness does not support the prosecution case. There is one important condition for using the prior statement for contradiction. The condition is that the part of the statement used for contradiction must be duly proved.

38. When the two statements cannot stand together, they become contradictory statements. When a witness makes a statement in his evidence before the Court which is inconsistent with what he has stated in his statement recorded by the Police, there is a contradiction. When a prosecution witness whose statement under Section 161(1) or Section 164 of CrPC has been recorded states factual aspects before the Court which he has not stated in his prior statement recorded under Section 161(1) or Section 164 of CrPC, it is said that there is an omission. There will be an omission if the witness has omitted to state a fact in his statement recorded by the Police, which he states before the Court in his evidence. The explanation to Section 162 CrPC indicates that an omission may amount to a contradiction when it is significant and relevant. Thus, every omission is not a contradiction. It becomes a contradiction provided it satisfies the test laid down in the explanation under Section 162. Therefore, when an omission becomes a contradiction, the procedure provided in

the proviso to sub-Section (1) of Section 162 must be followed for contradicting witnesses in the cross-examination.

39. As stated in the proviso to sub-Section (1) of section 162, the witness has to be contradicted in the manner provided under Section 145 of the Evidence Act. Section 145 reads thus:

"145. Cross-examination as to previous statements in writing.-*A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

The Section operates in two parts. The first part provides that a witness can be cross-examined as to his previous statements made in writing without such writing being shown to him. Thus, for example, a witness can be cross-examined by asking whether his prior statement exists. The second part is regarding contradicting a witness. While confronting the witness with his prior statement to prove contradictions, the witness must be shown his prior statement. If there is a contradiction between the statement made by the witness before the Court and what is recorded in the statement recorded by the police, the witness's attention must be drawn to specific parts of his prior statement, which are to be used to contradict him. Section 145 provides that the relevant part can be put to the witness without the writing being proved. However, the previous statement used to contradict witnesses must be proved subsequently.

Only if the contradictory part of his previous statement is proved the contradictions can be said to be proved. The usual practice is to mark the portion or part shown to the witness of his prior statement produced on record. Marking is done differently in different States. In some States, practice is to mark the beginning of the portion shown to the witness with an alphabet and the end by marking with the same alphabet. While recording the cross-examination, the Trial Court must record that a particular portion marked, for example, as AA was shown to the witness. Which part of the prior statement is shown to the witness for contradicting him has to be recorded in the cross-examination. If the witness admits to having made such a prior statement, that portion can be treated as proved. If the witness does not admit the portion of his prior statement with which he is confronted, it can be proved through the Investigating Officer by asking whether the witness made a statement that was shown to the witness. Therefore, if the witness is intended to be confronted with his prior statement reduced into writing, that particular part of the statement, even before it is proved, must be specifically shown to the witness. After that, the part of the prior statement used to contradict the witness has to be proved. As indicated earlier, it can be treated as proved if the witness admits to having made such a statement, or it can be proved in the cross-examination of the concerned police officer. The object of this requirement in Section 145 of the Evidence Act of confronting the witness by showing him the relevant part of his prior statement is to give the witness a chance to explain the contradiction. Therefore, this is a rule of fairness.

40. If a former statement of the witness is inconsistent with any part of his

evidence given before the Court, it can be used to impeach the credit of the witness in accordance with clause (3) of Section 155 of the Evidence Act, which reads thus:

"155. Impeaching credit of witness: *The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him-*

(1).....

(2).....

(3) *by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."*

It must be noted here that every contradiction or omission is not a ground to discredit the witness or to disbelieve his/her testimony. A minor or trifle omission or contradiction brought on record is not sufficient to disbelieve the witness's version. Only when there is a material contradiction or omission can the Court disbelieve the witness's version either fully or partially. What is a material contradiction or omission depends upon the facts of each case. Whether an omission is a contradiction also depends on the facts of each individual case.

41. In our opinion, the defence has confronted P.W. 1 and P.W. 2 as to the improvements made by the eye-witnesses but the explanation submitted by them is not trust worthy coupled with the fact that Investigating Officer-P.W. 6 in his statement before the court below had clearly stated that such statements were not given by P.W. 1 and P.W. 2 before him at the time of recording of their statements under Section 161 Cr.P.C. Both P.W. 1 and P.W. 2 in their statements made before the court for the first time stated that when they reached the house of deceased after hearing the sound of fire, they saw accused-

appellant holding *Tamancha* (country made pistol) in his hand, co-accused Meena (acquitted by the trial court) was holding the hands of the deceased from the back and accused-appellant shot Saroj (deceased) in their presence. No such statement was made by P.W. 1 and P.W. 2 before the Investigating Officer under Sections 161 Cr.P.C. This omission is very significant which amounts to contradiction. Only explanations offered by P.W. 1 and P.W. 2 is that they stated these facts before the Investigating Officer (P.W.6) but if the same was not recorded, they cannot give any reason for the same. P.W. 6 i.e. Investigating Officer in his statement stated that no such statement was given by P.W. 1 and P.W. 2 to Investigating Officer in their statements recorded under Section 161 Cr.P.C. Thus, there are material omissions which amounts to contradiction and affect the reliability of the eye-witnesses i.e. P.W. and P.W. 2.

42. Learned counsel for the appellant further submitted that there are material contradiction in the statement of P.W. 1 and P.W. 2 regarding the manner of assault, time of assault and place of occurrence. P.W. 1 in his statement has stated when he heard the sound of fire while coming out from the house of Raju, he went to the house of deceased and saw accused having *Tamancha* in his hand and Meena holding hands of the deceased and thereafter accused shot the deceased and ran away from the place. It had also been stated by P.W. 1 that he heard the sound of fire at about 04:15 to 04:30 A.M, total two shots were fired, of which he heard one and the other shot was fired in his presence and the time difference between the two shots was one minute. It was also stated by P.W. 1 that when he heard the first shot, he was at the east-south gate of the house of deceased

and after hearing the shot he did not go into the house and had seen the incident from outside. P.W.1 further stated that at the time of second shot, he was present at the gate of the house of the deceased and *charpai* (bed) of the deceased was 3 to 4 meters away from the witness. P.W. 1 also stated that at that point of time, Meena and Lavkush were in the house, Meena was on the north of the *charpai* whereas Lavkush on the south. The head of the deceased was on the western side and legs were on the eastern side. It had also been stated when the second shot was fired then, P.W. 1 and Gajendra P.W. 2 were there at the place of occurrence and there was no other person. P.W. 1 further stated that after the firing he and Gajendra P.W.2 had not gone inside the house, light was on at the time of incident and they witnessed the incident from outside. Regarding source of light, P.W. 1 stated that there was no electric pole outside the house of the deceased, bulb was lit in the neighbouring house. P.W. 2 stated that after hearing the shot when they reached the house of Saroj, they saw that Meena caught hold of hands of the deceased and Lavkush shot the deceased. P.W. 2 stated that total two shots were fired and when the first shot was fired, we (P.W.1 & P.W. 2) started towards the house of the deceased from the house of Raju, the second shot was fired after three minutes when they were in front of the house of deceased Saroj. It was stated by P.W. 2 where we (P.W.1 & P.W. 2) were standing, Saroj was at a distance of 5 to 7 steps in the Verandah. It has also been stated that there was a boundary wall and a gate around the house of the deceased and the height of the wall was of a height of a man. Regarding source of light, P.W. 2 deposed that the bulb was there in the Verandah of the house of the deceased and in the light of bulb they saw the incident. It was also

stated by P.W. 2 when the fire was shot, Lavkush was on the east of the *charpai* whereas Meena was on the west. Meena was not having weapon in her hand and she was holding hands of the deceased from the back. It was also stated by P.W. 2 that Saroj was lying on her back and her face was towards the sky. It had also been stated by P.W. 2 that Saroj died and they had no talks with the Saroj. It was also stated by P.W. 2 that “*hamne*” (both P.W. 1 and P.W. 2) touched the deceased and found that she was dead. Learned counsel also invited our attention to the statement made by P.W. 1 wherein in his cross-examination he admitted that the accused had lodged a case against Ram Pal s/o Dhanu, Gajendra (P.W.2) and P.W. 1 on 14.04.2007 for entering in his house and beating deceased Saroj and the accused. It was also stated that on investigation, the said incident was found to be false on the other hand, P.W. 2 totally denied that Lavkush lodged the case on 14.04.2007 against P.W. 2 and Ram Pal.

43. Learned counsel for the appellant submitted that from the statements referred above, it is clear that there are material contradictions in the testimony of both the eye-witnesses and apart from these witnesses there is no other eye-witness. P.W. 3, who was the complainant had turned hostile and had not supported the prosecution version.

44. *Per contra*, learned A.G.A. has submitted that though there are certain contradictions in the testimony of the P.W. 1 and P.W. 2 but they are minor and on the basis of same, their evidence cannot be discarded.

45. Considering the statements of P.W. 1 and P.W. 2, in the light of the arguments made by respective counsel, we

are of the opinion that there are material contradictions in the testimony of the eye-witnesses. Further the eye-witnesses have improved the statement made before the court below with the statements made by them before the Investigating Officer. The material contradictions are not being explained by the eye-witnesses, the prosecution has also failed to explain the material contradictions in the statement of eye-witnesses as to what the eye-witnesses had stated before the Investigating Officer while their statement was recorded under Section 161 Cr.P.C. The trial court has also not taken any pain to discover the truth and had relied upon the statements of the eye-witnesses and brushed aside the contradictions saying them to be minor.

46. It is submitted by learned counsel for the appellant that the prosecution story as well as statement of the witnesses did not corroborate with the medical evidence.

47. It is further submitted by learned counsel for the appellant that the ocular evidence do not support the medical evidence and as such cannot be relied upon. In the post-mortem, two gun shot injuries were found on the body of the deceased. Injury No. 2, 3 cm x 2 cm brain cavity deep on left side of head. 2 inches above. So far as injury No. 2 is concerned, learned counsel for the appellant submitted that as per P.W. 1 the accused was on the south of the *charpai* (bed) on which the deceased was lying. The head of the deceased was towards the west and the legs are toward east and in such a situation, pellet injury on the north side of the head is not possible. In this connection, he has relied upon the statement of doctor also who had conducted the post-mortem i.e. P.W. 8 who had stated in his statement that in case the head of the deceased was in the west and

the legs towards east and the shot is fired from the south direction, in such a situation injury No. 2 was not possible. It has been further contended by learned counsel for the appellant that injury No. 3 was on the right side of the chest which was a entry wound of a fire. It has been submitted that according to P.W. 2, the deceased was lying with the head towards east and the legs towards west and in such a situation, the said injury cannot be caused by a person, who is on the southern side of the deceased.

48. Learned counsel relied upon statement of P.W. 8, the doctor who had conducted the post-mortem, that such an injury is not possible from a person standing on the same level of the deceased and this injury is only possible if the fire is shot from the up-side down. Learned counsel appearing for the appellant further submitted that from the evidence as has come, it is apparent that it is a case of firing from very short distance as according to both the witnesses, the accused was standing near the cot where the deceased was lying and in such a situation there must be a blackening and tattooing present on the person of the deceased wherein as per the post-mortem report which has been proved by P.W. 8 there is no blackening and tattooing present on the person of the deceased. This fact is further fortified by the fact that the incident has taken place in a Verandah and prosecution has failed to prove the dimension of the Verandah. Prosecution has also failed to prove the approximate distance from which the actual firing was done.

49. *Per contra*, learned A.G.A. submitted that from the ocular evidence as adduced before the court below, it is clear that the second shot was fired by the accused

Lavkush and if there is some inconsistency with the post-mortem, the same will not be fatal and on this score, the ocular evidence cannot be rejected.

50. Learned counsel for the appellant further contended that there are material contradictions in the evidence of P.W. 1 and P.W. 2. P.W. 1 in their statement before the court stated that at the time of incident Meena was on the north of the charpai whereas Lavkush was on the south. The head of the deceased Saroj was towards west and the legs towards east. P.W. 2 in his statement has stated that when the accused Lavkush shot Saroj, Lavkush was on the east of the charpai (bed) and Meena was on the west. It was stated by P.W. 2 that the charpai was lying from east to west. It is further contended by counsel for the appellant that P.W. 2 in his statement had changed the direction where the accused was standing at the time of incident from south of charpai (bed) to east of charpai (bed) because prosecution realized after evidence of P.W. 1 that injury Nos. 2 and 3 which were fire arm injuries were not possible in case, accused-appellant was on the South of the charpai while deceased was lying west to east on the charpai (bed) therefore, there is a material contradiction and improvement in the statement of P.W. 2 vis a vis statement of P.W. 1.

51. Considering the statements of P.W. 1 and P.W. 2 and P.W. 8 and the arguments of the counsel for the parties, we are of the considered view that prosecution case is not consistent with the medical evidence and there are material contradictions and improvement in the testimony of P.W. 1 and P.W. 2 regarding the same.

52. Learned counsel for the appellant also submitted that as per the prosecution case the country made pistol was recovered

on the pointing out of the accused at about 20:30 hours on the date of incident itself. It is further submitted that the alleged recovery cannot be relied upon as the same was not in consonance with the law laid down by the Supreme Court in cases of **Subramanya Vs. State of Karnataka**; reported in **A.I.R. 2022 SC 5110** and **Ramanand alias Nandlal Bharti Vs. State of U.P.**; reported in **A.I.R. 2022 SC 5273**.

53. Learned counsel for the appellant further submitted that the recovery of *Tamancha* (country made pistol) and the cartridges on the pointing out of accused is also inadmissible in evidence in view of Section 27 of the Evidence Act. In this regard, counsel for the appellant invited the attention of this court to *Fard Baramadgi* (recovery memo) Ex. Ka-15, wherein it has been stated that on 16.11.2011 Investigating Officer Sanjay Verma, along with S.I. Rajendra Singh Bhadana and Ram Chander, Virendra Singh and Constable Mange Ram, driver of the jeep along with the accused Lavkush proceeded in the official jeep towards place where as per the accused, he had buried the *Tamancha* and cartridges used in the incident for recovery of same, on there way they tried to take witness from the public nearby but nobody was ready for the same and therefore, under compulsion they have searched each other and ensured that none of the persons have any illegal material with them and came to the spot and recovery of *Tamancha* and two cartridges was made.

54. Learned counsel for the appellant submitted that the recovery as made is not in accordance with the procedure as prescribed and held to be mandatory by the Supreme Court in case of **Subramanya Vs. State of Karnataka(supra)**. Counsel for

the appellant relied upon paragraphs Nos. 76, 77 and 78 of the judgment in case of *Subramanya (supra)* which are quoted as under:-

“76. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

“27. How much of information received from accused may be proved.— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence

etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

55. Same view has been reiterated by the Supreme Court in Case of **Ramanand @ Nandlal Bharti Vs. State of U.P (supra)**.

56. It has been contended by counsel for the appellant that as per the law laid

down by the Supreme Court there was no effort by the Investigating Officer, once the alleged confession made by the accused in the police custody at the police station to procure the independent witness and to record the statement of accused in presence of independent witnesses at the police station itself, which has been held mandatory by the Supreme Court. From the perusal of the recovery memo, it appears that the police while going along with accused as stated in recovery memo tried to procure witnesses on the way and not before when alleged confession was made by the appellant at the police station and therefore, the alleged recovery cannot be relied upon. It is also pointed out by the counsel for the appellant that the alleged confession of the accused before the police was recorded on 16.11.2011, whereas the statement of accused-appellant recorded by Investigating Officer on 17.11.2011 while sending the accused-appellant for remand, wherein it has been stated that the accused denied the commission of offence.

57. Learned counsel for the appellant further contended that the alleged recovery has been made from an open place accessible to all and therefore, the same cannot be relied upon. Learned counsel for the appellant also contended that the fire arm allegedly used in the offence and the cartridges which were found along with the fire arm were never sent to ballistic examination and if sent, there was no report on record of a ballistic expert and there was no examination of ballistic expert by the prosecution to connect the weapon with the pellets found on the body of the deceased and in view of the same, it is contended that there was no material before the trial court that the accused shot the deceased with fire arm which was recovered on the pointing out of the accused to connect the

same with the pellets found on the body of the deceased.

58. *Per contra*, learned A.G.A. submitted that in view of the judgment of the Supreme Court in cases of **Gurcharan Singh and another Vs. State of Punjab**, reported in 1963 AIR (SC) 340 and **Ram Singh Vs. State of U.P.** reported in 2024 AIR (SC) 1176, in case where there is ocular evidence of an incident, mere non examination of the ballistic examiner or even where the fire arm has not been sent for ballistic examination will not be fatal to the prosecution.

59. Replying the above submission of the learned A.G.A., learned counsel for the appellant relied upon the same judgment and submitted that in case the ocular evidence is trust worthy, mere non-examination of ballistic expert or where the fire arm has not been sent for ballistic examination may not be fatal but in case, where testimony of the eye-witnesses is not trust worthy, the opinion of the ballistic examiner and omission on the part of the prosecution not to get an opinion from the ballistic expert shall be fatal.

60. In case of **Gurcharan Singh and another Vs. State of Punjab (supra)**, the Supreme Court in paragraph No. 19 has held as under:-

“19. It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in

support of this proposition, reliance has been placed on the decision of this court in Mohinder Singh v. The State 1950 SCR 821. In that case, this court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the photo must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It would be noticed that these observation were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of 'these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examind. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by

leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case. Therefore, we do not think that Mr. Purushotam is right in contending as a general proposition that in every case where a fire-arm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."

61. In case of **Ram Singh Vs. State of U.P. (supra)**, the Supreme Court in paragraph Nos. 24 to 29 has held as under:-

"24. On the aspect of non-examination of ballistic expert and its impact on the prosecution case, one of the earliest decisions of this Court was rendered in Gurucharan Singh Vs. State of Punjab, AIR 1963 SC 340. This Court observed that there is no inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused by a gun and those prima facie appeared to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by

leading the evidence of a ballistic expert. However, in what cases the examination of a ballistic expert is essential for the proof of the prosecution case must naturally depend upon the circumstances of each case. This Court held as under:

41.... These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case....

25. This issue was again examined by this Court in Sukhwant Singh Vs. State of Punjab, (1995) 3 SCC 367. In that case, this Court observed that though the police had recovered an empty cartridge from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution did not send the recovered empty cartridges and the seized pistol to the ballistic expert for examination and expert opinion. This Court was of the view that if such opinion would have been called for, comparison could

have been made which in turn could have provided link evidence between the crime and the accused. It was noted that this again was an omission on the part of the prosecution for which no explanation was furnished. It was thereafter that this Court declared as follows:

21.... It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.

25.1. Thus, in the aforesaid case, this Court emphasized that in cases where injuries are caused by firearms, the opinion of the ballistic expert becomes very important to connect the crime cartridge recovered during the investigation to the firearm used by the accused with the crime. Failure to produce expert opinion in such cases affects the creditworthiness of the prosecution case to a great extent.

26. However, in *State of Punjab Vs. Jugraj Singh*, (2002) 3 SCC 234, this Court opined that when there are convincing evidence of eyewitnesses, non-examination of the expert would not affect the creditworthiness of the version put forth by the eyewitnesses.

27. This Court considered the issue as to failure of the prosecution to recover the crime weapon and also non-examination of ballistic expert in *Gulab Vs. State of U.P.*, (2022) 12 SCC 677. In that case, the deceased had sustained a gunshot injury with a point of entry and exit. In that case, prosecution had relied on the eyewitnesses' accounts of three eyewitnesses which were found to be

credible. Therefore, non-recovery of the weapon of the offence would not dis-credit the case of the prosecution. After referring to the previous decisions, this Court opined that in the facts and evidence of the case, the failure to produce the report by a ballistic expert who could testify to the fatal injuries being caused by a particular weapon would not be sufficient to impeach the credible evidence of the direct witnesses.

28. In *Pritinder Singh Vs. State of Punjab*, (2023) 7 SCC 727, this Court in the facts and evidence of that case held that conviction could not be sustained. That apart, from not collecting any evidence as to whether the gun used in the crime belonged to the appellant or not, even the ballistic expert had not been examined to show that the wad and pellets were fired from the empty cartridges of the appellant. In that case which was based on circumstantial evidence, it was held that when there was serious doubt as to credibility of the witnesses, the failure to examine ballistic expert would be a glaring defect in the prosecution case.

29. Thus, what can be deduced from the above is that by itself non-recovery of the weapon of crime would not be fatal to the prosecution case. When there is such non-recovery, there would be no question of linking the empty cartridges and pellets seized during investigation with the weapon allegedly used in the crime. Obtaining of ballistic report and examination of the ballistic expert is again not an inflexible rule. It is not that in each and every case where the death of the victim is due to gunshot injury that opinion of the ballistic expert should be obtained and the expert be examined. When there is direct eye witness account which is found to be credible, omission to obtain ballistic report and non-examination of ballistic

expert may not be fatal to the prosecution case but if the evidence tendered including that of eyewitnesses do not inspire confidence or suffer from glaring inconsistencies coupled with omission to examine material witnesses, the omission to seek ballistic opinion and examination of the ballistic expert may be fatal to the prosecution case.”

62. It has been further contended that it appears that after the recovery of *Tamancha* and the cartridges, the same were sent for examination to Forensic Science Laboratory. Before the court below, it has come in the statement of P.W. 6 that the packets received from Forensic Science Laboratory was opened before the court on 03.12.2016, which was proved by P.W. 6 and wherein the *Tamancha* and the cartridges were there. It is further contended by counsel for the appellant that though the prosecution had sent the recovered *Tamancha* and cartridges to Forensic Science Laboratory for the ballistic examination but no report of the same was brought in evidence before the court below and in absence of such ballistic report, there is no evidence before the trial judge which connects that the weapon used in the crime was the same which was sent for examination. The prosecution has not produced the ballistic report and has deliberately suppressed the same and therefore, an adverse inference be drawn that the report if any, was against the prosecution and for this reason, the same was not produced.

63. Considering the evidence on record, arguments of counsel for the parties and the case laws relied upon by them, we are of the considered view that the alleged recovery of *Tamancha* (country made pistol) on the pointing out of the accused

cannot be relied upon as the same was not done in accordance with the provisions of Section 27 of the Evidence Act and the law laid down by the Supreme Court referred above. We are of the considered opinion that though, the *Tamancha* (country made pistol) and the cartridges were sent for ballistic examination and which was proved by statement of P.W. 6 but the report of the ballistic examination was not placed before the court below. In view of the inconsistencies and improvement in the statements of the eye-witnesses, the ballistic examination of *Tamancha* and its report was very important but the prosecution has not brought the same before the court below and the counsel appearing for the appellant is right in saying that the said material has been withheld by the prosecution leading to a presumption that if it was there, the same was not helpful for the prosecution in its case.

64. Learned counsel for the appellant further submitted that as per the ocular evidence, co-accused Meena was holding the hands of the deceased from the back side and the fire was shot from a close range on the deceased by the accused and several pellets have been found in the wound but there is no injury on the body of the co-accused. It is highly improbable in case of shooting by a country made pistol that any person will dare to hold the deceased as there is every possibility of being hit by the pellets, which are fired by a country made pistol from close range. It is also submitted by learned counsel for the appellant that on the one hand, the ocular evidence of P.W. 1 and P.W. 2 is to the effect that Meena was holding hand of the deceased, on the other hand it has been stated by both the witnesses that they saw deceased was lying on the bed when they

reached the spot. There is no evidence to the fact that after firing the deceased fell on the bed. As per the evidence of P.W. 1 and P.W. 2, the co-accused Meena was holding the hands of the deceased from the back when the fire was shot by the accused-appellant. It is further contended that as per the testimony of eye-witnesses i.e. P.W. 1 and P.W. 2 they saw Saroj lying on the bed and it had not been stated by eye-witnesses that the deceased was standing or sitting at the time of incident. If the deceased was lying on the bed, then there is no occasion or opportunity for the co-accused Meena to hold the hands of the deceased from the back at the time when she was shot and this creates a serious doubt as to manner of assault by the accused from the evidence of P.W. 1 and P.W. 2. It is not possible to catch hold of hands of a person lying on a bed. Hands can be held only while the person is standing or sitting.

65. Learned counsel for the appellant further submitted that the trial court has committed a fundamental error in convicting the appellant on the one hand and acquitting the co-accused Meena on the other hand. Evidence against both were the same. When on the same set of evidence, accused was acquitted; the trial court ought to have acquitted the appellant as well.

66. It is pointed out by learned counsel for the appellant that it was only for the first time in the examination before the court, the eye-witnesses deposed that both the accused Meena and Lavkush were present at the spot at the time of incident, Meena was holding hands of the deceased from the back when Lavkush shot the deceased and thereafter, they ran away. The trial judge has admitted this position in his judgment while recording a finding that it is true that P.W. 1 and P.W. 2 in their

examination-in-chief has stated that co-accused Meena was present at the spot at the time of incident and was holding hands of the deceased but in this regard the F.I.R. has to be looked into wherein P.W. 3 has stated that his brother Lavkush was having illicit relationship with Smt. Meena and his mother used to forbid Lavkush for such acts, therefore, Lavkush has shot his mother in the night of 16.11.2011. In the F.I.R., there is no mention of accused Meena to be part of the conspiracy or being present at the time of incident and therefore, the statement of P.W. 1 and P.W. 2 to this effect cannot be relied upon that Meena was present at the spot at the time of incident or was involved in the conspiracy. It is further submitted by counsel for the appellant that both the facts that Meena was present at the spot and was holding the hands of deceased when the accused Lavkush shot the deceased came for the first time in the evidence of P.W. 1 and P.W. 2 before the court but the part of the evidence regarding presence of Meena has been disbelieved by the trial judge while acquitting Meena and has believed the statement of P.W.1 and P.W. 2 regarding shooting by Lavkush. Once a part of the statement was disbelieved, the other part ought to have been disbelieved by the trial judge and the trial judge has committed error in convicting the accused on the same set of evidence on which he has acquitted the other co-accused, Meena.

67. It is also submitted by counsel for the appellant that P.W. 3 Sonu (complainant) had not supported the prosecution version and was cross-examined by A.D.J.C. In his cross-examination, P.W. 3 stated that the time consumed in coming from house of Raju to his house is approximately 20 minutes and it was also stated that there was no

electricity in the neighbouring houses. At the time of incident P.W. 3, was at Haridwar and came to know about the incident at about 08:00 A.M. He started from Haridwar at about 09:00 A.M. and reached his village at about 12:00 Noon. The complaint which was given at the police station was not written by P.W. 3 and he put thumb impression on the Tehrir (complaint) written by Vijay Pal (scribe). It is further submitted by counsel for the appellant that since P.W. 3, first informant has not supported the prosecution version, the prosecution ought to have examined the scribe of the F.I.R. but the same was not done by the prosecution for the reasons best known, especially, when the first informant has turned hostile.

68. Lastly, it was submitted by counsel for the appellant that the F.I.R. was ante-dated as the F.I.R. was sent to C.J.M. six days after the incident whereas as per Section 157 Cr.P.C., the same has to be sent forthwith.

69. Considering the rival submissions of the respective counsel and considering the evidence on record, we hold that the evidence of eye-witnesses P.W. 1 and P.W. 2 is not reliable as there are improvements in their statements made before the court below and the statements made before the Investigating Officer and that too without any explanation from the prosecution side for the same. The omission on the part of the eye-witnesses i.e. P.W. 1 and P.W. 2 to state before the Investigating Officer the facts, which were deposed by them before the court amounts to material contradiction. Further the ocular evidence is not supported by the medical evidence and the prosecution has failed to bring on record, the report of the ballistic expert to whom

the recovered Tamancha (country made pistol) and the cartridges were sent for examination and proved the same by examining the ballistic expert and as such there is no evidence to connect the weapon allegedly used by the accused with the pellets recovered from the body of the deceased. The recovery of Tamancha (country made pistol) is also not in accordance with provisions of Section 27 of the Evidence Act and the law laid down in this regard by the Supreme Court. Further the trial court committed an error in relying upon a part of the same evidence which was produced for the first time before the trial court for acquitting the co-accused Meena and has erroneously relied upon the other part of the same evidence for convicting the accused-appellant. Material witnesses such as ballistic expert, scribe of the F.I.R. were not examined by the prosecution. From the material on record, we are absolutely not satisfied with the truthfulness of the ocular evidence i.e. the statements of P.W. 1 and P.W. 2 and therefore, we find and hold that the prosecution has failed to substantiate the charges levelled against the accused-appellant beyond all reasonable doubts by adducing consistent, cogent and reliable evidence. Except for the statement of P.W. 1 and P.W. 2 which cannot be said to be trustworthy, there is no evidence against the accused and therefore, we hold that the accused-appellant is legitimately entitled to avail the benefit of doubt.

70. Hence the judgment dated 28.08.2017 and order of conviction dated 30.08.2017 passed by learned Addl. Sessions Judge, Court no.2, Muzaffarnagar in Sessions Trial No. 279 of 2012 and Sessions Trial No. 280 of 2012 could not

withstand the legal position and requires to be reversed by acquitting the accused from the charges levelled against him.

71. Consequently, the appeal deserves to be allowed by setting aside the impugned judgment and order of conviction.

72. In view of that following order is passed:-

(i) Appeal stands allowed.

(ii) Judgment dated 28.08.2017 and order of conviction dated 30.08.2017 in Sessions Trial No. 279 of 2012 and Sessions Trial No. 280 of 2012 passed by learned Addl. Sessions Judge, Court no.2, Muzzafarnagar stands quashed and set aside.

(iii) The accused-appellant-**Lavkush** is acquitted of offence punishable under Section 302 I.P.C. as well as under Section 25 of Arms Act.

(iv) The accused-appellant be released from jail forthwith, if not required in any other offence.

(v) The amount of fine, if deposited, be refunded to the accused-appellant.

(2024) 12 ILRA 401
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 689 of 2019
 With
 Criminal Appeal No. 299 of 2019

Devendra Shukla @ Mintu & Anr.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Sri Ramesh Chandra Yadav, Sri Saurabh Yadav

Counsel for the Respondent:

G.A., Sri Kuldeep Johri

Criminal Law - Indian Penal Code, 1860-

Section 302-Accused convicted u/s 302 of IPC and associated offences as allegation against accused persons that they assaulted informant's father with knife and gupti - none of the other family members sustained any injuries - indicative of the fact that the incident has not occurred in the manner suggested by the prosecution-two circumstances with regard to criminal traits of the deceased and unexplained injuries on the accused are taken in conjunction with the other facts -a distinct possibility of it being an incident in which the accused persons visited the house of deceased to discuss and sort out conflicts -offence would not fall u/s 302 IPC but would fall u/s 304 (Part-I) IPC.

Appeal partly allowed. (E-9)

List of Cases cited:

Babu Ram & ors. Vs St. of Pun. (2008) 3 SCC 709

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

1. This criminal appeal is directed against the judgment and order dated 12.12.2018, passed by the 4th Additional Sessions Judge/Special Judge, E.C. Act, Pilibhit in Sessions Trial No.199 of 2015 (State Vs. Devendra Shukla @ Mantu & Ors.), under Sections 148, 452, 302/149, 323/149, 504, 506 IPC, arising out of Case Crime No.529 of 2015, Police Station - Sungarhi, District - Pilibhit; Sessions Trial Nos.200 of 2015 (State Vs. Rahul Shukla Alias Rinku), 201 of 2015 (State Vs. Devendra Shukla @ Mantu), 202 of 2015

(State Vs. Mahesh Shukla), under Section 4/25 Arms Act, arising out of Case Crime Nos.530 of 2015, 531 of 2015, 532 of 2015, Police Station – Sungarhi, District – Pilibhit; whereby the accused appellants Devendra Shukla @ Mantu, Rahul Shukla Alias Rinku and Mahesh Shukla have been convicted and sentenced to life imprisonment under Section 302/149 IPC alongwith fine of Rs.10,000/- and in default of payment to undergo three months additional imprisonment; sentenced to one year rigorous imprisonment under Section 323/149 IPC; sentenced to one year rigorous imprisonment under Section 148 IPC; sentenced to three years rigorous imprisonment under Section 452 IPC alongwith fine of Rs.2,000/- and in default of payment to undergo two months additional imprisonment; sentenced to one year rigorous imprisonment under Section 504 IPC; sentenced to three years rigorous imprisonment under Section 506 IPC; sentenced to one year rigorous imprisonment under Section 4/25 Arms Act alongwith fine of Rs.1,000/- and in default of payment to undergo one month additional imprisonment. All the sentences are to run concurrently.

2. At 11.45 AM on 6.3.2015, informant Neelu Rupali Pandey was at her house alongwith her parents and brother Mudit Mishra when accused Devendra Shukla @ Mantu, Rahul Shukla Alias Rinku armed with knife, Triloki Nath Shukla @ Tillu armed with gupti (a sharp edged instrument), Anuj Shukla and Mahesh Shukla armed with knife entered informant's house at Nai Basti, near Chatri crossing within Police Station Sungarhi, District Pilibhit and in furtherance of their common intention attacked informant's father. Accused Mahesh Shukla exhorted by saying that informant's father had dared

to lodge a report against his daughter so he be not spared. Accused persons then assaulted informant's father with knife and gupti and when other family members tried to save them, they (family members) were also beaten and by extending threats the accused left. Out of fear of accused none from the neighbourhood came to their rescue. Informant brought his injured father to the police station. Some time before this incident accused Mahesh Shukla had allegedly extended life threat to informant's father on phone. The incident was reported by the informant vide her written report dated 6.3.2015 which is exhibited as Ex.Ka.1 during trial. On the strength of the above written report First Information Report came to be lodged under Sections 147, 148, 149, 302, 452, 323, 504, 506 IPC at Police Station Sungarhi, District Pilibhit on 6.3.2015 at 12.20 PM.

3. The investigation proceeded on the basis of the FIR and the inquest was conducted on 6.3.2015 at 2.30 PM. The inquest witnesses were of the view that deceased Nirmal Mishra has been done to death apparently on account of injuries caused by knife and to ascertain the correct cause of death postmortem be conducted. The body was sealed and sent for postmortem. Postmortem was also conducted on the same day. The autopsy surgeon found existence of following ante-mortem injuries and the cause of death was reported as shock and hemorrhage due to following ante-mortem injuries caused by stabbing:-

"1. Abrasion on middle of chest 4 cm x 2 cm red in color

2. Punctured wound 2 cm x 0.5 cm bone deep on left side chest 8 cm below left nipple red in color

3. *Stitched wound 3 cm width on left side abdomen 16 cm below from left nipple horizontally placed on exploration it was punctured wound through and through in abdominal cavity with cutting peritoneal and muscles (stabbed)*

4. *Stitched wound 2 cm width horizontally placed, 9 cm above from umbilicus on exploration wound passed through and through in abdominal cavity with cutting peritoneal and muscles*

5. *Abraded contusion on left side 8 cm x 3 cm obliquely placed 4 cm above left anterior superior iliac spine red in color*

6. *Abrasion 2 cm x 1 cm on left thigh 10 cm below left iliac crest red in color*

7. *Lacerated wound on right little finger 1 cm width at palmar aspect red in color*

8. *Lacerated wound on thumb left 1.5 cm x 0.5 cm at palmar aspect red in color*

9. *Lacerated wound on left index finger at palmar aspect 1 cm x 0.5 cm red in color*

10. *Lacerated wound on left middle finger at palmar aspect 1.5 cm x 0.5 cm red in color”*

4. The accused Rahul Kumar Alias Rinku, Devendra Shukla @ Mantu sons of Mahesh Kumar Shukla and Mahesh Kumar Shukla were arrested on 6.3.2015, who confessed that daughter of accused Mahesh Kumar, namely Shilpi was married to Deepak Pandey of Bareilly. Brother of Deepak Pandey, namely Prakash Pandey was married to the daughter of deceased Nirmal Mishra, namely Neelu @ Rupali. Neelu @ Rupali had lodged an FIR complaining dowry harassment by her husband and in-laws in which Shilpi (daughter of accused Mahesh Shukla) was

also implicated. Accused Mahesh Shukla alongwith his sons Rahul Kumar Alias Rinku, Devendra Shukla @ Mantu, Triloki Nath Shukla as well as with grandson Anuj Shukla visited deceased Nirmal Mishra to enquire about the dowry related criminal case and it was there that Nirmal Mishra started abusing them and in a fit of rage they assaulted Nirmal Kumar Mishra with knives and gupti. These weapons were then cleaned and hidden in the toilets at their house. On the basis of such confession the police took the accused to their house from where three knives were recovered on the pointing out of accused Mahesh Shukla and his two sons Rahul Kumar Alias Rinku, Devendra Shukla @ Mantu. Since the size of the knife was more than the prohibited size, as such second FIR came to be lodged under Section 3/25 Arms Act as Case Crime Nos.530 of 2015, 531 of 2015, 532 of 2015, Police Station – Sungarhi, District – Pilibhit. Recovery memo was also prepared in respect of three knives recovered from possession of accused Mahesh Shukla, Rahul Kumar Alias Rinku, Devendra Shukla @ Mantu. On 6.3.2015 itself the Investigating Officer visited the place of occurrence and took the blood stained earth and plain earth in separate boxes and sealed it vide Ex.Ka.4.

5. On 22.5.2015 accused Triloki Nath @ Tilu proceeded son of Mahesh Shukla was arrested at 7.45 in the morning and on his pointing out gupti was recovered from an old tubewell room in the Barha railway colony the accused appellant confessed that it is with this gupti that he has assaulted deceased Nirmal Kumar Mishra and had hidden it there. Gupti was nine inches long of which seven inches had wooden bait while the sharp pointed part is of two inches. It was pointed at the edge and flat on the middle part. Deceased was aged

about 55 years with average body built. The deceased was in his undergarments and wearing a janeu (a piece of wired thread) on him. The Investigating Officer recorded the statement of witnesses including family members and on the strength of recoveries made from the place of occurrence as also on the pointing out of accused appellants submitted charge-sheets in both the FIRs on 10.3.2015 and 24.5.2015. Cognizance was taken on the aforesaid charge-sheets and the case was committed to the courts of Sessions where it got registered as Sessions Trial No.199 of 2015, under Sections 148, 452, 302/149, 323/149, 504, 506 IPC, arising out of Case Crime No.529 of 2015 and Sessions Trial Nos.200 of 2015, 201 of 2015, 202 of 2015, under Section 4/25 Arms Act, arising out of Case Crime Nos.530 of 2015, 531 of 2015, 532 of 2015. On 19.8.2015 the accused appellants were charged of above offences and since they denied their implication and demanded trial, the proceedings of trial commenced.

6. The prosecution has adduced following documentary evidence:-

“1. FIR dated 6.3.2015 as Ex.Ka.16

2. Written Report dated 6.3.2015 as Ex.Ka.1

3. FIR dated 6.3.2015 as Ex.Ka.19

4. Recovery Memo of blood stained & plain soil as Ex.Ka.4

5. Recovery Memo of knife as Ex.Ka.5

6. Recovery Memo of ‘gupti’ as Ex.Ka.7

7. ‘Panchayatnama’ dated 6.3.2015 as Ex.Ka.10

8. P.M. Report dated 6.3.2015 as Ex.Ka.2”

7. In addition to the above documentary evidence the prosecution has produced informant, namely Rupali Pandey @ Neelu as PW-1. She has told that she got married to Prakash Pandey in 2007. She was happy with her husband. Few months prior to the incident her husband developed inclination towards her jethani Shilpi Pandey. This led to strained relations between the family members. Father-in-law Sudheer Pandey, mother-in-law Shakuntala Devi, husband Prakash Pandey and jethani Shilpi Pandey started harassing her for demand of dowry. She came to her father’s house and lodged a police case of dowry against her husband, in-laws and jethani. On account of lodging of this FIR accused Mahesh Shukla alongwith his sons and grandson became annoyed. On 6.3.2015 accused Mahesh Shukla telephoned Nirmal Kumar Mishra and extended life threats to her father. On the same day at about 11.45 in the morning accused persons came to her husband and started hurling abuses. It is thereafter that all the accused collectively attacked her father. Accused Mahesh Shukla, Devendra Shukla and Anuj Shukla were carrying knives, while accused Triloki Nath had a gupti in his hands. These persons indiscriminately inflicted blows and seriously injured her father. It is thereafter that PW-1 took her father to the hospital in injured condition where written report was prepared. She has proved the written report and the same is exhibited as Ex.Ka.1. After lodging of the report the witness took her father to District Hospital, Pilibhit where he was admitted and on the same day at about 1.45 in the afternoon her father died. Statement of the witness was recorded by the Investigating Officer at the Hospital. The Investigating Officer came to her house and inspected various spots where blood etc was lying and recovery memos were prepared in the presence of

her brother Mudit Mishra, mother Santosh Mishra and sister-in-law Shilpi Mishra.

8. In the cross-examination PW-1 has stated that six months after her marriage demand of dowry started which continued till she was literally thrown out of the house. Prior to her leaving the house she neither lodged any FIR nor made any complaints against the family members. Report was lodged at Police Station Sungarhi on 21.2.2015. In the dowry case a compromise was worked out and she was living in her matrimonial house. She had not given any affidavit in the dowry case that the report was lodged on the persuasion of others. On 21.2.2015 neither her in-laws came nor any threat was extended to her father. These facts were not disclosed by her in the FIR lodged by her. In case such an assertion is contained in the FIR then the same is not correct.

9. It was Holi on the date of incident. People were playing colors in the locality. She was inside her house. The accused persons suddenly entered the house and started hurling abuses. They also attacked her father with knife and gupti. All Accused entered the room. Initially they assaulted her father with fists and kicks and later caused the knife blows. Her father fell. She tried to save her father but the accused persons continued to cause injuries. Her father sustained various injuries. No injuries of knife and gupti were however caused to PW-1 or her mother and brother etc. After assaulting the father accused persons did not cause any injuries of knife or gupti to other family members. The accused left hurling abuses. She had stayed for about five minutes after the accused left. She then took her father in the car owned by her father. She has denied the suggestion that on the saying of S.H.O. the

report was lodged by her. She was aware that till the injured was brought to the hospital the report would not be lodged. She has specifically denied the suggestion that the version of extending threats to her father, on phone, sometime prior to incident was subsequently added. She has also stated that blood stains had appeared on her cloths alongwith that of her mother and brother. They had gone to the police station in the blood stained cloths and that Investigating Officer had seen it also. The Investigating Officer, however, had not collected their blood stained cloths. No case was lodged against her father and it is incorrect to state that he has any criminal history.

10. PW-2 is Mudit Mishra, who happens to be the son of the deceased and is the real brother of informant. He has substantially followed the version of PW-1 with regard to the genesis of the incident as also the manner in which the incident occurred. He has stated that a telephone call was received from mobile number 9761216633 of accused Mahesh Shukla on the mobile number 9411976624 of his father. His father had another mobile number also. Life threat was extended by accused Mahesh Shukla on mobile. This fact was told by the deceased to him. PW-2 has proved the panchayatnama, wherein he was the witness and also proved the recovery of bloodstained and plain earth from the place of incident.

11. In his further cross-examination PW-2 has stated that when his father informed him of this threat he did not suggest lodging of any report. He did not lodge a report either. The accused in this case were not arrayed as accused in the dowry case of his sister. Only the in-laws of Neelu were implicated as accused

therein. In a specific question posed to the witness about threat to life extended in the dowry case he told that he has no such knowledge. He had read the FIR in the dowry case. He is, however, aware of the contents of the report lodged by his sister in this case. He is aware that no threat to life was extended to her sister by her in-laws. His sister resumed living in her matrimonial house after about a month of the incident wherein her father died. A compromise has been arrived at. He was not aware that his father had several criminal cases against him or that he was tried for the offence of murder. He has explained the topography of his house according to which there is a lawn in front of his house which is double storied. He was on the ground floor when the incident occurred. The accused arrived and hot talks continued for about 5-7 minutes. No injuries were caused to him or to his mother or sister in this incident. The statement of PW-2, in this regard, reads as under:-

“मेरा दो मंजिला मकान है। मेरी मकान के किनारे पर बाउण्ड्री वाल में गेट लगा है। वह छोटा गेट है। यह मेन गेट नहीं है। उस गेट में कार नहीं घुस सकती है। मेन गेट से अन्दर घुसने पर लॉन है। हम अपनी कार मेनगेट से गैलरी में खड़ी करते हैं। लॉन करीब 10 x 6 फिट लम्बा चौड़ा है। बरामदा नहीं है। घटना के समय मैं नीचे था। कोई बातचीत नहीं हुई थी, केवल गाली-गलौच हुई थी। कुछ झगड़ा 5-7 मिनट चला था। गाली गलौच 1-2 मिनट हुआ था। मौहल्ले के कोई लोग झगड़े के समय नहीं आए थे। मुझे झगड़े में चोट नहीं आई और न ही मेरी मम्मी व बहिन को चोट आई।”

12. This witness has denied the suggestion that FIR contents are based on legal advice. He has denied the suggestion that he was not present at the house when

the incident occurred or that accused are falsely implicated. In a question posed to the witness by court he stated as under:-

“मैं नहीं बता सकता किस मुलजिम ने मेरे पिता के किस अंग पर क्या मारा। वार होने से पहले मैंने धारदार हथियार देख लिए थे। मैंने अभियुक्तगण के पास धारदार हथियार देखने के बाद शोर नहीं मचाया। पिता के चोट लगने के बाद मेरी पिता से बातचीत नहीं हुई। वह बेहोश नहीं हुए, होश में थे। मेरे पिता की किसी और से भी बातचीत नहीं हुई। अस्पताल इलाज को ले गए थे। मेरे पिता को करीब 10 मिनट (Sic) रोके रक्खे थे फिर पिता वहीं मर गए थे। यहां खून गिरा था, वहां पर मिट्टी पर भी खून गिरा था और फर्श पर भी खून गिरा था। त्रिलोकी नाथ के पास गुप्ती थी। गुप्ती कहां मारी थी, नहीं पता गुप्ती बिना कवर की थी, खुली देखी थी।”

13. He also stated that:-

“प्रश्न:- क्या आपकी झगड़े से पहले पिता से बातचीत हुई थी?

उ०:- मेरे पिता ने मुझे धमकी वाली बात बताई थी। जिस फोन पर मेरे पिता को धमकी दी गई वह मोबाईल मेरे पास रहा। पुलिस को नहीं दिया।

दरोगा जी ने मेरे से मोबाईल लेकर कॉल दरोगा जी ने मोबाईल का मेमोरी कार्ड नहीं लिया था और उस मोबाईल की मेमोरी की भी जांच नहीं की थी। दरोगा जी ने केवल मोबाईल को देखा था, कम्प्यूटर पर scan नहीं किया था। मुझे दरोगा जी ने बताया था कि उन्होंने मोबाईल का कॉल डिटेल् रिकार्ड निकलवाया है। दरोगा जी ने जो भी मुकदमें की जांच की उसकी प्रगति रिपोर्ट मुझे नहीं दी। दरोगा जी ने मुझे मार्च 2015 में कॉल रिकार्ड दिखाया था।”

14. PW-3 is Dr. Rajesh Kumar, who had conducted postmortem on the deceased

and has proved the postmortem report. He has opined that the cause of death was the stab injury which resulted in excessive loss of blood. Injury no.2,3,4 and intestinal injuries could have been caused by sharp edged weapon, whereas other injuries could have been caused by fists and kicks. Injury no.6 could have been caused by a stick or an iron rod. Injury no.7 to 12 also could have been caused by a stick or an iron rod. Injury no.7,8,9 could have been caused by a broken bottle also.

15. PW-4 is Inspector Brajesh Singh, who conducted investigation in the matter and has proved the police papers including the charge-sheet filed in the present case. He has also proved the recovery of weapon of assault. This witness has admitted that the deceased had several cases of murder, loot and dacoity pending against him. He had a criminal background. He also disclosed that the father of deceased Ram Kumar and his uncle were also convicted for murder.

16. PW-5 is Sub-Inspector Ashok Kumar, who has proved the inquest and some of the other police papers. He had no knowledge as to whether the recovered knives were sent for forensic science laboratory or not. He had not seen the FIR or GD at the time of filling up inquest. Incident of death was already reported in the GD.

17. PW-7 is SI Rahmat Khan. He partly conducted investigation in the present case and recorded statement of witnesses.

18. The above evidence led in the matter has been confronted to the accused, who have denied the evidence and have stated that police proceedings are all

fraudulent. Anti-time papers have been prepared. On 6.3.2015, it was Holi and at about 9.00 accused alongwith his sons were hit by an unknown vehicle near the crossing wherein the accused sustained injuries and gave information to the police. The accused were taken to the hospital where they were examined. The informant in collusion with the police has lodged a false report.

19. The defence has produced testimony of doctor Dr. Anupam Sharma, Emergency Medical Officer, District Hospital, Pilibhit as DW-1. He has proved the injuries of accused Rahul Shukla which are as under:-

“1. Incised wound skin deep 1x0.5cm on palmar aspect of right hand 4 cm from right wrist.

2. Incised wound 1x0.5 cm on dorsal aspect of right hand, 4 cm above forearm, base of right little finger.

3. Complaint of pain in left wrist.”

20. All the injuries were fresh and could have been caused by a sharp edged weapon. Accused Mahesh Shukla has also been examined by DW-1 on the same day and following injuries have been found on him:-

“1. Incised wound 1x0.5cm on sternum, muscle deep, 8 cm from below left nipple with tailoring 4 cm towards left oblique.

2. Contused abrasion 6 cm from wound, injury no.1.

3. Complaint of pain in right middle finger.

4. Contused abrasion 7 cm long on left side of chest, 2cm below from injury no.1.

5. Complaint of pain in head.”

The patient was kept under observation. Injuries were fresh and injury no.1 could have been caused by a sharp object. Injury no. 2 and 3 could have been caused by a pointed object. The patient was referred for expert opinion to surgeon. This witness has produced the original records of injury and its photocopy has been produced. He has also stated that police had taken all such original records from him earlier.

21. It is on the basis of above evidence that the trial court has convicted and sentenced the appellants, as per above.

22. Learned counsel for the appellants argued that all the accused appellants have been falsely implicated in the present case. It is submitted that the testimony of witnesses are not reliable. Genesis and manner of incident is not proved on the strength of evidence led in the trial. In the alternative it is submitted that the incident occurred at the spur of the moment without any intent to commit the murder of the deceased. It is also submitted that the injuries on the accused are not explained by the prosecution, consequently, genesis is not proved and since possibility of incident having suddenly occurred cannot be ruled out the conviction and sentence of accused appellants cannot travel to Section 302 IPC and would, at best, fall under Section 304 IPC. It is also submitted that the prosecution case about extending threat of life to the deceased on phone is clearly a case of improvement based on advise in respect of which no evidence is collected. Submission is that this part of the prosecution case is a deliberate falsehood introduced on advise with intent to make out a case of murder for which no evidence otherwise exists on record.

23. Per contra, learned AGA and Sri Kuldeep Johri, learned counsel for the informant submits that the incident was pre-planned and was executed after extending threat on phone to the deceased for which specific motive was available to the accused. Submission is that the manner in which the incident occurred belies any plea of it being a case of sudden provocation. It is also submitted that defence explanation that accused sustained injuries in an accident or that the deceased died in an accident are wholly misplaced and the plea in that regard is clearly inconsistent with the evidence on record. It is, therefore, argued that the judgment of trial court convicting and sentencing the accused appellants requires no interference.

24. Background facts of the case, as are noticed above, remain undisputed. The daughter of deceased i.e. the informant as well as daughter of accused Mahesh Shukla were married in the same family to two brothers. The daughter of accused Mahesh Shukla is the jethani while the daughter of deceased (informant) was her younger sister-in-law (devrani).

25. The FIR came to be lodged by the informant (PW-1) against her in-laws for demand of dowry, wherein the daughter of accused was also implicated. The evidence further suggests that the informant suspected some unholy relationship between her husband and her sister-in-law (daughter of accused Mahesh Shukla). This lodging of FIR led to differences in the families of the deceased and the accused.

26. The incident occurred on 6.3.2015 when the festival of colors (Holi) was being celebrated. This festival of colors culturally provides an occasion for the estranged relatives and friends to bury their

differences and hug each other. However, on this pious day just the reverse occurred. In what context and manner this incident occurred is the subject matter of issue in the present appeals.

27. The prosecution in order to demonstrate that it was a case of pre-planned murder of the deceased has alleged that on the date of incident a life threat was extended by accused Mahesh Shukla to the deceased on phone. The prosecution witnesses alleged that it was in furtherance of this threat that all the accused came armed and assaulted the deceased as a result of which he died.

28. The evidence on record has been examined by us. Though it is the persistent case of the prosecution that a threat to life was extended by accused Mahesh Shukla to the deceased but it remains undisputed that no such threat was reported to the police. The two prosecution witnesses of fact allege that the deceased informed them of such threat extended to him. None of these two witnesses, however, suggested lodging of police report nor actually any such report was lodged. The threat to life is stated to have been extended by accused Mahesh Shukla on his mobile phone. Though PW-2 specifies the mobile number from which this threat was extended as also the mobile number on which it was received but the I.O. has neither taken the phones in his possession nor any investigation on this aspect appears to have been conducted. There is no call detail records collected during investigation of these mobile phones which could may demonstrate that any phone call was received by the deceased from the mobile phone of accused Mahesh Shukla. The evidence, therefore, is found lacking on the aspect of threat having been extended to the deceased by the accused

persons. To reiterate neither any report is lodged in this regard nor any call detail record exists to prove that any mobile call was made by the deceased to the accused as is stated by PW-2. The possibility of this aspect having been introduced as a result of advice cannot be entirely ruled out.

29. We have already observed that the date of incident was Holi which is an occasion for estranged relations to be normalized by meeting relatives and friends. Though PW-1 has stated that all accused came and suddenly started assaulting the deceased but this version of PW-1 is somewhat differently described in the testimony of other witnesses of fact i.e. PW-2. According to PW-2 all the accused came on Holi and for initial 5-7 minutes they had hot talks, whereafter accused persons started assaulting the deceased. The fact that parties talked initially for some time before the incident occurred is indicative of the fact that the accused persons had some talks with the deceased before the incident occurred. It is not as if incident occurred in a pre-planned manner where the accused having extended threat on the phone came rushing and immediately caused the incident as is sought to be suggested by the prosecution.

30. The evidence of PW-2, suggesting a distinct course, seems more plausible. The fact that none of the other family members sustained any injuries is indicative of the fact that the incident has not occurred in the manner suggested by the prosecution. We may also note that PW-1 although has claimed that other family members were also beaten but none of their injuries are examined by the doctor. PW-2, nevertheless, admits that none of them sustained any injuries. We are, therefore, inclined to attach greater

importance to the version of PW-2 over what is stated by PW-1. This is, particularly so as it was due to estranged relations between PW-1 and the daughter of the accused Mahesh Shukla that the entire incident had occurred. The charge emotions of PW-1, therefore, cannot be discounted due to which we are inclined to place greater trust in the version of PW-2.

31. There are two other circumstances relating to the incident which have to be borne in mind. The first circumstance is that the deceased was a man of criminal traits. This is admitted by the I.O. in his testimony. A suggestion has been given by defence to both the prosecution witnesses of the fact about the criminal traits of the deceased. The second circumstance is the injuries sustained by the accused persons. The testimony of DW-1 proving the injuries of two accused has not been doubted or controverted by the prosecution or the informant. Though an explanation is furnished for such injuries by the defence of an accident but the defence version in that regard is found wholly unreliable.

32. The law with regard to non-furnishing of explanation of injuries on the accused is by now well settled. The prosecution is expected to prove the injuries caused to the accused and the failure to do so may result in generating doubt about the genesis of incident. In *Babu Ram & Ors. Vs. State of Punjab* (2008) 3 SCC 709, the Supreme Court has observed as under in para 18 and 19 of the judgment:-

“18. It is a well-settled law that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important

circumstance from which the court can draw the following inferences:

“1. that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

2. that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

3. that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.” (See Lakshmi Singh v. State of Bihar [(1976) 4 SCC 394 : 1976 SCC (Cri) 671 : AIR 1976 SC 2263] , SCC p. 401, para 12.)

19. Further, it is important to point out that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.”

33. When the above two circumstances with regard to criminal traits of the deceased and unexplained injuries on the accused are taken in conjunction with the other facts on record we find a distinct possibility of it being an incident in which the accused persons visited the house of deceased to discuss and sort out issues relating to conflicts between the two ladies on account of lodging of report by PW-1 against her in-laws. It is also admitted to PW-1 that after the death of her father she has resolved the differences with her in-laws and has been residing with them. The differences between her and her in-laws were therefore such which could have been

sorted out. The attempt on part of accused persons, therefore, to visit the deceased and the informant for resolving their differences by visit on a pious day appears to be a distinct possibility. This is so as we have found no evidence with regard to any earlier threat having been extended to the deceased by the accused. It is in this background that the parties appear to have entered into an altercation which led to the fight in which blows were exchanged between the accused and the deceased. This is clearly reflective from the injuries on the deceased caused by fists and kicks etc. An analysis of injuries on the deceased and the accused also throws some light on what may have happened on the fateful day. Injury no.7 to 10 of the deceased are on his fingers and in the nature of laceration. Injuries on accused are also such which reflects that scuffle and exchange of fists etc occurred before injuries no.2 to 4 were caused to the deceased by knife and gupti, which proved fatal.

34. So far as the use of gupti and injuries are concerned, the recovery made from the accused appellants are not in the presence of any independent witness. No disclosure statement or panchayatnama is otherwise on record for such recoveries to be read in evidence under Section 27 of the Indian Evidence Act, 1872. There are no FSL report otherwise to prove the use of these weapons in the commissioning of offence. Nevertheless injuries on the deceased since are caused by sharp edged weapon it remains undisputed that accused persons did inflict injuries on the deceased. Suggestion has been given to the doctor that many of these injuries could have been caused by broken bottle or other household items. Presence of some sharp edged articles in the room otherwise cannot be discounted. It is this context that we are

persuaded to opine that in the enraged emotions the incident suddenly occurred in which the deceased was inflicted injuries causing his death. The cause of death is otherwise loss of blood on account of injuries caused by sharp edged weapon. From the evidence placed on record it is also not clear as to whether the common object of the unlawful assembly was to cause the death of the deceased. The entire incident occurred on Holi after initial talks for some time leading to a free fight in which both sides sustained injuries. It is thus possible that accused side visited deceased to sort out differences and in hot talks that followed the incident occurred.

35. We have gone through the judgment of trial Judge in this case. The Court of Sessions has not appreciated the evidence on record in correct perspective, inasmuch as lack of evidence on the aspect of life threat extended to the deceased earlier in the day; lack of evidence on the recovery of knife and gupti for it to be read in evidence under Section 27 of the Indian Evidence Act, 1872; non-explanation of injuries on accused etc. are overlooked. The genesis and manner of incident is also not considered in proper perspective. Accordingly, we cannot endorse the conclusion drawn by the trial Judge upon appreciation of evidence and for the reasons already enumerated substitute our own findings in this case and modify the sentence on the accused.

36. When the incident is taken in its entirety in light of the evidence brought on record we feel that the offence of the accused would not fall under Section 302 IPC but would fall under Section 304 (Part-I) IPC. The conviction of accused is thus altered from Section 302 IPC to Section 304 (Part-I) IPC. None of the accused

appellants have any criminal history. The manner in which the incident appears to have occurred would not warrant extreme punishment of life and we, accordingly, modify the sentence awarded to the accused appellants as rigorous imprisonment of ten years in place of life sentence. All the accused are family members, otherwise. The imposition of fine and the default fine is maintained. The accused appellants shall be set free on serving the sentence imposed on them.

37. Appeals, accordingly, are partly allowed.

38. Let a copy of this order be sent to the concerned Chief Judicial Magistrate for necessary compliance.

(2024) 12 ILRA 412
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2054 of 2012

Sattar **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
 Onkar Singh, Sanjay Srivastava

Counsel for the Respondent:
 G.A.

**Criminal Law - Indian Penal Code, 1860-
 Section 302**-Case based on circumstantial evidence -no direct evidence to indicate the involvement of the accused appellant -no date of last seen-no other witness who may testify the presence of enmity between the appellant

and the informant-St.ment of the accused appellant for the recovery to be made under Section 27 of the Evidence Act -has not been recorded in writing by the Investigating Officer-chain of circumstances is not complete-mere suspicion, howsoever strong it may be, cannot be a substitute for acceptable evidence-impugned order quashed.

Appeal allowed. (E-9)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116
2. G. Parshwanath Vs St. of Karn. (2010) 8 SCC 593
3. Raju Vs St. of Raj. (2022) 121 ACC 954
4. Dharam Deo Yadav Vs St. of U.P. (2014) 5 SCC 509
5. Ashok Vs St. of Mah. (2015) 4 SCC 393
6. Niranjan Panja Vs St. of W.B. (2010) 6 SCC 525
7. Ravi Sharma Vs St. (NCT of Delhi) (2022) 8 SCC 536
8. Chandra Mondal Vs St. of W.B. (2023) 6 SCC 605
9. Jaikam Khan Vs St. of U.P. (2021) 13 SCC 716
10. St. of Orissa Vs Sitansu Sekhar Kanungo (2002 SCC OnLine SC 1296)
11. St. of U.P. Vs Kishanpal (2008) 16 SCC 73
12. Munshi Prasad Vs St. of Bihar (2002) 1 SCC 351

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

1. This criminal appeal under Section 374(2) of the Criminal Procedure Code has been preferred against the judgement and

order dated 16.4.2012 passed by the IInd Additional Sessions Judge, Court No.3, Muzaffarnagar in Sessions Trial No.1580 of 2008 (State vs. Sattar), arising out of Case Crime No. 695 of 2008, Police Station Shamli, District Muzaffarnagar whereby the accused appellant was convicted under Sections 363, 302 and 201 IPC and sentenced to undergo four years rigorous imprisonment for the offence under Section 363 IPC with a fine of Rs. 5,000/-, to undergo life imprisonment for the offence under Section 302 IPC with a fine of Rs. 10,000/- and to undergo two years rigorous imprisonment with a fine of Rs. 1000/- for the offence under Section 201 IPC with default clause. All the sentences were directed to run concurrently.

2. The prosecution story, as culled out from the record, is that a missing report Ext. ka-1 in respect of missing of Ummed, aged about 4 years, son of Momin since 10.5.2008 at about 10.00 a.m. was reported at P.S. Kotwali Shamli on 14.5.2008, which was registered at Ext. ka-5. Subsequently, another application Ext. ka-2 was given by the informant at P.S. Shamli alleging therein that his missing son was last seen in the company of Sattar son of Abbas by Shamshad and Lilu on 10.5.2008 at about 11.00 a.m. During investigation, accused Sattar was arrested by the police and on his pointing-out from a sugar cane field one skeleton of deceased Ummed was retrieved by the police on 16.5.2008. The Investigating Officer performed necessary formalities during investigation and recorded the statements of witnesses as well. The recovered skeleton was sent for inquest and post mortem and after completion of investigation charge sheet under Sections 363, 302 and 201 IPC was submitted against accused Sattar. The case being exclusively triable by the Sessions

Court was committed to the Court of sessions where charges under Sections 363, 302 and 201 IPC were framed on 25.2.2009 against the accused, who denied all the charges and claimed for trial.

3. To bring home the charges against the accused, the prosecution relied upon the oral evidence of P.W.-1 Momin - informant / father of the deceased, P.W.-2 Lilu, the witness of last seen, P.W.-3 Ajay Prakash, scribe, P.W.-4 Dr. Pankaj Jain, P.W.-5 Shyam Pratap, the first Investigating Officer, P.W.-6 S.H.O. Brijpal Singh, the second Investigating Officer and PW-7 Dr. V.V. Bhargav, radiologist.

4. In order to corroborate the oral evidence adduced by the prosecution, the prosecution has also relied upon the documentary evidence as written report Ext. ka-1, application moved by the informant Ext. ka-2, recovery memo Ext. ka-3, G.D. Ext. ka-4, chik F.I.R. Ext. ka-5, post mortem report Ext. ka-6, report regarding skeleton Ext. ka-7, letter to C.M.O. Ext. ka-8, inquest report Ext. ka-9, letter R.I. Ext. ka-10, letter C.M.O. Ext. ka-11, photo nash Ext. ka-12, form no. 13 Ext. ka-13, site plan Ext. ka-14, charge sheet Ext. ka-15, G.D. dated 16.5.2006 Ext. ka-16, x-ray report Ext. ka-17, FSL report Ext. ka-18 and recovery memo Ext. ka-3A and material Ext. 1 to 7 have also been proved in evidence.

5. After conclusion of the prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded and the incriminating evidence and circumstances were put to him wherein he claimed the prosecution evidence as false and fabricated and denied to adduce any defence evidence, however, Sabir was himself produced as DW-1.

6. PW-1 Momin, the informant / father of the deceased child in his evidence proves the missing report as Ext. ka-1 and other written report naming the accused Sattar as Ext. ka-2. He is also a witness of recovery of skeleton and clothings of his son and proves it as Ext. ka-3 and further before the Court he proves the incriminating materials as material Ext. 1 to 5.

7. PW-2 Lilu is the witness of last seen together and he in his evidence states that he had seen the deceased child Ummed with accused Sattar coming from the village and subsequently he disclosed this fact to the informant Momin.

8. PW-3 C/C Ajay Prakash is the scribe who has proved the registration G.D. for missing report as Ext. ka-4 and chik F.I.R. as Ext. ka-5.

9. PW-4 Dr. Pankaj Jain performed the autopsy of the skeleton of the deceased Ummed on 17.5.2008. The condition of the skeleton has been explained by him in his evidence and he proves post mortem report as Ext. ka-6 and further proves the post mortem report prepared by the medical board to which he was also a member as Ext. ka-7.

10. PW-5 S.I. Shyam Pratap is the first I.O. of the case who proves the proceeding of investigation, recording of statements of witnesses, arrest of accused Sattar and also recovery of skeleton and clothings of deceased child on the pointing out of accused Sattar in the presence of witnesses and further he proves the inquest report, letter to R.I., letter to C.M.O., photo nash, challan nash as Ext. ka-9 to Ext. ka-13. He also proves the site plan of the place of recovery as Ext. ka-14 and during

investigation he also added Section 363, 302, 201 IPC to the matter.

11. PW-6 S.H.O. Brijpal Singh also corroborates the story of arresting the accused and recovery of incriminating articles on his pointing out as second I.O. of the case. He proves the memo of recovery of skeleton and nikkar and shirt relating to the deceased as Ext. ka-3A. He further proves charge sheet as Ext. ka-15.

12. PW-7 Dr. V.V. Bhargava, radiologist proves the x-ray report as Ext. ka-17 and further proves x-ray plates as material Ext. 6 and 7.

13. The trial Court after hearing both the sides at length and scrutinizing and analyzing the evidence on record convicted the accused appellant under Sections 363, 302 and 201 IPC and sentenced, as mentioned here-in-above.

14. Heard Shri Onkar Singh and Shri Sachin Malik, learned counsel for the appellant and Shri Gyan Narayan Kanaujiya, learned A.G.A.-I for the State.

15. The impugned judgement and order passed by the learned Sessions Court has been assailed by the learned counsel for the appellant on various grounds. It has been vehemently submitted that the entire prosecution story is false and frivolous and the present appellant has been falsely roped in this case by the informant. It is also submitted that the present case is based upon circumstantial evidence. Nobody has seen the deceased boy in the company of the accused appellant and witness Lilu, who has been examined as last seen witness, is not reliable at all and his presence over the place of occurrence is not natural and probable. It is also submitted

that the present appellant had no motive at all to commit the alleged crime. It is further submitted that the prosecution has failed to prove that the skeleton, which was allegedly retrieved on the pointing out of the appellant, was really of the deceased child of the informant. It is also submitted that the medical evidence also does not support the prosecution version. It is further submitted that in the present case the missing of links to make a complete chain of circumstances is a relevant lacuna on the part of the prosecution. The chain is not complete in any case which further results into failure of the prosecution case. On such grounds a prayer has been made for the acquittal of the appellant by allowing the present criminal appeal.

16. Per contra, learned A.G.A. vehemently opposed the contentions raised by the learned counsel for the appellant. It has been submitted that it is a case based on circumstantial evidence. There is no possibility of false implication of the accused appellant in this case. It is true that the case in hand depends upon circumstantial evidence but the victim boy was lastly seen in the company of the accused himself by the independent witnesses, who had no grudge or enmity with the accused appellant and they had never any occasion to falsely implicate the present appellant in this case. The investigation conducted in this case has no serious omission or negligence on the part of the Investigating Officer. It is also submitted that there is no perversity in the impugned judgement which is well reasoned and sentencing is also proper and the present criminal appeal is liable to be dismissed.

17. I have considered the rival submissions made by the learned counsel

for the parties and perused the material available on record including the impugned judgment and order carefully.

18. Indubitably, present is a case based on circumstantial evidence and no direct evidence lies on record to indicate the involvement of the accused appellant in the alleged crime. What the prosecution is under obligation to prove in a case based upon circumstantial evidence, has been settled in umpteen of cases by the Hon'ble Apex Court and this Court as well.

19. In **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116**, the Hon'ble Apex Court laid down following five golden principles, i.e. the panchsheel for the proof of a case based on circumstantial evidence:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused i.e. they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible hypothesis except the one to be proved, and

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion

consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

20. In **G. Parshwanath Vs. State of Karnataka, (2010) 8 SCC 593**, it was held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in the chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.

21. Recently in **Raju Vs. State of Rajasthan, 2022 (121) ACC 954**, the aforesaid legal position has been reiterated.

22. The case in hand is liable to be decided on the touch stone of law laid down by the Hon'ble Supreme Court as mentioned above. Applying the aforesaid proposition of law in the present case, we are under obligation to search out whether having taken cumulatively, the circumstances are forming the chain which is so complete that there is no escape from the conclusion that within all normal and human probabilities, the crime was committed by the accused only and none else and the aforesaid conclusion must be free from any other hypothesis than that of the guilt of the accused.

23. In a plethora of judgments delivered by the Hon'ble Apex Court it has been held that the unusual and suspicious conduct of the accused in a case based on the circumstantial evidence particularly under the theory of 'last seen together' may lead to his conviction because if the

prosecution on the basis of sufficient evidence pointing towards the guilt of the accused discharges his initial burden of proof and successfully establishes that the victim was last seen together with the accused, the burden of proof in view of Section 106 of the Evidence Act shifts upon the accused to show as to what happened when the victim departed from his company and the exact happening of the occurrence after the 'last seen together' is now to be proved by the accused and not by the prosecution. It is true that the last seen together is never a conclusive proof of the guilt of the accused but if the surrounding circumstances relating to the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, non-explanation of death of the deceased also stand with cogent evidence against the accused it may lead to the conviction of the accused. In that way the theory of 'last seen together' has a significant role to determine the success or failure of the prosecution in a case based on circumstantial evidence.

Last Seen Together

24. To start with the first circumstance, the theory of 'last seen' may be appreciated. It is always to be kept in mind that the essence of the theory of 'last seen together' is not that just prior to the incident the victim was seen in the company of the accused. It means that the time gap between the last seen of the deceased in the company of the accused and his death should be so proximate to leave even an iota of doubt as to whether the deceased had opportunity to move in the company of the other persons leaving the company of the accused. The legal theory in connection with proof of 'last

seen together' if on the basis of evidence is found well proved, the burden of proof shifts upon the accused and it is he who is required to explain as to how the occurrence occurred and failure on his part to furnish satisfactory explanation in this regard may stand adverse to him and strong presumption of his guilt may rise in this situation.

25. In **Dharam Deo Yadav vs. State of U.P., (2014) 5 SCC 509**, it has been held that normally the 'last seen theory' comes into play when the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, as in the present case, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence".

26. The legal position in respect of the last seen theory has also been explained in a catena of decisions of the Apex Court and this Court also such as **State of Goa vs. Pandurang Mohite, AIR 2009 SC 1066, State of U.P. vs. Satish, 2005 (3) SCC 114, Mohibur Rahman & Another vs.**

State of Assam, 2002 (2) JIC 972 (Supreme Court), Rohtash Kumar vs. State of Haryana, 2013 (82) ACC 401 (SC) (Paragraph 25), Ashok vs. State of Maharashtra, (2015) 4 SCC 393, Niranjana Panja vs. State of West Bengal, 2010 (6) SCC 525.

27. The aforesaid theory, if translated into the facts and circumstances of this case and also the evidence on record regarding the last seen together, we find that PW-2 Lilu is the solitary witness to the fact of last seen together.

28. PW-2 Lilu in his evidence deposes that for a period of about two years and one month before at about 11.00-12.00 in the morning when he alongwith Shamshad was coming to the village they met accused Sattar with Ummed, the son of Momin coming from the village and on his query the accused replied that he was going to the field. Subsequently, he went to Loni and when returned after 6-7 days Momin met him and informed for the missing of his child and then he disclosed the aforesaid fact of last seen together to the informant.

29. The veracity of the testimony of PW-2 Lilu was tested in his cross-examination. When he was controverted to his statement that the accused had told him that he was going to the field he replied that the aforesaid fact was narrated by him to the Investigating Officer of the case but if it was not found in his statement he could not explain the reason thereof. The learned counsel for the appellant has vehemently submitted that PW-2 is not a natural witness. He is a chance witness who works at Loni and his presence in the village on the day of the occurrence of kidnapping was not natural and probable. Further, his conduct regarding a very delayed

disclosure of the factum of 'last seen together' before the informant also makes his evidence as suspicious and unreliable.

30. This Court also examined as to what was the time gap between the alleged last seen together and the death of the deceased.

31. It is notable that no date of last seen has been disclosed by PW-2 Lili in his evidence, albeit he states that about 2 years and 1 month before at about 11.00-12.00 in the morning he had seen the accused appellant taking the deceased boy Ummed with him. The missing report was lodged on 14.5.2008 whereas the missing was caused on 10.5.2008.

Motive

32. In a catena of decisions, it has been settled that motive keeps a significant place and is countenanced in a case based upon circumstantial evidence.

33. While examining the significance of motive in cases based on circumstantial evidence, it was observed by the Hon'ble Apex Court in **State of U.P. vs. Kishanpal, (2008) 16 SCC 73** like this :

“38.....the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is

also settled law that the motive looses all its importance in a case where direct evidence of eye-witnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of eye-witnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide *Pannayar vs. State of T.N., (2009) 9 SCC 152*).”

34. We examined the prosecution evidence to find out the element of motive behind the crime. PW-1, the informant in his evidence has stated that he was having no prior enmity with the accused Sattar or any of his family member, hence, no enmity between the informant and the accused appellant at the time of the incident is inferred from the said statement. There is no other witness on record who may testify the presence of enmity between the appellant and the informant, father of the deceased. In his entire testimony PW-1 nowhere utters a single word in respect of his enmity with the accused appellant.

35. Since the case in hand rests upon the circumstantial evidence, motive plays an important link to complete the chain of circumstances in such a case, though in a case of direct evidence, motive loses its significance.

Time of death of the deceased and recovery

36. The dead body of the deceased has been retrieved by the police on the pointing out of the accused appellant Sattar. PW-1 is also a witness of the said recovery. He states that on call of police when he came to the main road from his residence accused Sattar in his presence delivered a statement of disclosure of the dead body of the deceased to the police and when they entered into the sugar-cane field walking behind the accused appellant, he handed over some skeleton and clothes to the police after removing some soil from a pit and in this regard memo Ext. ka-3 was also prepared. He further states that the clothings and jaw alongwith skull were also recovered which he proves as material Ext. 1 to material Ext. 5. The said recovery was made on 16.5.2008. The post mortem of the said skeleton was performed by PW-4 Dr. Pankaj Jain, who found five broken pieces of skull bones, lower jaw having only four teeth, one piece of scapula bone and black hair for autopsy. Since nothing was identifiable, the post mortem report Ext. ka-6 was prepared accordingly, however, subsequently on 27.6.2008 one medical board also performed the post mortem by order of the C.M.O. Ext. ka-8 and report Ext. ka-7 was prepared. PW-4, however, expressed his inability to disclose as to when death of the deceased occurred.

37. In the same manner, PW-7 Dr. V.V. Bhargava, Radiologist also proves x-ray report Ext. ka-17 alongwith x-ray plates material Ext. 6 and 7 and states that the medical board to which he was also a member determined the age of the deceased examining the bones of the skeleton. Hence, the prosecution has further failed to establish the time of the death of the deceased and this fact remains unanswered as to before how much time from the recovery of the dead body, the deceased

was seen in the company of the appellant and when his murder was committed.

38. The learned counsel for the appellant vehemently submitted that the said recovery is nothing but a false and fabricated evidence adduced by the prosecution. It is argued that the presence of the informant and witnesses Ali Sher and Imran at the time of the recovery of the skeleton of the deceased is totally false. The dead body has been recovered from an open space having access to anyone at any time.

39. Learned AGA has submitted that the recovery of the skeleton and cloths on the pointing out of the accused appellant is covered under Section 27 of the Evidence Act but however, he could not satisfy the Court on the point that the recovery has been made from an open place and any person might cause disappearance to the skeleton in the sugar-cane field or might hide it there which creates a mark of suspicion to the story of recovery. Nobody has seen the accused appellant causing disappearance or hiding the body / skeleton of the deceased in the pit.

40. It is submitted by the learned counsel for the appellant that the alleged place of recovery is very near to the chak-road which is a public path surrounded by the fields of other persons. It is further submitted that since the dead body was found in the skeleton form the same must be creating a bad smell which could easily attract any person present nearby and since the place of occurrence was surrounded by the fields and was situated near the chak-road whereupon the presence of public persons was very probable, hence the pit wherein the dead body was concealed should be normally visible to others. In the

memo of recovery Ext. ka-3 it has been mentioned that there was spreading a very bad smell of a dead body from the pit, hence, it was very natural that any person might be attracted to that smell.

41. In **Jaikam Khan v. State of U.P., (2021) 13 SCC 716**, the Hon'ble Apex Court observed as under:

“One of the alleged recoveries is from the room where deceased Asgari used to sleep. The other two recoveries are from open field, just behind the house of deceased Shaukeen Khan i.e. the place of incident. It could thus be seen that the recoveries were made from the places, which were accessible to one and all and as such, no reliance could be placed on such recoveries.”

42. Further, the Hon'ble Supreme Court in **Nikhil Chandra Mondal v. State of W.B., (2023) 6 SCC 605** has held that :

“20. The trial court disbelieved the recovery of clothes and weapon on two grounds. Firstly, that there was no memorandum statement of the accused as required under Section 27 of the Evidence Act, 1872 and secondly, the recovery of the knife was from an open place accessible to one and all. We find that the approach adopted by the trial court was in accordance with law. However, this circumstance which, in our view, could not have been used, has been employed by the High Court to seek corroboration to the extra-judicial confession.”

43. Another limb of argument from the learned counsel for the appellant is that it was incumbent upon the prosecution to prove that the recovered incriminating materials were kept in sealed condition in

the malkhana of the police station and G.D. thereof was also prepared and when the said articles were produced in the Court, the same were taken from the malkhana of the police station. It is further submitted by the learned counsel for the appellant that no malkhana register has been produced before the Court to show the aforesaid facts. It has been vehemently submitted that considering the aforesaid circumstances it is explicitly clear that the entire story of recovery on the pointing out of the appellant Sattar is a false and concocted story of the police. This, as submitted, is a serious lacuna in the prosecution case and it shatters the link evidence as well. He also placed reliance on the judgment delivered in **State of Orissa vs Sitansu Sekhar Kanungo, 2002 SCC OnLine SC 1296** wherein the Hon'ble Apex Court in almost similar matter held that the absence of link evidence in such cases vitiates the prosecution story and accused is entitled to get benefit of that.

44. It is further submitted that PW-5, the Investigating Officer has stated that Ali Sher and Imran were the two public witnesses of the alleged recovery besides the informant but the said witnesses have not been examined by the prosecution. The so-called statement of the accused appellant for the recovery to be made under Section 27 of the Evidence Act has not been recorded in writing by the Investigating Officer.

45. The aforesaid facts hit the prosecution story in respect of recovery of incriminating articles on the pointing out of the accused appellant consequent upon his statement given in the police custody, which was claimed to be admissible under Section 27 of the Evidence Act.

46. Learned trial court has also discussed the oral evidence rendered by the prosecution. PW-1, informant, in his cross-examination states that before 10-15 days of the occurrence marriage of accused appellant Sattar was solemnized and he alongwith his whole family participated in the marriage function and both the families were on friendly relations. Hence, if both the families were having close relations, there was no motive at all for the accused appellant to commit the alleged crime. It is only PW-2 Lilu who disclosed the fact of last seen together before the informant on the basis of which the accused appellant was named before the police. PW-1 in his cross-examination further states that Lilu met him at about 7.30 a.m. and Shamshad met him 15 minutes thereafter and whatsoever they disclosed before him, he narrated the same in the written report. If in the light of the aforesaid statement made by the PW-1, the testimony of PW-2 Lilu is further scrutinized and it is found that just after witnessing the boy going alongwith accused Sattar he left the village and went to Loni for his employment and when he came back 6-7 days after the incident he was informed about the missing of the son of Momin. It is notable that PW-2 himself did not visit the informant after getting the information of the missing child of Momin rather when Momin met him by chance and told the incident of missing of his child it was only then he disclosed the story of 'last seen together' to PW-1 Momin and such statement finds place in his examination-in-chief. It is noteworthy that the statement of PW-2 Lilu for his visit to Loni for his employment was nowhere stated in his statement under Section 161 CrPC and he has been cross-examined on this point. Hence, it appears that the statement made by PW-2 Lilu was after thought only.

47. The attention of the Court has also been drawn by the learned counsel for the appellant to a material point that on 16.5.2008 although further information was given by the informant at the police station concerned against the named accused, which has been proved as Ext. ka-2 by PW-1 but no G.D. in connection with the said fact has been proved and PW-3, the scribe, also makes no statement in this regard. Though PW-5 states that G.D. No. 28 at 10.40 a.m. was prepared but the said G.D. was not made part of the record and further not proved in evidence. It has been vehemently argued that Ext. ka-2 was a relevant and significant document and the prosecution failed to explain as to why the said information was not written in any G.D. of the concerned police station.

48. It is also submitted that there is no rawangi G.D. on record which was required from the prosecution in order to prove the fact that on 16.5.2008 the police party made an exit from the police station alongwith accused Sattar for recovery of the dead body of the deceased and in the absence of the rawangi G.D. it cannot be said that the police party left the police station, as claimed, and took the accused appellant to the place of recovery. The G.D. Ext. ka-16, which was proved by PW-5, only consists of the statement made by the appellant Sattar in the police custody but it does not relate to the exit of the police party from the police station. Except PW-1, who also deposes some fluctuating statements, no other public witness proved the factum of recovery of the skeleton of the deceased on the pointing out of the appellant.

49. In **Rifaqat alias Fakkar vs. State of U.P., 2007 SCC OnLine All 1638**, this Court has held as under :

“15.....It is also worthwhile to mention here that P.W. 1 and P.W. 2 have stated in their testimony that they had proceeded on patrolling duty from their concerned police station and reached at the place of incident. He was apprehended by the police from his house as per suggestion. In such circumstances, it was essential that Rawanagi G.D. of P.W. 1 and P.W. 2 should have been proved on behalf of prosecution, so that it could be proved that they had proceeded from concerned police station and reached at the relevant place of incident. In absence of producing Rawanagi G.D. of these witnesses, the presence of both the witnesses is liable to be suspicious at the place of incident. Therefore, search and seizure has become ultimately suspicious.....”

50. Another limb of argument raised by the learned counsel for the appellant is that the conduct of PW-1, the informant, is very unnatural in this case. The prosecution has put forward a specific case that the son of the informant was missing since 10.5.2008 but missing report Ext. ka-1 was given at the police station concerned only on 14.5.2008. It is never natural and probable that after missing of his son aged about only four years the informant gave information at the police station four days after his missing and moreover no satisfactory explanation has been offered by the prosecution for this inordinate delay.

51. In the light of the aforesaid submissions, we examined the evidence of PW-1 and it emerges out from his statement that since he was busy in search of his son, he could not report to the police station prior to 14.5.2008. The said conduct of PW-1 in this connection was not natural. The missing boy was not a grown-up child

but was a little boy of tender age of 4 years only but the police was informed four days after his missing by the informant / father which denotes the unnatural conduct of PW-1 and it appears that the prosecution has tried to conceal the real facts and origin of the case.

52. Another issue which has been raised by the learned counsel for the appellant is that there is one FSL report Ext. ka-18 on record in respect of examination of clothings and skeleton retrieved from the pit on the pointing-out of the accused appellant which reveals that human blood was found on the articles sent for forensic test but it does not connect the present appellant with the crime alleged against him.

53. The learned counsel for the appellant has also laid emphasis upon Ext. kha-1, which is a compromise letter given to the S.H.O. Kotwali, Shamli wherein theft of buggy of the informant Shabbir was committed on 5.1.2008 by the named persons Lilu and Shamshad but subsequently both the persons confessed their guilt before the village people and prayed for admonishing and a compromise deed dated 12.8.2008 was prepared before the police.

54. DW-1 Sabir, the real brother of the accused appellant, in his testimony states that a named report in connection with the aforesaid theft was given at the police station Shamli by Shabbir, father of the accused appellant. He further proves the compromise deed dated 12.1.2008 as Ext. kha-1. It has been argued by the learned counsel for the appellant that Shabbir son of Tula is the father of the accused appellant Sattar and DW-1 is his real brother. The contents of the aforesaid compromise deed have been corroborated by DW-1. Learned counsel for the appellant on the basis of Ext. kha-1 advanced an argument that on

account of old animosity Lilo PW-2 has given false evidence against the accused appellant. It has also been argued that the evidence adduced by the defence also gets the same weight as the prosecution evidence. Reliance has been placed on a decision of the Apex Court in *Munshi Prasad vs. State of Bihar, (2002) 1 SCC 351*. Hence, in the entire facts and circumstances of the case, the evidence adduced by the defence helps the accused appellant.

55. On the basis of the aforesaid discussion, we are of the considered view that the prosecution has miserably failed to prove its case beyond reasonable doubt. Learned trial court though discussed several factors relating to the case but has not scrutinized and appreciated the evidence on record in proper and legal manner and thereby, has accorded a perverse finding of conviction. The chain of the circumstances is never complete, which was essential to record a conviction of an accused in a case based on circumstantial evidence. All the material circumstances, like last seen, motive, recovery of kidnapped boy have not been proved for want of cogent and reliable evidence. The evidence rendered by the prosecution is shaky and not trustworthy. The medical evidence also is of no help to the prosecution. All these lacunas denude the prosecution case and in the aforesaid legal and factual scenario, we have no option but to set-aside the impugned judgment and order and to record acquittal of the appellant.

56. Recently, in *Ravi Sharma Vs. State (NCT of Delhi), (2022) 8 SCC 536*, where in the circumstances of the case, the Hon'ble Supreme Court found the last seen theory not to be true, motive was not proved, recovery of firearm was doubtful, material contradictions found in the evidence rendered and no sufficient link to come to the

irresistible conclusion pointing guilt only to appellant, it was reiterated that mere suspicion, howsoever strong it may be, cannot be a substitute for acceptable evidence. In the peculiar circumstances of the present case, the aforesaid theory applies to this case as well.

57. Hence, the impugned judgment and order of conviction and sentence, which has been sought to be assailed, calls for and deserves interference. The criminal appeal is liable to be allowed and the same is, accordingly, allowed.

58. The impugned judgement and order dated 16.4.2012 is, accordingly, set aside. The convict-appellant Sattar is accordingly found not guilty for the offence punishable under Section 363, 302 and 201 IPC. He is acquitted from all the charges. Convict-appellant is on bail. He need not surrender, his bail bonds are cancelled and sureties are discharged.

59. Let a copy of this judgment along with trial court record be sent to the Sessions Judge, Muzaffarnagar for necessary compliance.

(2024) 12 ILRA 423
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4793 of 2019
 With
 Other Connected Cases

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

Counsel for the Appellant:

Lav Srivastava, Rajan Srivastava, Sr.
Advocate

Counsel for the Respondent:

G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Sections 302, 147, 148, 149, 307, 325 & 452 - Code of Criminal Procedure, 1973 - Section 437-A – Bail to require accused to appear before next Appellate Court - Culpable Homicide Not Amounting to Murder - Common Intention - Sudden provocation - fatal injury - severe beating - solitary fatal injury - A sudden provocation arising from a perceived interference with property rights does not amount to murder under Section 302 IPC but instead falls under culpable homicide not amounting to murder under Section 304 (Part I) IPC - When injuries inflicted without premeditated intention result in death, the act is classified under Section 304 (Part I), as the intent was to cause grievous harm rather than death.(Para - 33,34,36,38)

(B) Distinction between Murder and Culpable Homicide not amounting to Murder: - In cases of sudden provocation or heat of the moment incidents, if the intent to kill is not clearly established, the offense may fall under Section 304 IPC rather than Section 302 IPC. **(Para - 33,34,36,38)**

Case involved a dispute over a plot of land - Appellants, armed with various weapons, assaulted the deceased - resulting in fatal injuries to his head - Incident arose suddenly when the deceased was carrying bricks - perceived by the accused as an encroachment on disputed property - Injuries were also sustained by other family members. **(Paras 1-8, 32-36)**

HELD: - Evidence not appreciated in correct perspective. Possibility of incident occurring at the spur of the moment on account of perceived threat to the property of accused has been overlooked. Findings and conclusions drawn by

trial court, modified. Act of accused (Malkhan) causing fatal injury on the head would qualify to be an offence under Section 304 (Part-I) IPC. Conviction of accused converted from Section 302 IPC to Section 304 (Part-I) IPC. Three other appellants were convicted under Section 325 IPC and released based on sentence already undergone. **(Para – 39,40,41)**

Appeals partly allowed. (E-7)

List of Cases cited:

Shri Kishan & ors. Vs St. of U.P., AIR 1972 SC 2056

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

1. These appeals arise out of the judgment and order of conviction and sentence dated 1.6.2019, passed by the Additional Sessions Judge, Anoopshahar, Bulandshahar in Sessions Trial No.647 of 2006 (CNR No. UPBU07000005-2006), State Vs. Natthu Singh and others, arising out of Case Crime No.35 of 2006, Police Station Naraura, District Bulandshahar, whereby the accused appellants Natthu Singh, and Ramveer have been convicted and sentenced to two years rigorous imprisonment under Section 147 IPC; ten years rigorous imprisonment alongwith fine of Rs.10,000/- each under Section 307/149 IPC; rigorous life imprisonment alongwith fine of Rs.25,000/- each under Section 302/149 IPC, whereas accused appellant Raju has been convicted and sentenced to two years rigorous imprisonment under Section 147 IPC; ten years rigorous imprisonment along with fine of Rs.10,000/- under Section 307/149 IPC; rigorous life imprisonment alongwith fine of Rs.25,000/- under Section 302/149 IPC; five years rigorous imprisonment alongwith fine of Rs.2,000/- under Section 452 IPC, and accused appellant Malkhan has been

convicted and sentenced to three years rigorous imprisonment under Section 148 IPC; ten years rigorous imprisonment along with fine of Rs.10,000/- under Section 307/149 IPC; rigorous life imprisonment alongwith fine of Rs.25,000/- under Section 302/149 IPC. On failure to deposit fine to undergo additional simple imprisonment for six months under Section 307/149 IPC; for one year under Section 302/149 IPC; and for one month under Section 452 IPC. All the sentences have been ordered to run concurrently.

2. There existed a disputed piece of land on the west of the house of the informant. The dispute was between him and Natthu Singh son of Bihari Singh. For this reason Natthu Singh allegedly maintained enmity against the informant. The incident in the present cases occurred on 1.8.2006 at about 9.00 in the morning when the informant's son Hetram (deceased) was carrying bricks lying in front of the house for construction of a fence on the roof. It was then that the accused Natthu Singh, Malkhan Singh, Ramveer and Raju sons of Bihari Singh and Devendra @ Bhola son of Natthu Singh, Omvir son of Malkhan Singh, Bholeram son of Hotiram came to the house of the informant. Natthu was carrying a water tap handle (Nal Ka Hattha); Ramveer an iron rod; Raju a stick; Malkhan a rifle; Devendra a countrymade pistol; Omvir a stick and Bholeram an iron rod. As soon as the accused came to the house of the informant, they exhorted that let the issue be finished once for all, and thereafter these accused assaulted informant's son. Malkhan tried to fire from his rifle but for some glitch it failed, despite couple of attempts, whereafter with the butt of his rifle and others with weapon in their hand started assaulting the informant's son and

other family members. The informant was having his breakfast as he had to go to school and on hearing the screams of his son Hetram, the informant alongwith his son Digamber and wife of Hetram namely Neksee rushed out and saw that all accused were assaulting Hetram. In the attempt to save Hetram, informant's son Digamber, informant himself, wife of Hetram Neksee sustained injuries. On hearing the scream of these persons Nepal Singh and Dileep alongwith others came and but for their intervention everyone would have been done to death. Seeing these persons coming for rescue, accused Devendra fired from his Tamancha in air. Informant's daughter, who Sarvesh was inside the house was also beaten in the house. Thinking that informant's son Hetram has died, Malkhan told Devendra not to fire and the accused left. With these contents the FIR came to be lodged on 2.4.2006 at 3.10 pm on the basis of written report of informant as Case Crime No.35 of 2006, under Sections 147, 148, 149, 307/34, 452, 323, 504 IPC. After the lodging of the report the Investigating Officer came to the spot and collected plain and bloodstained soil from the place of occurrence on the date of incident itself.

3. All the injured namely Digamber, Neksee, informant Nand Kishore and Hetram, who later died, were rushed to the nearest hospital at Naraura. The first examination of injuries by the Medical Superintendent, NAPS, Naraura, contains following specification of injuries:-

"1. Het Ram

Multiple deep lacerated wound over scalp.

I) 4-5 inches on right parietal region

II) 2-3 inches left parieto occipital region

III) Bleeding from both nostrils
Bleeding from both ears and multiple abrasion over body
Patient was unconscious responding to deep painful stimuli
Patient was in state of shock pulse feeble BP-not recordable
Haematoma left temporal right occipital region
2. Nand Kishore
3-4 inches lacerated wound over scalp
Multiple abrasion over body
3. Digambar
Multiple lacerated wound over scalp
4-5 inches L.W. over occipital region
1-2 inches L.W. over occipital parietal region
4. Nekshree
2-3 inches lacerated wound over (scalp) parieto occipital region
1 inches lacerated wound over chin”

4. The informant’s son Hetram and other injured were then taken to the J.N. Hospital at Aligarh Muslim Universtiy wherein their injuries were examined again. The injury reports in respect of Hetram, Digamber, Nekshiya and Nand Kishore of the Hospital at Aligarh are on record, as per which following injuries were found:-

“(1) Name:- Het Ram

Nature of injury	Dime nsion of Injury	Part of the body inflic ted	Simple/G revious	Prob able wea pon used
1. Two stitche d	4 cm long & 3	Left parie tal	Simple	Blun t

wound lying side by side	cm long	regio n of skull		
2. Two stitche d wound present side by side	5 cm long & 3 cm long	Left parie to occi pital regio n	Simple	
3. CNS patient is deeply unconsc ious not respon ding to painful stimuli pupil bilater ally dilated with sluggis h reactio n to light		Grie vous		

(2) Name:- Digamber Singh

Natur e of injury	Dime nsion of Injury	Part of the body infli cted	Simple/G revious	Prob able weap on used
1. Stitch ed woun	2 cm long	Top of head	Simple	

d				
2. Stitched wound	Occipital region of head	4 cm long	Simple	
3. Lacerated wound red margin	4 cm x .5 cm skin deep	Little finger of left hand	Simple	Blunt
4. Swelling with tenderness with abnormal mobility with bony crepitus at base of middle phalanx of left thumb suggestive of fracture			Greivous	Blunt

(3) Name:- Neksee Devi

Nature of injury	Dimension of Injury	Part of the	Simple/Greivous	Probable weapon used

y		body inflicted		on used
1. Stitched wound	3 cm long	Frontal area of head	Simple	
2. Abrasion with red base	3 cm x 2 cm	Right shoulder	Simple	

(4) Name:- Nand Kishore

Nature of injury	Dimension of Injury	Part of the body inflicted	Simple/Greivous	Probable weapon used
1. Stitched wound	3 cm long	Right parietal region	Simple	
2. Stitched wound	5 cm long	Left parietal region	Simple	
3. Abrasion with red base	2 cm x 1 cm	Right knee	Simple	Blunt
4. Abrasion with red base	12 cm x 6 cm	Left side of chest	Simple	Blunt "

5. It appears that Hetram was later taken to Safdarjung Hospital at New Delhi where he ultimately died at 12.00 noon on 2.4.2006. Inquest was conducted on 2.4.2006 at the hospital itself, which is duly exhibited during trial as Ex.Ka-7. The apparent cause of death as per inquest was the head injury caused by iron rod. The postmortem of deceased Hetram was conducted in Safdarjung Hospital, in which following injuries were noticed in the external examination and the internal examination:-

“External Examination

(1) Lacerated wound (LW) – over midline, in anterior part, 3 x 1 cm size bone deep.

(2) LW- over right side of the head, 4 x 1 cm, stitches present, 3 cm above right ear bone deep, obliquely present.

(3) LW- over right side of head, 3 x 1 cm in size, stitches present, 2.5 cm behind injury no.2, obliquely present.

(4) LW- over midline, 3.5 x 1 cm size, stitches present, in back part of head, 6 cm behind injury no.1, bone deep.

(5) LW- over left side of front of head, inverted V in shape, 5 cm x 3 cm in size, stitches present, bone deep.

(6) left eyelids blue black.

(7) abrasion over bridge of nose, (1 cm size) and left maxilla (1 cm size), both scabbed.

(8) abrasion over back of Right elbow, 3 x 2 cm, scabbed.

(9) Bruise – over right forearm, lower part, back side, 9 x 3 cm size, vertical, blue red in colour.

(10) bruise mixed with abrasion, right side of back, lower part, 7 x 3 cm, blue red colour, obliquely present.

(11) Bruise over right thigh, outer part, 7 x 3 cm size, blue red in colour, horizontally placed in middle part.

(12) Bruise over right thigh, outer part, 5 x 3 cm size, blue red in colour, horizontally placed in middle part, 3 cm below injury no 11.

Internal Examination

1- Head – scalp- contused, lacerated below injuries no. 1 to 5

Skull- fracture separation of all sutures, fracture left temporal, parietal and frontal bones piece separated and present in place.

Brain- extradural haematoma in left anterior region

- duramater lacerated below fractured skull piece

-subdural haematoma over left superior and side(lateral) surfaces

- left temporal, parietal and frontal lobes contused and lacerated with subarachnoid haemorrhages.

2. Neck- All structures – NAD (No abnormality detected)

thorax – ribs+ lungs - NAD

Abdomen – stomach – 100 ml medicinal fluid present

Organs- NAD,

Rectum and bladder empty.”

6. Injury no.5 i.e. lacerated wound on the left side of front of head has been treated to be fatal and sufficient to cause death in the ordinary course of nature.

7. The investigation followed with the arrest of the accused persons. Recovery of weapons used in the crime was made by the Investigating Officer. The water tap handle (Nal Ka Hattha) containing mud without any bloodstain was recovered on the pointing out of the accused Natthu, whereafter on the pointing out of the accused Raju, a stick of Mulberry (Sehtoot Ka Danda) was recovered on which there were bloodstains and some hairs (Ex.Ka-14). On the pointing out of the Bholaram,

an iron rod was recovered on 5.4.2006. Similarly on 19.4.2006 an iron rod was recovered on the pointing out of the accused Ramveer, which was admitted by the accused to have been used in the offence. On 21.4.2006 a stick was recovered from the accused Omvir.

8. The investigation proceeded with submission of chargesheet against the accused under Section 147, 148, 149, 307, 302, 452, 323, 34 IPC. The cognizance on the chargesheet was taken and the case was committed to the court of sessions, where it got registered as Session Trial No.647 of 2006. Charges were framed against the accused on 5.9.2008 and were read out to the accused, who denied their implication and demanded trial.

9. During the course of trial, documentary evidence are adduced by the prosecution in the form of FIR as Ex.Ka-9; written report as Ex.Ka-1; recovery of item used in the crime as Ex.Ka-14; recovery memo of bloodstained and plain soil as Ex.Ka-13; recovery memo of a piece of rod iron as Ex.Ka16; recovery memo of murder weapon bloodstained wooden stick Shehtoot as Ex.Ka17; recovery memo of items used in crime as Ex.Ka 21; injury reports dated 1.4.2006 as Ex.Ka-3, Ex.Ka-4, Ex.Ka-5, Ex.Ka-6, and Ex.Ka-23; postmortem report as Ex.Ka-2; death report as Ex.Ka-7; chargesheet as Ex.Ka-20; site plan with index as Ex.Ka-12; site plan with index as Ex.Ka-18; and site plan with Index as Ex.Ka-19.

10. In addition to above, the prosecution has produced the informant as PW-1, who has supported the prosecution case. He has stated that the accused persons were all residents of his village. The accused Raju is the co-brother of the

informant's deceased son Hetram. There existed a plot of land, over which he had a dispute with Natthu Singh. The dispute was got resolved with the intervention of family members, according to which Rs.45,000/- was to be paid by the informant to the accused Natthu. However, Natthu was not ready to accept this amount, on account of which he (Natthu) maintained enmity. On 1.4.2006 at about 9.00 in the morning, Hetram (deceased) was carrying bricks lying outside the house of informant to the roof for raising a fence when accused persons came armed with a water tap handle (Nal Ka Hattha), iron rod, stick, rifle, countrymade pistol, stick and iron rod. On hearing the shouts of Hetram, the informant alongwith his younger son Digamber and Hetram's wife Nekshiya came out and saw the accused persons assaulting Hetram. Malkhan tried to fire from his rifle but did not succeed, whereafter he assaulted Hetram with rifle butt. Other accused assaulted the deceased with sticks and iron rods. In the attempt to save his son, informant alongwith his younger son and daughter-in-law also sustained injuries. The accused then entered the house of the informant and also assaulted his daughter Sarvesh. Thereafter Nepal and Dulli came at the spot. Devendra then fired in the air from his Tamancha. Nepal and Dulli retracted on account of firing by Devendra. Treating Hetram to have died, the accused left. The informant, Digamber, Hetram, Neksee and Sarvesh all sustained injuries and were rushed to NAPS Hospital at Naraura, whereafter they were referred to the District Hospital at Aligarh. Considering the serious condition of Hetram he was referred to Delhi. Informant has proved the written report, which was got scribed by Puran Singh on 2.4.2006. On 3.4.2006 informant came to know that his son has died in Delhi and the

written report in that regard was made at the police station. This written report is Ex.Ka-2.

11. Informant has been cross-examined by the accused and he has been questioned on the relationship between the parties and also the dispute of land. Informant has denied that his son Hetram was a criminal. However, he admitted that Hetram had remained in jail for two months for an offence under Section 376 IPC. He denied the fact that Hetram was implicated under the Gangsters Act or that there were other cases against him. Informant's son Digamber also has criminal record and was sent to jail after the incident in an offence under Section 307 IPC and is mostly lodged in jail. The informant has denied the suggestion that police station fell on his way to the hospital from the place of incident. The police station is at a distance of about one and a half furlong, whereas the hospital is at about two furlongs. He has also stated that he was unconscious in the hospital at Aligarh. The hospital where informant alongwith others were first taken for treatment was not open to public and a suggestion has been given to him that Kunwar Sen since was working in that hospital, who happens to be his cousin, that is why they got themselves examined in this hospital. The informant (PW-1) has stated that about 3000 bricks were lying in front of his house. His son Hetram had already carried 50-100 bricks on the roof while other bricks were lying there. He has denied the suggestion that any dispute occurred on account of bricks. He has, however, not shown the bricks lying in front of his house to the Investigating Officer. He has denied the suggestion that no bricks were found in front of the house and his son was not carrying the bricks on the roof.

12. PW-1 has moreover admitted that there existed a boundary around the disputed plot. He has nevertheless denied the suggestion that about 6000 bricks were kept in that plot and that he wanted to grab it. Informant alleged that the disputed plot belonged to him. In the panchayat it was agreed that Rs.45,000/- would be paid by informant to Natthu but Natthu was not willing to take that amount. He has, however, not mentioned the liability to pay Rs.45,000/- in the report. He has also denied the suggestion that on account of harassment and torture meted out by his son Hetram to several persons in the locality, someone else has caused the incident.

13. Digamber Singh (PW-2), son of the informant, is the other prosecution witness. He has supported the prosecution case about a dispute subsisting in respect of open piece of land with Natthu. He too admits that the villagers had got the dispute resolved and they had to pay Rs.45,000/- to Natthu but he was demanding Rs.60,000/-, on account of which enmity occurred. PW-2 has substantially followed the stand of PW-1 about the manner in which the incident occurred. He has stated that Malkhan assaulted him and his brother with the rifle butt. Others assaulted them with weapon in their hand. In his further cross-examination PW-2 has admitted that he has not shown the place to police where the bricks were lying in front of the house. He could not tell as to how many bricks were lying in front of the house. He could not even guess the number of bricks lying there. He has, however, denied the suggestion that in fact no bricks were lying in front of the house. He claims that after the incident he fainted and only regained consciousness in the hospital at Aligarh during night. He could offer no explanation

as to why no report was lodged, though the police chowki was on the way.

14. PW-3 is Dr. Sarvesh Tandon of Safdarjung Hospital, who has proved the postmortem report. In his opinion, the cause of death was head injury, which could have been caused by a hard and blunt object. In the cross-examination he has stated that injuries on the deceased could have been caused by stick and iron rod. It could not have been caused by rifle butt or Sariya. Fatal injury could have been caused by the water tap (Nal Ka Hattha). He has, however, stated later in his cross-examination that rifle butt is heavy and injury on the head could have been caused by it. Cause of death was specified as cranium cerebral damage.

15. PW-4 is Dr. Nazim Alam, who was posted at J.N. Medical College, Aligarh and has proved the injury report. PW-5 is ASI P.D. Meena, who was posted at Sarojani Nagar at Delhi. He has proved the inquest report. PW-6 is S.I. Vinod Kumar Singh, who has proved the GD entry made at 3.10 pm on 2.4.2006. PW-7 is SI Madan Mohan Pandey, who was the first Investigating Officer in the case. He collected the bloodstained and plain earth and has proved the recovery memo in that regard. He has inspected the place of occurrence on the disclosure made by Sarvesh (daughter of the informant).

16. PW-8, Karan Singh Chauhan, is the second Investigating Officer. He arrested the accused on 5.4.2006 and also recovered the weapon used in the offence. Various recovery memo in that regard have been proved by this witness. In the cross-examination, PW-8 has not been able to explain as to whether the recovered weapons used in the crime were sent to Forensic Science Laboratory or not.

Investigating Officer had not recorded the statement of doctor of Naraura Hospital during the investigation. He also made no effort to collect injury report from NAPS Hospital, Naraura.

17. PW-9 is Dr. Rajesh Bhaskar, who was posted at NAPS Hospital, Naraura and has proved the first injury report. This witness has stated that NAPS hospital is only for the employees of Naraura Atomic Power Plant and only if police comes with injured that the hospital is authorized to treat the patient. He has given the information of the treatment of injured to the police. The hospital record in respect of examination of injured was latter destroyed but he had maintained the carbon copy in his office. He has denied the allegation that in collusion with the informant's side he has falsely prepared the injury report.

18. Smt. Sarvesh, who happens to be the daughter of the informant, has been called by the court as a witness and her statement is recorded as CW-1. She has supported the prosecution case. She claims that she saw the accused persons assaulting her deceased brother. At the time of incident she was inside the house. She has alleged that though Devendra had a Tamancha but he had not fired. Malkhan also had a rifle but he had not fired from it and had only used the butt of rifle. She claims to have seen the incident from inside the house, since the doors were open. She was assaulted inside the house by the accused Bholeram, Raju and Omvir. In her further cross-examination CW-1 has stated that after Nepal Singh and Dileep Singh came to save her, Devendra fired due to which they backtracked.

19. Smt. Nekshiya, wife of late Hetram, has been produced as CW-2. She has also supported the prosecution case,

according to which cause of incident was the dispute between the informant and Natthu over a portion of land, which was purchased by Natthu from Ganga Devi, from her family. In the panchayat it was decided that Rs.45,000/- would be paid by informant to Natthu, but Natthu did not accept this decision of panchayat, on account of which enmity existed between the informant and Natthu. This witness has stated that Malkhan had fired on her husband but the fire missed. Natthu and other accused kept assaulting her husband. She was also assaulted. This witness has further stated that her husband was carrying bricks since 7.00 in the morning to the rooftop. By the time accused came, few bricks had remained. Some bricks were lying at the place where incident occurred.

20. On the basis of aforesaid evidence led by the prosecution, the statement of accused persons was recorded under Section 313 Cr.P.C. All the accused have stated that they have been falsely implicated and that medical report and other evidence are not reliable. Accused Rajvir has stated that no incident occurred at the place indicated by the prosecution.

21. The defence has produced Narendra Singh, Block Education Officer, Anoopshahar as DW-1. He has proved the record, which indicated school timings where informant was employed. As per the record, the school timing was 7.00 am to 12.00 noon.

22. It is on the strength of above evidence that the trial court has concluded that the prosecution has established the guilt of the accused appellants beyond reasonable doubt, and consequently, the trial court has convicted and sentenced the accused appellants, as per above.

23. Sri V.P. Srivastava, learned Senior counsel for the appellants submits that incident herein has not occurred in the manner suggested by the prosecution and that the accused appellants have been falsely implicated. He submits that there was no intention on part of the accused persons to commit murder of Hetram, inasmuch as two of the accused persons i.e. Malkhan and Devendra @ Bhola were armed with rifle and tamancha but no firearm injury has been caused to the deceased. So far as attempted use of rifle and tamancha are concerned, learned Senior counsel argues that the testimony of witnesses in that regard is an exaggeration only to attach greater seriousness to the act of the accused persons and that such version otherwise is not consistent with other prosecution evidence on record. It is argued on behalf of the appellants that the intention of accused, at best, was to give severe beating and thereby cause grievous injuries due to dispute of immovable property and the solitary blow on the head was the apparent cause of death. Submission is that conviction and sentence under Section 302 IPC is excessive and disproportionate to the gravity of offence proved and, therefore, the judgment of conviction and sentence cannot be sustained.

24. So far as the injuries on other persons are concerned, most of such injuries are simple in nature and do not indicate any intent of the accused to cause any serious harm to them.

25. On behalf of the informant, Sri Sunil Kumar Dwivedi and learned AGA for the State, however submits that the conviction and sentence is justified on the evidence led by prosecution, inasmuch as all accused have come armed and caused

the fatal injury to the deceased. Other family members have also been assaulted. It is also urged that accused Malkhan did try to fire from his rifle on the deceased but due to some glitch rifle did not fire, whereafter rifle butt was used to cause injury on the head of the deceased. It is submitted that causing of injury by rifle butt is clearly indicative of the intent of accused Malkhan to commit the murder of deceased. It is also submitted that there was sufficient motive for the accused to commit the offence and the intent was to end the life of the deceased. The respondents, therefore, argue that the conviction of the accused persons is based upon correct appreciation of evidence on record which requires no interference. It is also argued that the sentence awarded to the accused persons clearly commensurate with the gravity of offence as all the accused had joined with the intent to commit the murder and, therefore, no interference in the appeal is called for.

26. We have heard Shri V. P. Srivastava, learned Senior Counsel, assisted by Shri Rajan Srivastava, learned counsel for the accused-Natthu Singh, and Shri Pankaj Kumar Shukla, learned counsel for the accused-Malkhan, Raju and Ramveer, as well as Mrs. Archana Singh, learned A.G.A. for the State and have examined the records including the original records of Sessions Trial No.647 of 2006.

27. At the outset, we may note that accused Natthu Singh, Ramveer, Raju and Malkhan, Devendra @ Bhola, Omvir and Bholeram are shown to be the aggressor in the incident leading to death of Hetram and injuries being caused to informant Nand Kishore, Digamber and Neksee (wife of deceased Hetram). Out of all these accused Devendra @ Bhola and Omvir were

declared juvenile and their trial was segregated. Accused Bholeram, who was assigned the role of carrying iron rod, has died. The conviction and sentence of accused Natthu Singh, Ramveer, Raju and Malkhan alone are, therefore, the issues to be determined in the present appeal.

28. Before coming to the incident we would like to refer to the prosecution evidence on the aspect of motive for the offence and the genesis of the incident. The informant in his written report made to the police has clearly acknowledged the fact that to the west of his house there is a disputed piece of land. Litigation over such disputed land was pending between informant and accused Natthu Singh son of Bihari Singh. Natthu Singh allegedly maintained enmity with the informant and his family on account of such dispute. The witnesses of fact, namely the informant and his son Digamber both have admitted such enmity between the parties. It has come in their testimony that a panchayat was held with the intervention of villagers to settle the dispute between informant and accused Natthu Singh. In this panchayat it was agreed that Rs.45,000/- would be paid by informant to accused Natthu Singh. Both the prosecution witnesses of fact alleged that though informant was willing to pay this amount of Rs.45,000/- but the same was not accepted by accused Natthu Singh. PW-2 states that accused Natthu Singh was asking for payment of Rs.60,000/- instead of Rs.45,000/- due to which the dispute was not resolved. The prosecution evidence, therefore, reveals that there was a disputed piece of land close to the house of informant over which the claim of accused Natthu Singh was acknowledged by the informant and it was agreed that a sum of Rs.45,000/- would be paid to accuse Natthu Singh. Fact that this amount was not

accepted is a different aspect on which we may not attach much importance, but the admitted position, nevertheless, is that the right of accused Natthu Singh over this disputed land was recognised and an amount of Rs.45,000/- was admitted by the informant to be payable to accused Natthu Singh but in fact this amount was not paid/received.

29. The prosecution evidence also shows that the disputed plot was surrounded by a boundary and some bricks were kept inside this plot. Learned Senior counsel for the appellants argues that the genesis of the incident was the act of deceased Hetram in taking some of the bricks from the plot to his house on which an objection was raised by the accused persons. This argument is countered by the respondents by submitting that the bricks taken by Hetram to the roof were stacked outside the house of the informant and that such bricks belonged to the informant.

30. On the above aspect we have examined the evidence and we find that though informant alleges that the bricks belonged to him and were stacked outside his house but in fact no such bricks were shown to the I.O. when he inspected the place of offence. In the site plan also the place where bricks were stacked is now shown. No evidence has been led by the prosecution to show that the bricks that were being taken by Hetram on the roof for erecting its fence belonged to the informant. The prosecution witnesses, nevertheless, admitted that the disputed plot was surrounded by a boundary and that some bricks were stored in it.

31. In the absence of positive proof led by the prosecution to show that bricks belonged to informant and stacked outside

the house of the informant the possibility of such bricks being taken from the disputed plot cannot entirely be ruled out. It is otherwise admitted to the prosecution witnesses that the incident occurred at the time when Hetram was carrying bricks. In the event bricks were stacked outside the house of informant and it belonged to the informant then there was hardly any reason for an issue to be raised on the carrying of bricks by Hetram. The fact that the incident occurred when Hetram was carrying the bricks appears to be the act of provocation which triggered the incident.

32. Accused Natthu Singh, Malkhan, Raju, Ramveer (appellants before us) are all real brothers being sons of Bihari Singh. They alongwith others are said to have suddenly come to the house of informant while Hetram was carrying bricks from outside to his roof. The FIR as well as the two witnesses of fact clearly specify the weapons in their hands. Accused Natthu Singh is shown to be carrying a water tap handle (Nal Ka Hattha) while accused Ramveer had an iron rod and accused Raju was carrying a stick. Accused Malkhan allegedly carried a rifle. But for the rifle in the hands of accused Malkhan and tamancha in the hands of accused Devendra @ Bhola all others were carrying articles which are easily available in any village. Water tap handle (Nal Ka Hattha), stick and iron rod (sarya) etc. are easily found. It appears that the incident occurred suddenly when the accused persons found that Hetram was carrying the bricks to his roof top. The other two accused, namely Malkhan and Devendra @ Bhola were carrying firearms.

33. Prosecution witnesses of fact allege that accused Malkhan tried to fire from his rifle but the fire did not take place.

Accused Devendra @ Bhola allegedly was armed with tamancha but it is admitted case of prosecution that he has not fired on Hetram. We find some substance in the argument of the appellants that in the event accused persons wanted to kill the deceased they could have easily fired from the tamancha if the rifle had developed some snag. No empty cartridges etc have been recovered from the place of occurrence. A cumulative assessment of the prosecution evidence on record on the aspect of genesis and the manner of incident persuades us to assume the possibility that on account of dispute between the parties in respect of the plot of land the incident suddenly occurred on the perceived act of deceased in taking disputed bricks to his house. The accused persons suddenly reacted and rushed to the house of informant and seeing Hetram carrying bricks started assaulting him. The intent apparently was to stop Hetram from taking the bricks to his house. Temper ran high on account of perceived act of deceased and the intent apparently was to cause serious beating to Hetram as a lesson for doing something wrong to Natthu Singh and his family. We, therefore, find substance in the argument of Sri Srivastava that this is not a case where the intent of the accused was to commit murder of Hetram.

34. Instead the intent was to give severe beating and thereby cause grievous injuries to the accused and in their anxiety to do so at the spur of the moment, the deceased was assaulted by the accused. There are two injury reports followed with the description of injuries in the postmortem. In the first and second injury report, reproduced above, only two injuries are found on Hetram. These injuries are on the right parietal region and left parietal occipital region. Hetram was found bleeding from both his nose. In the

postmortem report injuries are more. The other injuries are in the form of abrasion and bruises etc and the autopsy surgeon has opined that injury no.5, which is a lacerated blow on the head, is the solitary injury capable of causing death of the deceased. Injuries on others are mostly simple in nature and could have been caused by a blunt object. Only other injury grievous in nature is of Digamber which is at the base of middle phalynx of left thumb suggestive of fracture. The injury on the head by a blunt object is serious enough to cause death in ordinary course. We, therefore, are of the view that the case in hand would fall not under Section 302 IPC but would fall in Part-I of Section 304 IPC. This too would be restricted to the person who caused the fatal injury on the head of deceased.

35. Accused Malkhan is assigned the role of assaulting Hetram with his rifle butt. In the opinion of the doctors, who had examined the injured and had conducted postmortem fatal injury on the deceased could have been caused by the butt of the rifle.

36. The witnesses are consistent that accused Malkhan assaulted Hetram with his rifle butt on his head. The FIR also records that accused Malkhan assaulted the deceased with the butt of the rifle. In such circumstances we hold accused Malkhan to be guilty of the offence under Section 304 (Part-I) IPC. So far as other accused are concerned, they are liable to be convicted for offence under Section 325 IPC as we have found that the incident occurred instantly and the intent of accuse was to cause serious beating to Hetram.

37. On behalf of the appellants, reliance is placed upon the judgment of the Supreme Court in Shri Kishan and others

Vs. State of U.P. AIR 1972 SC 2056. In para 6 the Supreme Court has observed as under:-

"6. There was no previous enmity between the accused-appellants on the one hand and Seru deceased and Sadaphal (PW) on the other. The occurrence was the offshoot of a trifling incident in the nature of a scuffle between two urchins. Nandlal, it appears then went weeping and told his father that he had been beaten by Seru and Sadaphal. The four accused thereupon protested to Seru and Sadaphal for the beating given to Nandlal and also belaboured them with lathis. Five injuries were caused to Seru. Apart from the one injury on the head, which proved fatal, the other injuries were not of a very serious nature. Sadaphal had seven injuries all of which were simple in nature. The prosecution evidence, as observed by the High Court, does not indicate as to which one of the accused appellants inflicted the fatal blow on the head of Seru. As such, none of the accused can be held to be personally liable for the fatal injury. The liability can only be vicarious under Section 34 of the Penal Code, 1860 and, as such, we have to find out as to what was the common intention of the accused in furtherance of which they caused injuries to Seru and Sadaphal. In this context we find that the High Court has arrived at the following finding;

"There could, therefore, be no doubt that the common intention of the appellants was to give a severe beating to Seru and Sadaphal."

The above finding as well as the broad circumstances of the case go to show that the common intention of the accused was to cause grievous injury to the victim. The fact that one of them exceeded 'the bound and gave a fatal blow on the head of

the deceased would make him personally liable for the fatal injury, but so far as the other three are concerned, they can be held liable only for the injuries which were caused in furtherance of the common intention and not for the fatal injury. As it is not possible on the material on record to find out as to which one of the accused gave the fatal blow, there is no escape from the conclusion that each one of the four accused can only be guilty of the offence under section 325 read with section 34 Indian Penal Code. We accordingly alter the conviction of each of the accused-appellants from under section 302 read with section 34 Indian Penal Code to that under s. 325 read with s. 34 Indian Penal Code. Each of them is sentenced to undergo rigorous imprisonment for a period of five years on that count. The sentence of rigorous imprisonment for a period of one year awarded to each of the accused under section 323 read with section 34 Indian Penal Code would run concurrently with the above sentence. The appeal is allowed to that extent."

38. From the above observations, we find support for our opinion that all the accused persons came with the intent of causing severe beating to Hetram for having done some objectionable act which interfered with their rights over the property and in the process the solitary injury on the head proved fatal.

39. We have perused the judgment and we find that the evidence has not been appreciated in correct perspective and possibility of incident occurring at the spur of the moment on account of perceived threat to the property of accused by Hetram has been overlooked. For the reasons indicated in our judgment, we are not inclined to endorse the view of the trial

court. The findings and conclusions drawn by the trial court are, accordingly, modified.

40. These appeals are, accordingly, allowed in part. The conviction of accused appellant Malkhan is converted from Section 302 IPC to Section 304 (Part-I) IPC, whereas for three other accused, namely Natthu Singh, Ramveer and Raju their conviction is substituted as that under Section 325 IPC. Since these three accused have already served incarceration of more than six years, therefore, they are released on the sentence already undergone by them, unless they are wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

41. So far as accused Malkhan is concerned, we find that the act on his part of causing fatal injury on the head would qualify to be an offence under Section 304 (Part-I) IPC. This is, however, first offence of accused Malkhan and we have already seen the context in which the incident occurred. In such circumstances we sentence him to seven years rigorous imprisonment and enhance the fine to Rs.1 lakh, failing which he will undergo default sentence of one year.

42. Let a copy of this order be sent to the concerned Chief Judicial Magistrate for necessary compliance.

(2024) 12 ILRA 437
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.12.2024

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Criminal Appeal No. 8105 of 2023

Sandeep Kumar & Ors. ...Appellant
Versus
State of U.P. & Anr. ...Respondent

Counsel for the Appellant:

Deepak Singh Yadav, Rajiv Lochan Shukla

Counsel for the Respondent:

Abhishek Tandon, Ashima Goel, G.A., Manu Srivastava

A. Criminal Law-Indian Penal Code,1860-Sections 147,148,452,323,504,506 &354kha-The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,1989-Sections 3(2)(5) & 14-A(1)-Criminal Procedure Code,1973-Section 319-the appellants challenged order passed by ADJ, summoning them as additional accused u/s 319 Crpc –Held, the court noted that complainant had not filed any protest petition against the investigation's findings, the court held that mere mention of names in testimony without corroborative evidence is insufficient-the court set aside the trial court's order ruling that the complainant's deposition did not constitute "strong and cogent evidence" required for invoking section 319 Crpc.(Para 1 to 16)

The appeal is allowed. (E-6)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors.(2014) 3 SCC 92
2. Labhuji Amratji Thakor & ors.Vs St. of Guj. & anr.(2019) 12 SCC 644

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Appellants have filed this appeal under Section 14-A(1) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to challenge the impugned order dated 28.07.2023 passed by the Additional Session Judge, Court No.15, Allahabad in Sessions Trial No. 164

of 2020, arising out of Case Crime No. 550 of 2020, under Sections 147, 148, 452, 323, 504, 506, 354-Kha I.P.C. and Section 3(2)(5)Ka Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Jhunsi, District Allahabad, whereby in exercise of power under Section 319 Cr.P.C., the appellants have been summoned as additional accused.

2. Briefly, the facts leading to the appeal are that on the basis of written complaint by Dharma Devi-opposite party no.2, the first information report bearing Case Crime No. 550 of 2020, (Annexure No.1), was registered, wherein it is alleged that complainant's father-in-law, namely, Bhawani Deen under the influence of liquor in a deceitful manner was made to execute a sale deed in favour of Sunil Kumar son of Bhalli Lal Yadav, and the ancestral property was transferred in favour of the purchaser without the consent of the others, which also included the ancestral house. For the last two years, Sunil Kumar had been harassing complainant and her family members, who every day is forcing them to vacate the property. About six months back, Sunil Kumar along with his accomplices had given beatings to the complainant and her husband, and in this regard, an information was given to the police, but no case was registered. For the last one week, Sunil Kumar along with his associates and family members has been intimidating the complainant. Today, on 14.09.2020 at around 7.00 a.m., Sunil Kumar along with Rajendra Prasad Yadav, Vijay Kumar and Kapil Yadav came to her house and dragged the complainant out on the road, and it turned her partially unclothed, and the assailants also committed obscenity, whereupon complainant's husband and son came to rescue her, but the accused persons abused

and threatened them all. When the neighbours arrived at the spot, the assailants fled away. On these broad allegations, the first information report was registered against four named and one unknown persons for the alleged commission of offences punishable under Sections 147, 148, 425,323, 504, 506 354 (Kha) IPC and Section 3(2)(va) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. After registration of the case, the investigation was carried out and upon conclusion of the same charge sheet under Section 173(2) Cr.P.C. was filed on 11.11.2020 only against Sunil Kumar, whereas the appellants were declared innocent.

4. Thereafter, the trial court analyzed the final report and proceeded to frame charges against the sole accused Sunil Kumar. During trial the complainant/opposite party no.2 was examined as P.W.-1 on 10.05.2023, and thereafter an application under Section 319 Cr.P.C. dated 25.07.2023 was moved by complainant for summoning appellants as additional accused, which has been allowed vide impugned order dated 28.07.2023. Hence this appeal.

5. Learned counsel for the appellants has argued that the allegations made in the FIR itself would show that the complainant has set up a false case to question the action of her father-in-law, who had disposed of his immovable property in favour of co-accused Sunil Kumar. The appellants were unnecessarily dragged in the said case through the FIR, and during investigation no incriminating evidence was collected by the Investigating Officer to show the involvement of the appellants, therefore,

they were declared innocent in the final charge sheet under Section 173(2) Cr.P.C. dated 11.11.2020.

6. Mr. Rajiv Lochan Shukla, learned counsel for the appellants has argued that the evidence on record is not enough for exercise of power under Section 319 Cr.P.C., but the trial court has erroneously exercised the jurisdiction under Section 319 Cr.P.C. while summoning the appellants as additional accused. Mr. Shukla, learned counsel for the appellants relies upon the decision of Hon'ble Supreme Court in the case of **Hardeep Singh Vs. State of Punjab and others** reported in (2014) 3 SCC 92, and urged that the principles and guidelines laid down by Hon'ble Supreme Court in the context of exercise of power under Section 319 Cr.P.C. have not been strictly followed by the trial court, while passing the impugned order. He submits that the impugned order is not based upon proper appreciation of material on record, therefore, the interference is warranted by this Court in exercise of appellate powers. He prays that the impugned order be set aside and the application under Section 319 Cr.P.C. filed by prosecution be dismissed, in the interest of justice.

7. The prayer is opposed by Mr. Tandon, learned counsel for the opposite party no.2, who has argued that the complainant had been maintaining consistent stand from the very beginning, who had specifically named the appellants as an accused in the FIR also. He further submits that the case of the complainant is also supported by other witnesses, who are independent, but the Investigating Officer had wrongly exonerated the appellants, and filed charge sheet only against co-accused Sunil Kumar. Learned counsel for the opposite party no.2 relies upon the decision

of Hon'ble Supreme Court in the case of **Hardeep Singh Vs. State of Punjab and others** reported in (2014) 3 SCC 92 to contend that the expression "evidence" as appearing in Section 319 Cr.P.C. is to be construed liberally and at this stage the statement of complainant would alone be enough for exercising the power under Section 319 Cr.P.C., if, it suggests involvement of other accused persons in alleged commission of crime. According to Mr. Tandon, learned counsel for the complainant, the trial court has carefully analyzed the prosecution case and the evidence adduced during trial, therefore, the impugned order dated 28.07.2023 does not call for any interference. He prays that the appeal be dismissed.

8. Learned State Counsel has also argued on the similar lines, who while opposing the prayer submitted that in evidence P.W.-1/complainant has specifically named the appellants in commission of the alleged crime, and the trial court has justifiably exercised the jurisdiction under Section 319 Cr.P.C. to summon the appellants as additional accused. According to the learned State counsel, the impugned order is validly passed, who further prays that the appeal be dismissed.

9. Learned counsel for the parties have been heard and with their assistance the case file has been perused carefully.

10. Time and again, the Hon'ble Supreme Court as well as various High Courts have consistently examined the scope of Section 319 Cr.P.C., which empowers the trial court to summon any other person as an accused in a pending trial, where the evidence recorded during trial suggests the involvement of such

person in commission of the alleged crime. The said provision 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 afresh, 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.’

11. A reading of the above would show that this Section vests extraordinary power with the trial court to summon any other person as an accused to face trial along with other accused, who are before the trial court, but invariably the Hon’ble

Supreme Court as well as different High Courts have held that this discretionary power should be exercised sparingly and with circumspection. At this juncture, when the trial has already commenced, the degree of satisfaction required to be recorded by the trial court while summoning any other person as additional accused, should be more than the standards required at the stage of framing of charges. In other words, the evidence on record must strongly suggest more than a "prima facie" case against such a person and his involvement in commission of the crime. Reference in this regard can be made to the decision of larger Bench of Hon’ble Supreme Court rendered in *Hardeep Singh Vs. State of Punjab and others* reported in (2014) 3 SCC 92, wherein the Question (iv), was answered in the following manner:-

“Question (iv)- What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.’

Ans.-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.”

12. Now, while reverting back to the facts and circumstances of the case in hand, this Court finds that no doubt the complainant/opposite party no.2 (P.W.-1) had indeed mentioned the names of the

appellants in the first information report, but after completion of investigation the said stand of the complainant was disbelieved by the Investigating Officer for lack of support/corroboration. During the course of hearing, the stand of Mr. Shukla, learned counsel for the appellants that ten independent witnesses who allegedly came to rescue P.W.-1 never mentioned the presence of the appellants in their respective statements under Section 161 Cr.P.C., has not been refuted by Mr. Tandon, learned counsel for the complainant. Though, according to Mr. Tandon, learned counsel the deposition of P.W.-1 recorded during the trial proceedings is enough for summoning the appellants as an additional accused.

13. But, this Court does not find any force in the arguments advanced by Mr. Tandon, learned counsel for the complainant as the deposition of complainant before the court cannot be construed as a new piece of evidence, which emerged for the first time and was not previously available when either the first information report was registered or the investigation was carried out. The expression "Evidence" as contained in Section 319 Cr.P.C. would not include a vague statement, and essentially the deposition of prosecution witness has to be tested in its substance.

14. The decision in **Hardeep Singh (supra)** was again followed by Hon'ble Supreme Court in **Labhuji Amratji Thakor and others Vs. State of Gujrat and another** reported in **(2019) 12 SCC 644**, wherein it was held that the process under Section 319 Cr.P.C. cannot be issued by the trial court in a casual manner, as in view of the decision in **Hardeep Singh's** case (supra), the trial court is required to analyze the

substance of the evidence recorded during trial. The relevant observations are reproduced below:

"13.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 appellantss. The mere fact that the Court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. 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 unrebutted, would lead to conviction."

15. During the course of hearing, it has also not been disputed by Mr. Tandon, learned counsel for the complainant that after submission of final report, whereby the appellants were declared innocent, the complainant did not take any steps, as neither any complaint nor protest petition was filed by the complainant. A perusal of the impugned order dated 28.07.2023 reveals that the trial court has not at all considered the facts and circumstances of the case, and has also ignored the law on the subject while exercising extraordinary jurisdiction to summon the appellants. The impugned order does not refer to any new evidence, its nature, much less any valid reasoning for exercise of this discretionary

After giving a thoughtful and respectable consideration to judgments cited above, I am of the considered opinion that the summoning of revisionist by trial court in suo motu exercise of powers under Section 319 Cr.P.C. is not contrary to law and is based on evidence on record. The impugned order is not hit by judgment of Hon'ble Supreme Court in Devendra Kumar Pal Vs St. of U.P. & anr. in SLP (Crl.) No.6960 of 2021 and Criminal Appeal No.885 of 2019 and Criminal Appeal No.886 of 2019 in Sukhpal Singh Khaira Vs The St. of Punjab as the facts of those cases were slightly different from the facts of the present case. In those cases summoning of additional accused was done after recording of conviction and passing of sentences to accuses persons who were already facing trial. Whereas in the present case the revisionist has been summoned under Section 319 Cr.P.C. in judgment dated 17.01.2024, prior to recording of conviction of chargesheeted accused persons. In paragraph No.50 of impugned judgment, wherein the court below has observed that on the basis of evidence of PW-2 Hariom, PW-3 Brij Mohan and PW-5 Manoj Singh complicity of Bharat Singh is also established alongwith other accused persons, they have also filed affidavit in support of this version during the course of investigation which is part of case diary. There are cogent and strong evidence on record regarding complicity of accused Bharat Singh in the offence, which if remains unrebutted his conviction may be fully probable, therefore cognizance has been taken for charge under Section 302/34 I.P.C. against accused Bharat Singh and he is being summoned under Section 319 Cr.P.C. for trial. (Para 21)

Hon'ble Supreme Court in Sukhpal Singh Khaira (supra) held that if the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with. (Para 23)

The Hon'ble Court also held that the power under Section 319 Cr.P.C. can be exercised before the pronouncement of order on sentence, where there is a judgment of conviction of the accused. In the case of acquittal the power should be exercised before the order of acquittal is pronounced. Hence, the

(2024) 12 ILRA 442
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2024

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

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

Counsel for the Opposite Parties:
G.A.

HELD:
The Hon'ble Court observed that once the learned trial judge passes an order on sentence, the Court becomes functus officio and it is not within its jurisdiction to pass an order under Section 319 Cr.P.C. (Para 10)

summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable. (Para 24)

Therefore, the answer to the legal issue involved in the present case is found in above dictum of Hon'ble Court. As in the present case as the summoning order was passed prior to recording of conviction and imposition of sentence on other accused persons, although in the same judgment, the procedure adopted by learned court below cannot be faulted with and Hon'ble Supreme Court itself provided a space for separate trial of the accused who has been summoned under Section 319 Cr.P.C.. If trial of other accused persons has concluded and it is not feasible to carry on joint trial of the newly added accused with other accused persons, who are already facing trial, separate trial of newly summoned accused is not barred under law. (Para 25)

Revision application dismissed. (E-14)

List of Cases cited:

1. Devendra Kumar Pal Vs St. of U.P. & anr. in SLP (Criminal) No.6960 of 2021
2. Sukhpal Singh Khaira Vs The St. of Pun. AIR 2023 SC 1
3. Hardeep Singh Vs St. of Pun. & ors. 2014(2) SCR 1
4. Yakub Abdul Razak Memon Vs St. of Mah. (2013) 13 SCC 1

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

1. Instant Criminal Revision has been preferred against the impugned Judgment and order dated 17.01.2024 passed by learned Additional Session Judge, Court

No.7, Moradabad in Session Trial No.02 of 2010, whereby revisionist has been summoned under Section 319 Cr.P.C. as well as subsequent order dated 29.01.2024 passed by the learned Additional District and Session Judge, Court No.7, Moradabad in Session Trial No.37 of 2010 arising out of Case Crime No.329 of 2009 under Section 302/34 IPC, Police Station Thakurdwara, District Moradabad.

2. Heard learned counsel for the revisionist and learned A.G.A. for the State-respondent and perused the material on record.

3. The brief facts of the case are that FIR was lodged on the basis of information received by village watchman Ram Prasad vide GD Report No.20 Time 17:25 hours dated 22.04.2009 at PS. Thakurdwara, District Moradabad to the effect that village watchman informed to the police station that dead body of unknown person is lying in the vacant wheat field of Jai Prakash son of Radhey Shyam of his village. The SHO concerned moved into action on this information; he visited the place of incident alongwith his colleagues, who are police personnel by his official jeep. The police investigated the case and dead body was identified as that of Suresh Chauhan, son of late Hira Singh alias Hari Singh, resident of village Darapur, Police Station Thakurdwara, District Moradabad. The inquest on dead body of the deceased was already done as unknown person 22.04.2009 between 15:25 to 17:13 hours.

3. In postmortem report of the deceased Suresh Chauhan four external injuries were found on his person which included an incised wound 12 x 4 cm on neck and one incised wound 23 x 7 cm upcoming to abdomen cavity, intestines

had comes out, one abrasion on forehead and skin peeled out on right shoulder to arm. In internal examination trachea and larynx were found cut, membrane of heart was found lacerated, membrane of abdomen was also found lacerated. In the opinion of doctor the cause of death was shock and haemorrhage due to ante-remote injuries. The postmortem was conducted on 23.04.2009, in which time of death was approximated as between 12:30 to 01:00 hours on 22.04.2009. Rigor mortis passed on from entire body. During investigation name of five accused persons surfaced as author of time of murder of the deceased, who were subjected to trial for charge under Section 302/34 IPC, the case was converted into Crime No.329 of 2009 after post-mortem examination of the deceased. During investigation the name of five accused persons namely Jasram and four others surfaced as author of the crime of murder of the deceased. They were subjected to trial and the learned Additional Session Judge Court No.7, Moradabad by impugned judgment and order dated 17.01.2024 convicted four accused persons for charge under Section 302/34 IPC and sentenced them to imprisonment for life, and Rs.25,000/- fine was imposed on by each of them. One accused person Jasram Singh died during the trial and the trial in respect of deceased accused was abated.

4. In Judgment and order dated 17.01.2024, learned trial judge in paragraph No.50 has observed that on the basis of evidence of PW 2, 3 and 5 complicity of accused Bharat Singh is found, and there is cogent and strong evidence against accused Bharat Singh regarding his complicity in the offence and on the basis of the evidence adduced during trial there is full probability of his conviction, if the same remains unrebutted. With these observations the

learned trial court had summoned the revisionist/Bharat Singh under Section 302/34 IPC to face trial for the murder of deceased.

5. Learned counsel for the revisionist submitted that learned trial judge has summoned the revisionist in exercise of powers under Section 319 Cr.P.C. in the impugned judgment, wherein all the accused persons who were facing trial were convicted and sentenced. He has not been directed to be summoned separately on conclusion of trial of co-accused person therefore joint trial of the revisionist alongwith other accused persons had become impossible.

6. Learned trial court could not summon the revisionist in exercise of powers under Section 319 Cr.P.C. in the same breath, wherein other accused persons were convicted and sentenced and therefore the trial concluded. Learned counsel for the revisionist placed reliance on a judgment of Supreme Court in **Devendra Kumar Pal Vs. State of U.P. and another in SLP (Criminal) No.6960 of 2021**, wherein constitution Bench judgment of Supreme Court in **Sukhpal Singh Khaira Vs. The State of Punjab AIR 2023 SC 1** was discussed and reliance was placed thereon. After citing the twelve guidelines issued by the Constitution Bench, Hon'ble Court in paragraph No.13, 14 and 15 observed that if summoning order under Section 319 Cr.P.C. is passed, either after the order of acquittal or of imposing sentence in the conviction, the same may not be sustainable.

7. Learned counsel further submitted that Hon'ble Supreme Court in Constitution Bench Judgment in **Hardeep Singh Vs. State of Punjab and others 2014(2) SCR**

1 in paragraph No.43 held that since after the filing of chargesheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the chargesheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense, for it only requires an application of mind rather than a judicial application of mind.

8. Learned counsel for the revisionist further submitted that in **Sukhpal Singh Khaira Vs. The State of Punjab** out of 11 accused persons, the trial in S.T. No.289 of 2009 proceeded against 10 accused persons who were convicted on conclusion of trial as one of the accused was not available. Learned Session Judge pronounced the judgment on 31.10.2017, whereby one of the accused was acquitted while remaining nine accused persons were convicted and sentence was passed against them on 31.10.2017. The learned Session Judge also allowed the application filed under Section 319 Cr.P.C. dated 21.09.2017 on the same day i.e. 31.10.2017 and summoned the appellant to face trial. It is in this back drop the summoning order of the appellant was assailed by him, since according to him such order is not sustainable in law, as the same was not passed in a proceeding pending before the learned Session Judge as at the stage when the power to summon was exercised by learned Sessions Judge, the judgment of conviction and sentence had already been passed earlier on 31.10.2017. The said order was assailed in Criminal Revision Petition No.4070 and 4113 of 2017 but the same was dismissed

by the High Court, which had led to the filing of SLP Criminal No.5933 of 2019, where Supreme Court framed three issues and referred the matter to Hon'ble the Chief Justice to constitute a Larger Bench to consider the questions raised. The Constitution Bench of the Hon'ble Supreme Court vide judgment dated 05.12.2022 addressed and decided the issues referred for its consideration and issued as many as 12 guidelines therein regarding stage of invoking powers under Section 319 Cr.P.C. by trial court.

9. He next submitted that after constitution bench judgment the matter was finally decided by a division bench of Hon'ble Supreme Court in **Sukhpal Singh Khaira (supra)** and the summoning order passed by learned trial court under Section 319 Cr.P.C. against the appellant Sukhpal Singh Khaira was quashed and set-aside with finding that in view of the law laid down by the Hon'ble Supreme Court in **Sukhpal Singh Khaira (supra)** these appeals are allowed.

10. The Hon'ble Court observed that once the learned trial judge passes an order on sentence, the Court becomes functus officio and it is not within its jurisdiction to pass an order under Section 319 Cr.P.C.

11. Learned counsel for the revisionist also placed reliance on **Devendra Kumar Pal (supra)** arising out of SLP (Crl.) No.6960 of 2021, wherein in paragraph 14 it is observed that the Constitution Bench has clearly held that if such a summoning order is passed, either after the order of acquittal or imposing of sentence in the conviction, same may not be sustainable.

12. With above submissions, leaned counsel concluded that as summoning of

the revisionist and recording of conviction and awarding of sentence on other accused persons are part of same judgment and order, the joint trial of the revisionist alongwith other accused persons was not possible in view of the judgments cited above as the court had become functus officio on recording conviction of the accused persons who are already facing trial and awarding sentence against them. Thus in this backdrop the summoning of the revisionist was contrary to law and the impugned order deserves to be quashed and set-aside.

13. Per contra, learned A.G.A. for the State submitted that revisionist has been summoned in paragraph 50 of the impugned judgment and order, whereas the conviction and sentence has been awarded to the accused persons who are already facing trial in paragraph No.51 onwards. Therefore, it cannot be assumed that the summoning of the accused revisionist was done after conclusion of trial of co-accused persons. She also submitted that in paragraph No.50, learned trial court has observed that in evidence of PW2, PW3, PW4 and PW5 there is cogent evidence against the revisionist and for that reason he has been summoned to face trial under section 319 Cr.P.C.. There is no illegality, irregularity or perversity in the impugned order passed by the learned trial court.

14. The Hon'ble Court observed that at the outset, having noted the provisions of Section 319 Cr.P.C, it is amply clear that the power bestowed on the Court is to the effect that in the course of an inquiry into, or trial of an offence, based on the evidence tendered before the Court, if it appears to the Court that such evidence points to any person other than the accused who are being tried before the Court to have

committed any offence and such accused has been excluded in the charge sheet or in the process of trial till such time could still be summoned and tried together with the accused for the offence which appears to have been committed by such persons summoned as additional accused.

15. Hon'ble Court placed reliance on its earlier Constitution Bench Judgment in *Hardeep Singh Vs. State of Punjab* (2014) 3 SCC 92, wherein it is held that Section 319 Cr.P.C. 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 CrPC. 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. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC. Even the word "course" occurring in Section 319 CrPC, clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word "course" therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry up to the stage of the conclusion of the trial.

16. The Hon'ble Supreme Court in **Sukhpal Singh Khaira (supra)** after giving thoughtful consideration of number of its judgements on ambit and scope of

Section 319 Cr.P.C. cited as Sections 232, 235, 353, 319, 354 of Code of Criminal Procedure.

17. Hon'ble Court observed in paragraph No.26 that Hon'ble Court cited an earlier judgment delivered in **Yakub Abdul Razak Memon vs. State of Maharashtra (2013) 13 SCC 1**, wherein it is held that **"It is clear that a conviction order is not a "judgment" as contemplated under Section 315, 353 and that a judgment is pronounced only after the award of sentence."** It is also relevant to mention that Section 354 makes it clear that "judgment" shall contain the punishment awarded to the accused. It is therefore, complete only after the sentence is determined.

18. The Hon'ble Court further observed as under:

"27. Therefore, from a perusal of the provisions and decisions of this Court, it is clear that the conclusion of the trial in a criminal prosecution if it ends in conviction, a judgment is considered to be complete in all respects only when the sentence is imposed on the convict, if the convict is not given the benefit of Section 360 of CrPC. Similarly, in a case where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded as against the accused who are acquitted and the trial will have to be concluded against the convicted accused with the imposition of sentence. When considered in the context of Section 319 of CrPC, there would be no dichotomy as argued, since what becomes relevant here is only the decision to summon a new accused based on the evidence available on record which would not prejudice the

existing accused since in any event they are convicted.

28. In that view of the matter, if the Court finds from the evidence recorded in the process of trial that any other person is involved, such power to summon the accused under Section 319 of CrPC can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 of CrPC. From the said provision it is clear that if the learned Sessions Judge exercises the power to summon the additional accused, the proceedings in respect of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused. In a case where the learned Sessions Judge exercises the power under Section 319 of CrPC after recording the evidence of the witnesses or after pronouncing the judgment of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of CrPC. As against the accused who has been summoned subsequently a fresh trial is to be held. However while considering the application under Section 319 of CrPC, if the decision by the learned Sessions Judge is to summon the additional accused before passing the judgment of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgment is required to be withheld and the application under Section 319 of CrPC is required to be disposed of and only then the conclusion of the judgment, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power

under Section 319 of CrPC can be exercised only before the conclusion of the trial by passing the judgment of conviction and sentence.

29. Though Section 319 of CrPC provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of CrPC to hold a joint trial, it would also be open to the learned Sessions Judge at the point of considering the application under Section 319 of CrPC and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgment being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the learned Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that the decision to summon an additional accused either suo-moto by the Court or on an application under Section 319 of CrPC shall in all eventuality be considered and disposed of before the judgment of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section 319 of CrPC. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, this Court was justified in holding the phrase, "could be tried together with the accused" as contained in Section 319(1) of CrPC, to be directory as held in *Shashikant Singh*

(supra) which in our opinion is the correct view."

19. Hon'ble Court answered the questions referred for determination in paragraph No.33 of the judgment which is reproduced as under:-

33. For all the reasons stated above, we answer the questions referred as hereunder:-

"I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

The power under Section 319 of CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced.

Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding

accused after securing his presence, subject to the evidence recorded in the split up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

III. What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?"

(i) If the competent court finds evidence or if application under Section 319 of CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

(ii) The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

(iii) If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

(iv) If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

(v) If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

(vi) If the decision is that the summoned accused can be tried separately, on such order being made, there will be no

impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

(vii) If the proceeding paused as in (i) above is in a case where the accused who were tried are to be acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

(viii) If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split up (bifurcated) trial.

(ix) If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319 of CrPC, the appropriate course for the court is to set it down for re-hearing.

(x) On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

(xi) Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

(xii) If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the

main case and then proceed afresh against summoned accused.

20. In the present case, the learned trial court has summoned the revisionist in impugned judgment dated 17.01.2024 on finding his complicity in the offence alongwith co-accused persons on the basis of evidence appearing on record. The revisionists is named in the FIR and similar role has assigned to him in the offence of murder together with other accused persons, who were tried, convicted and sentenced by trial court in impugned judgment and order dated 17.01.2024.

21. After giving a thoughtful and respectable consideration to judgments cited above, I am of the considered opinion that the summoning of revisionist by trial court in suo motu exercise of powers under Section 319 Cr.P.C. is not contrary to law and is based on evidence on record. The impugned order is not hit by judgment of Hon'ble Supreme Court in **Devendra Kumar Pal Vs. State of U.P. and another in SLP (Crl.) No.6960 of 2021 and Criminal Appeal No.885 of 2019 and Criminal Appeal No.886 of 2019 in Sukhpal Singh Khaira Vs. The State of Punjab** as the facts of those cases were slightly different from the facts of the present case. In those cases summoning of additional accused was done after recording of conviction and passing of sentences to accuses persons who were already facing trial. Whereas in the present case the revisionist has been summoned under Section 319 Cr.P.C. in judgment dated 17.01.2024, prior to recording of conviction of chargesheeted accused persons. In paragraph No.50 of impugned judgment, wherein the court below has observed that on the basis of evidence of PW-2 Hariom, PW-3 Brij Mohan and PW-5 Manoj Singh complicity of Bharat

Singh is also established alongwith other accused persons, they have also filed affidavit in support of this version during the course of investigation which is part of case diary. There are cogent and strong evidence on record regarding complicity of accused Bharat Singh in the offence, which if remains unrebutted his conviction may be fully probable, therefore cognizance has been taken for charge under Section 302/34 I.P.C. against accused Bharat Singh and he is being summoned under Section 319 Cr.P.C. for trial.

22. After summoning of revisionist in paragraph 50 of the judgment, the learned trial court has recorded finding of conviction in respect of accused Ghanshyam, Sauran, Satpal and Rishi Pal for charge under Section 302/34 IPC and after hearing them on question of sentence, the sentence was passed against them in paragraph Nos. 54 and 55 of the judgment. In paragraph No.61 of the judgment some directions have been issued to office that in the light of facts mentioned in paragraph No.50 of this judgment, a separate case filed be prepared in respect of accused Bharat Singh for his trial for charge under Section 302/34 IPC, wherein certified copies of relevant prosecution documents will be placed, thereafter summoned be issued to him in concerned file.

23. Hon'ble Supreme Court in Sukhpal Singh Khaira (supra) held that if the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

24. The Hon'ble Court also held that the power under Section 319 Cr.P.C. can be exercised before the pronouncement of

order on sentence, where there is a judgment of conviction of the accused. In the case of acquittal the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

25. Therefore, the answer to the legal issue involved in the present case is found in above dictum of Hon'ble Court. As in the present case as the summoning order was passed prior to recording of conviction and imposition of sentence on other accused persons, although in the same judgment, the procedure adopted by learned court below cannot be faulted with and Hon'ble Supreme Court itself provided a space for separate trial of the accused who has been summoned under Section 319 Cr.P.C.. If trial of other accused persons has concluded and it is not feasible to carry on joint trial of the newly added accused with other accused persons, who are already facing trial, separate trial of newly summoned accused is not barred under law.

26. Consequently, I find no illegality or irregularity or perversity in the impugned judgment passed by learned trial court. The revision is devoid of merit and it deserves to be dismissed.

27. The revision is **dismissed**.

(2024) 12 ILRA 451

**REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2024**

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Criminal Revision No. 2948 of 2024

**Smt. Rekha & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Revisionists:
Braj Mohan Singh

Counsel for the Opposite Parties:
G.A., Sudhir Mehrotra

A. Criminal Law -Criminal Procedure Code, 1973-Sections 397 & 125-Wife/Revisionist filed maintenance-despite a prior court order granting maintenance, the respondent/husband did not comply-the family court later dismissed the wife's application for non-prosecution, prompting her to file the current revision petition-Held, Family courts must prioritize timely disposal of cases-judicial officers should exercise heightened sensitivity in cases of destitute women-the revision was disposed of with directions to decide the case within three weeks.(Para 1 to 12)

The revision petition is disposed of. (E-6)

List of Cases cited:

1. Rajnesh Vs Neha & anr.(2021) 2 SCC 324
2. Smt. Parul Tyagi Vs Gaurav Tyagi (2023) SCC OnLine All 2684
3. Rajesh Babu Saxena Vs St. of U.P. CRLRD No. 1789 of 2023

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Sudhir Mehrotra, learned Amicus Curiae, learned counsel for the revisionist-wife, learned A.G.A. for the State-respondent, and perused the record.

2. Succinctly, the brief facts outlined in the application filed u/s 125 Cr.P.C. by the revisionist-wife are that the revisionist-wife married to respondent-husband on 2.7.2012 as per Hindu rites and ceremonies and approximately Rs.10 lacs were spent on the solemnization of the marriage by the revisionist-wife's parents. The revisionist-wife was discharging all the matrimonial obligations, and on 8.3.2015, a baby girl was born out of the said wedlock, who is residing with the revisionist-wife. Despite performing all matrimonial obligations, the in-laws started raising demands of dowry and perpetuating cruelty on the revisionist-wife mentally and physically both. The younger brother of the respondent-husband had attempted to outrage the modesty of the revisionist-wife many a times, to which she complained to her husband, but he continued to do so as the revisionist-wife's husband kept silent. On 16.12.2024, a panchayat was convened in the village. The family members from the in-laws side were persuaded to keep the revisionist-wife in good condition, but the respondent-husband kept on perpetuating cruelty to the revisionist-wife. On 25.12.2017, the respondent-husband's younger brother attempted to commit rape upon the revisionist-wife, and when she complained to her husband, she was assaulted and abused in filthy language. A medical was also conducted on 27.12.2017 at the District Hospital Saharanpur. Since 27.12.2017, the revisionist-wife has been living separately, and lastly stated that the respondent-husband works as a Supervisor in a factory, and besides the job, he also owns a welding machine at Fatehpur Road

and earns more than Rs.45,000/- per month, whereas revisionist-wife has no source of income, and she is living a life of destitute.

3. The respondent-husband has refused to maintain the revisionist-wife, therefore, she had approached the learned Family Judge for maintenance by way of application u/s 125 Cr.P.C. wherein the learned Additional District Judge/Fast Track Court-II/Family Judge, Saharanpur vide order dated 19.4.2019 awarded Rs.5000/- per month to the revisionist-wife and Rs.3000/- per month to the minor child till she attains the age of majority or solemnization of her marriage, towards maintenance, but the respondent-husband has not paid even a single penny to the destitute wife. Aggrieved by the order dated 19.4.2019, the respondent-husband approached the learned Family Court by way of application u/s 126(2) Cr.P.C. for setting aside the ex-parte order dated 19.4.2019, which was allowed vide order dated 17.1.2023, and the ex-parte maintenance order dated 19.4.2019 was set aside and restored to its original number and status subject to cost of Rs.1500/-. Thereafter, on 30.11.2023, the application was erroneously dismissed for want of prosecution.

4. Feeling aggrieved, the revisionist-wife has preferred the instant revision petition assailing the legality and validity of the impugned order dated 30.11.2023 passed by the learned Additional Principal Judge, Family Court, Saharanpur, in Criminal Misc. Case No.12 of 2018 (new Case No.21/2018). The impugned order, along with the endorsement made by the revisionist-wife on the order sheet, are extracted herein below:

21-10-23

श्रीमान जी,
विपक्षी को न्यायालय द्वारा पूर्व में हजों पर आदेशित किया गया था तदुपरान्त उसका प्रा० पत्र 126(2) स्वीकार कर जवाब दवाव हेतु अनुमति प्रदान की गई थी किन्तु पूर्व में तीन बार वाद उक्त एक पक्षीय होने के उपरान्त न्यायालयों के आदेशों का पालन नहीं किया गया व इस बार भी न्यायालय के आदेश का समय सीमा के अन्दर पालन नहीं किया गया इस कारण विपक्षी के विरुद्ध एक पक्षीय रूप से कार्यवाही चलाई जानी आवश्यक है।

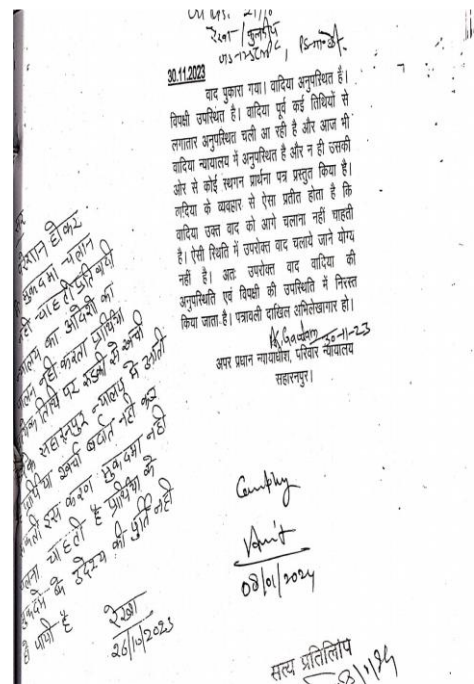
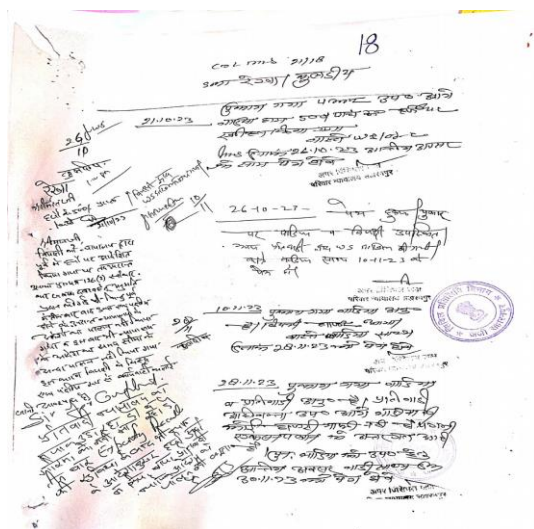
प्रतिवादी न्यायालय का मजाक उड़ा रहा है व गरिमा को नहीं मान रहा है। तीन बार मा चंतजम त्मबंसस की सुविधा के बाद भी न्या० के आदेशानुसार हर्जा अदा न किया गया प्रतिवादी न्यायिक आदेशों का पालन नहीं करता है।

ह० रेखा

सर परेशान होकर मैं मुकदमा चलाना नहीं चाहती प्रतिवादी न्यायालय के आदेशों का पालन नहीं करता प्रार्थिया प्रत्येक तिथि पर रुझकी से खर्चा करके सहारनपुर न्यायालय में आती है पार्थिया खर्चा बर्दाश्त नहीं कर सकती इस कारण मुकदमा नहीं चलाना चाहती है प्रार्थिया के मुकदमे के उद्देश्य की पूर्ति नहीं हो पायी है।

ह० रेखा

26.10.2023



5. It is anomalous that despite having a grudging endorsement by the destitute revisionist wife, who has been regularly visiting the courts since 2018 and had lost all hope from the learned Family Court to get timely justice, she thus made the aforesaid endorsement with hope and expectation that a better sense would prevail on the learned Family Judge to decide her maintenance application pending almost for last six years undecided. She regularly attended the court proceedings diligently and perhaps had no idea of the endorsement's consequences and outcome; the learned Additional Principal Judge, Family Court, dismissed the maintenance petition for non-prosecution and consigned the file to the records mechanically with the most insensitivity.

6. After examining the handwritten endorsement of the revisionist- wife on the court's order -sheet, a report was called

from all the learned Family Courts of District Saharanpur with regard to the compliance of guidelines issued by the Supreme Court and this Court from time to time. The relevant portion of the order dated 1.5.2024 is reproduced herein below:

*“.....This Court finds that the impugned order is not only erroneous but also immoral and inhuman, therefore, the Principal Judge, Family Court is directed to file a compliance report of his own court along with all courts that comes under his control and supervision with regard to the compliance of guidelines issued by Supreme Court in **Rajnesh v. Neha and another (supra)**; and this Court in **Smt. Parul Tyagi v. Gaurav Tyagi (supra)** and **Rajesh Babu Saxena v. State of U.P. and another (supra)**. The compliance report shall be placed in accordance with para 87 to 90 of **Smt. Parul Tyagi case (supra)** of each cases u/s 125 Cr.P.C. pending disposal before the Family Courts of Saharanpur, on or before the next date fixed....”*

7. In compliance with the order dated 1.5.2024, learned Principal Judge Family Court, Saharanpur, has submitted a report stating that the Family Courts are adhering to the directions issued by the Supreme Court in **Rajnesh v. Neha and another, (2021) 2 SCC 324, Smt. Parul Tyagi v. Gaurav Tyagi, (2023) SCC OnLine All 2684, and Rajesh Babu Saxena v. State of U.P. and another** passed in **Criminal Revision Defective No.1789 of 2023** in letter and spirit.

8. I deem it appropriate not to discuss the contents of the report in detail as the learned Judge -in- charge Family Court has flagged certain issues that are concerned with the administration of the affairs of

learned Judges of the Family Court and assured this Court that the Family Courts have started complying with the directions issued in the above-referred judgments.

9. On returning to the merits of the case, by previous order dated 1.5.2024, this Court remanded the instant case to the learned Principal Judge Family Court, Saharanpur, to ensure compliance with guidelines issued in aforesaid cases while deciding the applicant's case afresh. This Court hopes that the applicant's case must have been decided in accordance with the judgements referred to herein above and, if not, then shall be decided within three weeks from the date of receipt of the copy of the order on merits.

10. Acknowledging the facts of the case and the realities of prolonged court proceedings, this Court emphasizes the urgent need for learned Family Court judges to exercise their judicial mind with heightened sensitivity and responsibility. The judicial system must prioritize the expeditious disposal of maintenance cases of destitute women who are left without support from their parents, in-laws, or husbands, ensuring that justice is not delayed for those struggling for basic maintenance and dignity in society. One of the essential aspects of timely justice lies in retaining the essence of sensitivity towards the cause at hand and upholding the judiciary's societal responsibility. Therefore, learned family court judges must perform their judicial duties with heightened responsibility, sensitivity, and a steadfast commitment to delivering timely justice while upholding judicial discipline and propriety.

11. The Registrar (Compliance) is directed to transmit a copy of this order to

the Director JTRI to sensitise the judicial officers during regular training sessions to observe judicial discipline and maintain judicial propriety in following directions issued by the Supreme Court in the *Rajnesh case (supra)* and directions issued by this court in *Smt. Parul Tyagi case (supra)*, and *Rajesh Babu Saxena case (supra)* in letter and spirit. A checklist of essential points, including a clear outline of do's, should be prepared and circulated among the learned family court judges from time to time accordingly.

12. With the aforesaid observations, the instant revision is disposed of.

(2024) 12 ILRA 455

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

Criminal Revision No. 3420 of 2022

Krishna Mohan Singh & Ors.

...Revisionists

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Revisionists:

Vijendra Kumar Mishra

Counsel for the Opposite Parties:

G.A., A.B.N. Tripathi, Arvind Yadav, Gulab Shankar Singh

Criminal Law - Criminal Procedure Code, 1973 - Sections 397/401 — Revision under Cr.P.C.-Summoning order challenged— Requirement of judicial satisfaction — Proforma summoning order passed without recording reasons or discussing evidence — Violation of proviso to Section 202 Cr.P.C. — Reiterated, Magistrate must apply

judicial mind, record prima facie satisfaction and refer to materials relied upon — Summoning order liable to be set aside-revision application allowed. (Paras 10, 11, and 14)

HELD:

It is admitted fact that there was dispute in respect of ancestral property in between opposite party no.2/complainant and his brother Kripa Shanker Singh and several litigations between them are going on. Revisionists Nos.1, 3 and 4 are witnesses of charge-sheet filed against opposite party no.2/complainant and his son. It appears that the present complaint has been filed only to create pressure upon the revisionists. As per injury report, there was no gun shot injury to the complainant and all the injuries reflect only pain in different parts of body. No external injury was found by the doctor who prepared the injury report. Doctor was not produced in evidence. The learned Magistrate without recording any prima facie satisfaction regarding truthness of incident, has summoned the revisionists. No evidence of complainant and his witnesses were discussed in the impugned order. (Para 10)

From the bare perusal of summoning order, it is apparent that it is a proforma order without application of judicial mind. The law has been settled by the Hon'ble Apex Court as well as this Hon'ble Court in series of cases that before passing the summoning order in a complaint case, the Magistrate must record his satisfaction that there is sufficient ground for proceeding. The Magistrate is required to apply his judicial mind as to whether there is sufficient ground for proceeding in the case or not and formation of such opinion is required to be St.d in the order itself. In the present case it is apparent that no reason has been assigned and without discussing any evidence adduced by the complainant and his witnesses, the summoning order has been passed by the learned Magistrate. (Para 11)

In the present case, the learned Magistrate without discussing any evidence adduced by the complainant and his witnesses and without recording any prima facie satisfaction has summoned the revisionists. The order impugned has been passed without application of judicial

mind and it appears that it is a proforma order. (Para 14)

Revision application allowed. (E-14)

List of Cases cited:

1. Lalankumar Singh & ors. Vs St. of Mah. reported in 2022 SCC OnLine SC 1383
2. Sachin Garg Vs St. of U.P. & anr. reported in 2024 SCC OnLine SC 82

(Delivered by Hon'ble Vipin Chandra
Dixit, J.)

1. This criminal revision under Section 397/401 Cr.P.C. has been filed on behalf of revisionists against the summoning order dated 7.6.2022 passed by Judicial Magistrate-IIIrd, Gorakhpur in Complaint Case No.147428 of 2021 (Gulab Shankar Singh vs. Krishna Mohan Singh & others), by which revisionists were summoned under Sections 307 & 392 IPC.

2. Brief facts of the case are that the father of opposite party No.2 had executed a will deed on 9.12.2014 in favour of opposite party no.2. The brother of opposite party no.2 namely Kripa Shanker Singh had filed a suit for cancellation of will deed which was registered as Case No.1464 of 2016. The application under Order 39 Rule 1 & 2 CPC filed for interim injunction was rejected by the learned trial court vide order dated 17.1.2018. The brother of opposite party No.2 had challenged the order dated 17.1.2018 by filing Misc. Appeal No. 14 of 2018 and the lower appellate court vide order dated 26.2.2019 was pleased to set aside the order dated 17.1.2018 and directed the parties to maintain status quo in respect of suit property.

3. It is further noted that there was dispute regarding ancestral property in

between opposite party no.2 and his brother Kripa Shanker Singh and several litigations are going on. Kripa Shanker Singh had lodged an FIR against opposite party No.2 and his son Udai Shanker Singh @ Udai Bhan Singh in Police Station Campierganj, District Gorakhpur which was registered as Case Crime No. 342 of 2015 under Sections 380, 427, 504, 506, 120B IPC. The Investigating Officer after due investigation has submitted charge sheet against opposite party No.2 and his son. The revisionist Nos. 1, 3 and 4 are witnesses of prosecution in the charge-sheet submitted by the Investigating Officer. The revisionist no.2 is aged about 80 years and was working at the agricultural land of revisionist no.1.

4. The opposite party No.2 had moved an application under Section 156(3) Cr.P.C. on 28.9.2021 against revisionists and it was registered as a Complaint Case No. 147428 of 2021. The statement of complainant/opposite party no.2 was recorded under Section 200 Cr.P.C. on 24.2.2022 and the statement of P.W.-1 Udai Shanker Singh was recorded under Section 202 Cr.P.C. on 15.3.2022. Statement of P.W.-2 Akhand Pratap Singh @ Mohan was recorded under Section 202 Cr.P.C. on 6.4.2022. The learned Magistrate had summoned revisionists under Section 307, 392 IPC vide order dated 7.6.2022 which is impugned in the present criminal revision.

5. Heard Sri V.K. Mishra, learned counsel for revisionists, learned AGA for the State of U.P./opposite party no.1 and Sri Arvind Yadav, learned counsel for opposite party No.2, and perused the record.

6. It is submitted by learned counsel for revisionists that revisionists are

innocent persons and have been falsely implicated in this case. There was serious dispute between opposite party no.2 and his brother namely, Kripa Shanker Singh with regard to ancestral property and several litigations are going on between them. The revisionists are witnesses of charge-sheet submitted in pursuance of FIR registered as Case Crime No. 342 of 2015 lodged against opposite party No.2 and his son. The present complaint has been filed by the complainant against revisionists on wrong allegations only to create pressure upon the revisionists, as the revisionists are prosecution witnesses in criminal case filed against opposite party no.2. It is further submitted that the suit filed by brother of opposite party no.2 for cancellation of will deed is still pending for consideration. In Misc. Appeal filed by brother of opposite party no.2 there was an order of status quo in respect of suit property. Kripa Shaker Singh, brother of opposite party no.2 is in possession over the said property.

7. It is further submitted that two witnesses were produced by the complainant in support of his case but there are serious contradictions in their statements and they have failed to prove the prosecution case. Even doctor was not produced in evidence. The learned Magistrate without considering the evidence adduced by the complainant and without recording any prima facie satisfaction, has passed the impugned summoning order and summoned the revisionists under Section 307, 392 IPC. The complainant had not received any external injury. From perusal of injury report dated 4.9.2021, it is apparent that there was no gunshot injury or any external injury received by the opposite party no.2 and there was only complain of pain. Lastly, it is submitted that the learned trial

court has failed to comply the proviso of Section 202 Cr.P.C. and without recording statement of all the witnesses has summoned the revisionists. Law has been settled by Hon'ble Apex Court as well as by this Hon'ble Court that the Magistrate must record his satisfaction as well as reason before summoning the accused persons in a complaint case but in the present case, no satisfaction has been recorded and even evidence of witnesses have not been discussed. The impugned order suffers from many irregularities and is liable to be set aside by this Hon'ble Court.

8. On the other hand, learned counsel appearing on behalf of opposite party No.2 submits that the learned Magistrate after considering the statement of complainant and his witnesses has summoned the revisionists. The order passed by the learned Magistrate is in accordance with law and no interference is warranted. The learned Magistrate after considering the evidence and materials which are available on record has found the involvement of revisionist in the crime and after prima facie satisfaction had summoned the revisionists and there is no illegality in any manner. No ground for interference is made out and criminal revision is devoid of merits and is liable to be dismissed.

9. Considered the submissions of learned counsel for the parties and perused the record.

10. It is admitted fact that there was dispute in respect of ancestral property in between opposite party no.2/complainant and his brother Kripa Shanker Singh and several litigations between them are going on. Revisionists Nos.1, 3 and 4 are witnesses of charge-sheet filed against

opposite party no.2/complainant and his son. It appears that the present complaint has been filed only to create pressure upon the revisionists. As per injury report, there was no gunshot injury to the complainant and all the injuries reflect only pain in different parts of body. No external injury was found by the doctor who prepared the injury report. Doctor was not produced in evidence. The learned Magistrate without recording any prima facie satisfaction regarding truthness of incident, has summoned the revisionists. No evidence of complainant and his witnesses were discussed in the impugned order.

11. From the bare perusal of summoning order, it is apparent that it is a proforma order without application of judicial mind. The law has been settled by the Hon'ble Apex Court as well as this Hon'ble Court in series of cases that before passing the summoning order in a complaint case, the Magistrate must record his satisfaction that there is sufficient ground for proceeding. The Magistrate is required to apply his judicial mind as to whether there is sufficient ground for proceeding in the case or not and formation of such opinion is required to be stated in the order itself. In the present case it is apparent that no reason has been assigned and without discussing any evidence adduced by the complainant and his witnesses, the summoning order has been passed by the learned Magistrate.

12. Honble Apex Court in the case of **Lalankumar Singh & others vs. State of Maharashtra** reported in **2022 SCC OnLine SC 1383** has held that the order must contain reason and prima facie satisfaction of the Magistrate concerned. Relevant paragraph 38, 39 and 40 are reproduced hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal vs. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense

importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

39. A similar view has been taken by this Court in the case of *Ashoke Mal Bafna* (supra).

40. In the present case, leaving aside there being no reasons in support of the order of the issuance of process, as a matter of fact, it is clear from the order of the learned Single Judge of the High Court, that there was no such order passed at all. The learned Single Judge of the High Court, based on the record, has presumed that there was an order of issuance of process. We find that such an approach is unsustainable in law. The appeal therefore deserves to be allowed."

13. Similar view has been taken by the Hon'ble Apex Court in the case of **Sachin Garg vs. State of U.P. & another** reported in **2024 SCC OnLine SC 82**. Relevant paragraph 20 is reproduced hereunder:-

"20. While it is true that at the stage of issuing summons a magistrate only needs to be satisfied with a prima facie case for taking cognizance, the duty of the magistrate is also to be satisfied whether there is sufficient ground for proceeding, as has been held in the case of Jagdish Ram (supra). The same proposition of law has been laid down in the case of Pepsi Foods Ltd. and Anr. -vs-

Special Judicial Magistrate and Ors. [(1998) 5 SCC 749]. The learned Magistrate's order issuing summons records the background of the case in rather longish detail but reflects his satisfaction in a cryptic manner. At the stage of issue of summons, detailed reasoning as to why a Magistrate is issuing summons, however, is not necessary. But in this case, we are satisfied that the allegations made by the complainant do not give rise to the offences for which the appellant has been summoned for trial. A commercial dispute, which ought to have been resolved through the forum of Civil Court has been given criminal colour by lifting from the penal code certain words or phrases and implanting them in a criminal complaint. The learned Magistrate here failed to apply his mind in issuing summons and the High Court also failed to exercise its jurisdiction under Section 482 of the 1973 Code to prevent abuse of the power of the Criminal Court."

14. In the present case, the learned Magistrate without discussing any evidence adduced by the complainant and his witnesses and without recording any prima facie satisfaction has summoned the revisionists. The order impugned has been passed without application of judicial mind and it appears that it is a proforma order.

15. In view of above discussion, the impugned order dated 7.6.2022 is liable to be set aside.

16. The criminal revision is **allowed**. The impugned order dated 7.6.2022 passed by the Judicial Magistrate-II Ird, Gorakhpur is set aside. The matter is remanded back

to the concerned court to pass reasoned order after considering the evidence of complainant, his witnesses, injury report and other relevant documents which are available on record.

(2024) 12 ILRA 460
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Revision No. 4107 of 2023

Julius Masih @ Sintu Masih @ Ajay
...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Araf Khan

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code, 1973- Section 397-Indian Penal Code, 1860-Sections 363 & 366-Kidnapping and POCSO Act-section 8-Framing of charges-Prima facie case-Victim's age disputed based on contradictory documents(school record Vs birth certificate)-Victim's consent and volition emphasized in statements-No evidence of inducement or force by the accused-Held, prima facie case u/s 363 IPC made out based on strong suspicion but no case u/s 366 IPC and 8 of POCSO Act due to the victim's voluntary conduct and absence of evidence showing coercion or sexual intent-Trial court to reconsider discharge application afresh. (Para 1 to 20)

The revision is partly allowed. (E-6)

List of Cases cited:

1. S. Varadraján Vs St. of Mad. (1965) AIR SC 942
2. Arjun Kr. Vs St. of UP. & ors Misc. bench No. 25403 of 2018
3. Alamelu & Anr. St. Rep. by Ins. of Police (2011) 2 SCC 385
4. Sonu Paswan Vs St. of U.P. & anr.(2013) 31 LCD 1107
5. St. of Haryana Vs Raja Ram (1973) AIR SC 819
6. UOI Vs Prafulla Kr. Samal & anr. (1979) 3 SCC 4

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

1. Heard learned counsel for the revisionist, learned counsel for the respondent No.2, learned AGA for the State and perused the material placed on record.

2. Pleadings have already been exchanged between the parties.

2. Instant criminal revision has been preferred against the order dated 19.7.2023, passed by the Special Judge (POCSO Act), Hamirpur, in Special Sessions Trial No.397 of 2020, arising out of Case Crime No.241 of 2020, under sections 363, 366 IPC and Section 8 of POCSO Act, Police Station Maudaha, District Hamirpur (State of UP vs. Julius Masih @ Sintu Masih @ Ajay). By the impugned order learned Special Judge has disposed of application 25-Kha with finding that a prima facie case is made out against the accused Julius Masih @ Sintu Masih @ Ajay to put him on trial for charge under sections 363, 366 IPC and Section 8 of POCSO Act. The learned court below has also observed that on perusal of academic documents produced on behalf of

the prosecution, the date of birth of victim is found to be 25.11.2004. Accordingly, she was of 15 years, 7 months of age on the date of incident.

3. Learned counsel for the revisionist submitted that according to the the prosecution version the informant Prakash Soni lodged an FIR on the basis of written report at police station Maudaha, District Hamipur on 12.6.2020 that his daughter whose date of birth is 25.11.2004 had gone to purchase some household goods on 11.6.2020, at 5:00 PM at a grocery shop lying on the side of road, but she did not come back; the informant tried to gather her whereabouts and he came to know that his daughter was seen in the company of Julius Masih @ Sintu Masih @ Ajay as both were moving towards Bada Chauraha. He believed that his minor daughter was seduced and kidnapped by accused Chintu Masih and any untoward incident might have occurred with her. The FIR was lodged against named accused under Section 363 and 366 IPC. The police investigated the case and recorded statement of victim twice under Section 161 Cr.P.C. and her statement was also recorded by learned Judicial Magistrate under Section 164 Cr.P.C. during the course of investigation. In statement under Section 164 Cr.P.C. she categorically stated that her age is 19 years as per her date of birth recorded in Birth Certificate by Nagar Palika, Hamirpur issued on 21.9.2019, which is 13.1.2001. In fact, her date of birth in her High School Marksheet shown as 25.12.2004 has been wrongly recorded on the information supplied by her parents. She willingly accompanied the accused. She herself called the accused Julius Masih @ Sintu Masih @ Ajay on 11.6.2020 when she went out of her house on pretext of purchasing some household goods. When

the accused visited her, they went together. They had already solemnized marriage on 27.1.2020 and got the marriage registered on 17.3.2020 with Registrar of Marriages. She has also stated that they left their home with intention that they would live together. He had not kidnapped her. She accompanied him on her own volition. She has studied up to class 11th and she is ready to get herself medically examined. Similar statements were give by her to the Investigating Officer and a video CD has been prepared of her statement under Section 161 Cr.P.C. The revisionist got converted to Hindu religion by remnciating Christianity prior to solemnize marriage at Arya Samaj in accordance with Hindu rites and rituals.

4. Learned counsel for the revisionist further submitted that nevertheless the Investigating Officer submitted chargesheet against the revisionist for charges under Section 363, 366, 376(3) IPC and Section 4(2) of POCSO Act only due to the fact that as per the school record, the victim was minor. He next submitted that the trial judge has not placed reliance on the conclusion of Investigating Officer with regard to charges for which the revisionist has been sent up for trial by the Investigating Officer and dropped the charge under Section 376(3) IPC and a major charge under Section 4(2) of POCSO Act has been diluted under Section 8 of POCSO Act in impugned order, after initial charge framing order dated 24.9.2020 was set aside by this Court in Criminal Revision No.1539 of 2021, by order dated 15.9.2021 and remanded the matter to trial court for deciding the issue of framing of charge afresh. He further submitted that on proper analysis of the facts and circumstances of the case and on application of law thereon it is crystal clear that even charges under

Sections 363, 366 IPC and Section 8 of POCSO Act are not made out and learned trial judge has wrongly given a finding that these charges are made out against the revisionist accused and there are sufficient ground to frame charges against him under these penal sections. He further submitted that for that Hon'ble Apex Court in **S.Vardarajan vs. State of Madras, AIR 1965 SC 942** has considered the scope of Section 363 IPC meticulously and has observed as under:-

9. *It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.*

10. *It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is*

lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

13. *While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in ss. 497 and 498 of the Indian Penal Code should be given a wide interpretation so as to effectuate the object underlying these provisions there is no reason for giving to that word a wide meaning in the context of the provisions of s. 361 and cognate sections.*

14. *The last case relied upon by the High Court is Ramaswami Udayar v. Raju Udayar(2) which is also a case under s. 498, I.P.C. In that case the High Court has followed the two earlier decisions of that Court to which we have made reference but in the course of the judgment the learned Judge has observed that it is not open to a minor in law to abandon her guardian, and that, therefore, when the minor leaves the guardian of her own accord and when she comes into the custody of the accused person, it is not necessary that the latter should be shown to have committed an overt act before he could be convicted under s. 498. The learned Judge has further observed :*

"A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under s. 498."

Whatever may be the position with respect to an offence under that section and even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, for the reason which we have already stated, the accused person in whose company she is later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

18. Relying upon both these decisions and two other decisions, the law in England is stated thus in Halsbury's Laws of England, 3rd edition, Vol. 10, at p. 758 :

"The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and afterwards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her."

On behalf of the appellant reliance was placed before us upon the decisions in Rajappan v. State of Kerala(1) and Chathu v. Govindan Kutty (2). In both the cases the learned Judges have held that the expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian; or, in other words an act but for which the person would not have gone out

of the keeping of the guardian as he or she did. In taking this view the learned Judge followed, amongst other decisions, the two English decisions to which we have adverted. More or less to the same effect is the decision in Nura v. Rex(3). We do not agree with everything that has been said in these decisions and would make it clear that the mere circumstance that the act of the accused was not the immediate cause of the girl leaving her father's protection would not absolve him if he had at an earlier stage solicited her or induced her in any manner to take this step.

5. Learned counsel for the revisionist emphasized the provisions of Section 8 of POCSO Act, which reads as under:-

"Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."

6. Sexual assault as such has been defined under Section 7 of POCSO Act, 2012 reads as under:-

"Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

7. Learned counsel for the revisionist lastly submitted that in fact no offence is made out against the revisionist on the facts of the case and he has been wrongly put on trial. Learned trial court has failed to consider the legal and factual aspects of the

case in proper perspective and has recorded a wrong finding that a case under Section 363 and 366 IPC and Section 8 of POCSO Act is made out against the revisionist. The impugned order is liable to be set aside and the revisionist deserves to be discharged and the entire criminal proceeding, which is being initiated against him before trial court is liable to be set aside.

8. Learned counsel for the revisionist also placed reliance on a judgment of this Court in **Arjun Kumar vs. State of UP and others, Misc. Bench No.25403 of 2018**, in which an FIR lodged against the petitioner for charge under Section 363 and 366 IPC was quashed by this Court vide judgement dated 11.2.2019 placing reliance on statement of victim recorded under Section 164 Cr.P.C. In this judgement, this Court placed reliance on a judgement of Hon'ble Apex Court in **Alamelu and Another vs. State represented by Inspector of Police, (2011) 2 SCC 385**, wherein Hon'ble Apex court observed as under:-

"39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5.

40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in

evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of Birad Mal Singhvi Vs. Anand Purohit observed as follows:-

"14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid

documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of Narbada Devi Gupta Vs. Birendra Kumar Jaiswal², where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC 745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. **This margin of error in age has been judicially recognized by this Court in the case of Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.³.** In the aforesaid judgment, it is observed as follows:-

".....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

9. This Court in **Arjun Kumar vs. State of UP and others (supra)**, observed in paragraph Nos.9, 12, 15 and 16 as under:-

"9. We find that essentially the first information report was registered for committing offence under Sections 363 and 366 Indian Penal Code.

Section 363 Indian Penal Code is required to be read in conjunction with Section 359 Indian Penal Code and Section 361 Indian Penal Code. The said three provisions read as under :-

"359. Kidnapping.--Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is

said to kidnap such minor or person from lawful guardianship.

Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping.-Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

12. From the statement of victim of offence it becomes evident that she of her own left her parental home, went out of the keeping of her lawful guardian without inducement or coercion. Rather, going by the statement of the victim we find that it was on her asking, Arjun came to Huzurpur where the victim joined him and they went to live as husband and wife. It is, therefore, evident that ingredients of Section 363 Indian Penal Code read in conjunction with Section 361 Indian Penal Code are not satisfied. Section 361 Indian Penal Code inheres that offence would be committed if a minor is taken out of the keeping of the lawful guardian of such minor either by coercion or inducement.

15. So far as Section 366 Indian Penal Code is concerned, the said provision is required to be read in conjunction with Section 362 Indian Penal Code. The said two provisions read as under:-

"362. Abduction.--Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

16. Statement of the victim 'A' recorded under Section 164 Cr.P.C., to which reference has been made in extenso hereinabove indicates that the said offence has not been committed. The victim of her own volition on account of her love affair called Arjun; she left her own house to join the company of Arjun and went with him to contract marriage and thereafter lived with him as his wife."

9. Per contra, learned counsel for the opposite party No.2 as well as learned AGA submitted that according to the date of birth recorded in school records of the victim, she was minor on the date of incident and was merely of 15 years, 7 months old. She was enticed and taken away by the accused from lawful

guardianship of her father. He also instigated her to marry him after enticing her away and this is trite law that minor's consent is no consent. It is accused revisionist who has been instrumental in taking the victim out of lawful guardianship of her father, the informant. Therefore, it cannot be held that the act of taking the victim with him without consent of the guardian and out of keeping of lawful guardianship is innocent act. The impugned order passed by the learned trial court is well reasoned and perfectly legal and no interference needs in impugned order in present criminal revision.

10. In instant case, by the impugned order learned trial court has given finding that on the basis of statement of victim under Section 161 and 164 Cr.P.C., recovery memo and other prosecution papers, a prima facie case is made out against the revisionist to the effect that he had kidnapped the victim, who is a minor girl by enticing away her from lawful guardianship of her parents. Therefore, the charges under Sections 363, 366 IPC and Section 8 of POCSO Act are liable to be framed against him. In FIR lodged at the instance of father of the victim, it is stated that the date of birth of his minor daughter is 25.11.2004. On 11.6.2020, she left the home to bring some grocery items from a grocery shop situated on side of main road and when she did not come back, he went into search of her and then the people apprised him that they had seen her in company of Shintu Masih @ Ajay while moving towards main crossing from behind Ragaur Kirana Shop and then he believed that said Shintu Masih @ Ajay had enticed away his minor daughter. The victim was recovered by the police during course of investigation and her statement under Section 161 Cr.P.C. was recorded on

16.6.2020, in which she stated that she left her home on pretext of purchasing some household goods at around 4-5 PM on 11.6.2020. Julius Masih came there and both of them are known to each other from long time. She had gone with him with intention to solemnize marriage but police intercepted both of them. Her statement was recorded by the Judicial Magistrate thereafter under Section 164 Cr.P.C. on 15.6.2020, wherein she has stated that her age is 19 years, however, in High School Marksheet, her date of birth is mentioned as 25.11.2004. In Aadhar Card her date of birth is mentioned as 13.1.2001. On 11.6.2020, she left her home around 4-5 PM on pretext of buying some goods and she came to big crossing where she called Julius Masih. He came there. She solemnized marriage with him out of her own volition on 27.1.2020 and she called him on that day to live together. They went from home with intention to live together. He had not kidnapped her. She had gone one her sweet will. Her actual age is 19 years. She has studied up to class 11th. In the High School Marksheet, her age is recorded lesser. She want her medical examination to ascertain her age.

11. Learned counsel for the revisionist placed reliance on a Division Bench Judgement of this Court in **Habeas Corpus No.247 of 2015 (Smt. Ramsati @ Shyamsati Throu. Her Husband Jitendra vs. State of UP Throu. Prin. Secy. Home Deptt. Lko. And others)**. The facts of the case were that Smt. Ramsati @ Shyamsati through her husband Jitendra pleaded that she got married to Jitendra of her free will and accord. The petitioner was tormented because her father and brother had taken some money to get her marriage with an aged person. The petitioner registered said matrimonial alliance, however, the father

did not agree. It has been stated that the petitioner got marriage to Jitendra. She alongwith Jitendra files earlier also for the same reason as marriage of the petitioner with Jitendra was not accepted by his father. He lodged an FIR against him under Section 364, 506 IPC at police station concerned. It was contended that the petitioner had neither being kidnapped nor abducted and therefore, the charges as levelled against Jitendra were false. The petitioner was housed in a Government Woman Protection Home after recovery during investigation of the case. This court allowed the Habeas Corpus Petition and a direction was issued to release her in the company of Jitendra. This court placed reliance on an earlier judgement given by Justice Ajay Lamba, reported in **2013 (31) LCD 1107, Sonu Paswan vs. State of UP and Another**, whereby this Court observed that even if the detainee is a minor, her marriage cannot be said to be void ab initio under the provisions of Hindu Marriage Act and thereby directed for release of the detainee. The Court observed that marriage of a minor would be voidable under Child Marriage Prevention Act, 2006. Section 3 of the Act, 2006, at the option of contracting party being a child i.e. below than 18 years of age, if a female and not below than 21 years, if the contracting party is a male. This Court in **Sonu Paswan vs. State of UP and Another (supra)** observed in paragraph Nos. 18, 22, 23, 24, 25 and 28 as under:-

18. *Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation*

under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

22. *If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.*

23. *A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are*

required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).

28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no

evidence to indicate that the marriage is void.

12. A birth certificate of the revisionist issued by Nagar Palika Parishad, Maudaha, Hamirpur with regard to the victim has been filed as Annexure No.2 to the affidavit, in which date of birth of victim is recorded as 13.1.2001 and this birth certificate has been registered on 21.9.2019 and the birth certificate was issued on 25.9.2019, prior to the date of birth pleaded by the revisionist and in her statement under Section 164 Cr.P.C., however, it appears that this birth certificate is not part of case diary. The revisionist has also filed marriage certificate and marriage photographs of the victim and revisionist, which are also not part of case diary. The earlier order of framing of charge dated 24.9.2020, under Section 363, 366, 376 IPC and Section 3/4 of POCSO Act has been set aside by this Court's order dated 15.9.2021 in Criminal Revision No.1539 of 2021 and matter was remanded to trial court to decide the question of framing of charge afresh. This Court placed reliance on statements of victim recorded under Sections 161 and 164 Cr.P.C. wherein she stated her age as 19 years and has levelled no allegations against the revisionists. The learned trial court heard the discharge application 25-kha in the light of order dated 24.9.2020 passed in said criminal revision and disposed of discharge application 25-Kha with finding that a prima facie case is made out against the applicant under Sections 363, 366 IPC and Section 8 of POCSO Act and the trial court fixed a date for framing of charge.

13. In instant case, there is no material in support of the charge of commission of Sexual assault by the revisionist against the victim as the victim has stated in her

statement recorded under Section 164 Cr.P.C. that she herself solemnized marriage with him out of her free will and she had called him on date of incident in the present case to accompany her, so that they could live together. Therefore, in the absence of any supporting material charge under Section 8 of POCSO Act is not made out altogether.

14. Section 366 IPC may be reproduced as under:-

S. 366 Kidnapping, abducting or inducing woman to compel her to marriage, etc.- “Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.”

15. In present case, the victim has levelled no allegations against the revisionist that he kidnapped or abducted her with intent that she may be compelled or knowing it to be likely that she will be compelled to marry him against her will, or in order that they may be forced or suggest to illicit intercourse or knowing it to be

likely that she will be forced to seduce to illicit intercourse. Therefore, for want of evidence or material in support of this charge, no prima facie case is made out for charge under Section 366 IPC against the revisionist.

16. Offence of kidnapping is defined under Section 359, 360 and 361 IPC. Section 361 IPC is relevant here, which defines kidnapping from lawful guardianship. The following are the essentials of this offence:- “1. Offence is committed by “taking or inducing of a minor person or a person of unsound mind 2. Person kidnapped must (a) under age of 16 years male (b) under age of 18 years, if female (c) or, a person of unsound mind; 3. Taking or inducing must also be without the consent of the guardian; 5. The consent of minor is immaterial. Hon’ble Supreme Court in **State of Haryana v. Raja Ram A.I.R. 1973 S.C. 819**, held that the consent of the minor is immaterial for charge under Section 363 IPC.

17. The motive or intention of the kidnapper is immaterial. If the kidnapped girl turns out to be under 18 years of age, the kidnapper must take the consequences. Even though, he bonafidely believed and had reasonable grounds for believing that she was over 18. The word “taking or inducing” used in Section 361 IPC are relevant and both have different connotations. These two words are also used in section 498 IPC. In **State of Haryana v. Raja Ram (surpa)**, Hon’ble Supreme Court held that the object of Section 361 IPC is not only to protect the minor person or person of unsound mind from being seduced for immoral or illegal purpose but also to protect the guardians’ right to have custody or charge over their wards. For the purpose of taking or

inducing the minor, it is not necessary to carry out actual physical removal of a person of a minor age, it is sufficient if the offender pursues a minor or a person of unsound mind, so as to create willingness to leave his/her house where he/she was in the custody of the guardian. If the prosecution did not adduce any evidence establishing their allegations that the accused performed some active role, which can be said to be the element of persuasion upon the minor or unsound person to leave her house, then the Court cannot take the presumption that the accused committed the offence of kidnapping only on the basis that such a minor or unsound person met the accused immediately after his/her coming out of the keeping of his/her guardian or just because the accused helped that person in that process of leaving her house.

18. The law is very settled that for the discharge of an accused, it is essential that upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, the judge considers that there is no sufficient grounds for proceeding against the accused. The law is well settled in **Union of India vs. Prafulla Kumar Samal and Another (1979) 3 SCC 4** that if the court comes to the conclusion of strong prima facie case or strong suspicion, the charges will be framed. At the stage of framing of charge the court has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case is made out against the accused. However, the court is not supposed to delve deeply into the materials of the matter. Thus, at the time of framing of charge, the court is not supposed to look into the evidence of the case in detail and is only to consider whether there is strong suspicion against the accused.

19. On the basis of material available on record, it cannot be held that no case is made out against the accused for charge under Section 363 IPC as there is strong suspicion against him in respect of that offence and accused will have opportunity to prove his innocence by adducing evidence in defence as well as pointing out the infirmities in prosecution case by cross-examination of prosecution witnesses. Consequently, in my considered opinion, a prima facie case is made out for charge under Section 363 IPC against the revisionist. However, no prima facie case is made out to put the revisionist for trial for charge under Sections 366 IPC and 8 of POCSO Act.

20. Accordingly, present revision stands **allowed** and the impugned order is set aside.

21. The matter is remanded to learned court below to decide the application for discharge afresh in the light of observations made in this order, hereinabove, after giving opportunity of hearing to both sides and decide the same in accordance with law.

(2024) 12 ILRA 471

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.12.2024

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.**

Criminal Misc. Writ Petition No. 10893 of 2023
Connected With
Criminal Misc. Writ Petition No. 14101 of 2023 &
14053 of 2023

**Niraj Tyagi & Anr. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioner:

Ashutosh Mishra, Raghav Dwivedi. Sankalp Narain

Counsel for the Respondents:

G.A., Pawan Kumar Srivastava, Saumitra Dwivedi, Sikandar B. Kochar, Suresh Singh, Syed Imran Ibrahim

Criminal Law – Quashing of FIR – Article 226 of Constitution of India, 1950 - Civil commercial dispute between housing finance company and borrower – Loan secured by mortgage and pledged shares – Disputes referred to arbitration – Borrower initiated criminal proceedings after failure to obtain relief in arbitration and DRT proceedings – Allegations of undervaluation, round-tripping, and fraud – FIR and ECIR challenged as abuse of process – Interference in criminal proceedings justified where continuation amounts to abuse of process – Civil disputes cannot be converted into criminal prosecution to coerce lender – Parallel criminal proceedings after invocation of arbitration not sustainable- Constitution of India – Article 21 – Right to fair legal process – Repeated litigation and criminal proceedings initiated to obstruct lawful enforcement of security – Held, invocation of criminal law to subvert due process and secure leverage in civil dispute violates Article 21 – Protection of law cannot be extended to malicious prosecution- Prevention of Money Laundering Act, 2002 – ECIR registered based on FIRs – Allegations of undervaluation of shares and round-tripping – Civil nature of allegations already under consideration before arbitration and civil courts – Held, initiation of ECIR on same facts amounts to duplication and forum shopping- Held, dispute is purely civil and governed by contract and arbitration clauses – Suppression of material facts by complainant fatal – FIRs and ECIR quashed- petition allowed. (Paras 7, 16, 29, 47, 50, 51, 52, 53, 54, 55, 56, and 120)

HELD:

The challenge to the two FIRs as also the ECIR, impugned herein, is on the ground that no

offences, as alleged therein are made out and the allegations made therein at best disclose existence of pure commercial and civil dispute between the parties, in respect of which initiation of criminal proceedings is nothing but an abuse of the process of law. The short question that arises for our consideration in the facts of the present case is as to whether lodging of the impugned FIRs and the consequential ECIR is an abuse of the criminal process? (Para 7)

We have already noticed that sanction of loan to the borrower is pursuant to various loan agreements which admittedly contain Arbitration clause. The informant in the 1st FIR has made no disclosure about existence of Arbitration clause or the steps taken by the borrower to challenge the action of Indiabulls in Arbitration proceedings. The proceedings in that regard are relevant for the controversy raised in the FIR and would require its narration. (Para 50)

Sanction of loan is a commercial transaction. It is to be regulated by the terms of loan/contract and any dispute in respect thereof would require adjudication in the manner stipulated therein. It is undisputed that sanction of loan to the borrower is pursuant to loan agreement which contain an Arbitration clause. Even the pledge of shares of Kadam is in accordance with the pledge agreement dated 6.4.2018 which contains clause 20 as per which any dispute/disagreement/differences between the lender and pledger and/or confirming party (defined in the pledge agreement i.e. Indiabulls, borrower and Kadam) has to be resolved by way of arbitration. (Para 51)

Interestingly, the informant though is aware of the Arbitration clause but has made no reference of it in the complaint. There is complete suppression in the complaint filed before the Chief Judicial Magistrate, Gautam Budh Nagar with regard to the terms of loan agreement; existence of Arbitration clause, therein; invocation of Arbitration clause by the borrower; rejection of application filed by borrower before the Delhi High Court under Section 9 of the Act of 1996 and many other relevant facts which have a material bearing on the issue in question. (Para 52)

Suppression and concealment of material facts by the borrower while instituting complaint before the Chief Judicial Magistrate cannot be viewed kindly. The effect of such misrepresentation would render the proceedings of borrower tainted. In a recent judgment of Kusha Duruka v. St. of Odisha, (2024) 4 SCC 432, the Supreme Court of India emphasized the importance of disclosing correct facts before a court of law... (Para 54)

Suppression of material facts by the borrower while invoking criminal proceedings against the lender assumes greater significance in the facts of the present case as repeated attempts made by it to injunct the lender i.e. Indiabulls from proceeding against the pledged property had not succeeded. The non-disclosure of material facts would lead to an inference that criminal proceedings are maliciously instituted with the intent to avoid repayment of availed loan facility; to secure leverage in pending Arbitration and other proceedings inter-se between the parties; coerce the lender i.e. Indiabulls to succumb to the terms dictated by the defaulter borrower. (Para 56)

Upon elaborate consideration of the issues raised in this matter, we have no hesitation in holding that initiation of criminal proceedings at the instance of borrower are instituted on the strength of suppression and concealment of relevant facts, with unexplained delay and malicious intent to thwart legitimate steps taken by Indiabulls to recover the financial assistance extended to the borrower. Such proceedings are also intended to create leverage in ongoing civil/arbitration proceedings inter se between the parties. The criminal proceedings are, therefore, clearly an abuse of the process of law and deserve to be quashed. (Para 120)

Petition allowed. (E-14)

List of Cases cited:

1. Madhu Limaye Vs The St. of Mah., 1977 (4) SCC 551
2. The St. of Har.& ors. Vs Bhajan Lal & ors., 1990 SCR Suppl. (3) 259
3. St. of Telangana Vs Habib Abdullah Jeelani & ors., (2017) 2 SCC 779

4. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors., (2021) 19 SCC 401

5. M.S. Sheriff & anr. Vs St. of Madras, AIR 1954 SC 397

6. P. Swaroopa Rani Vs M. Hari Narayan @ Hari Babu, 2008 (5) SCC 765

7. Syed Askari Hadi Ali Augustine Imam Vs St. (Delhi Administration), 2009 (5) SCC 528

8. Sardool Singh Vs Nasib Kaur, 1987 Suppl. SCC 146

9. K. Virupaksha Vs St. of Karn., (2020) 4 SCC 440

10. M.N. Ojha Vs Alok Kumar Srivastav, (2009) 9 SCC 682

11. Mitesh Kumar J. Sha Vs St. of Karn. (2022) 14 SCC 572

12. Vijay Kumar Ghai Vs St. of W.B., (2022) 7 SCC 124

13. Sarabjit Kaur Vs St. of Pun., 2023 (5) SCC 360

14. Lalit Chaturvedi & ors. Vs St. of U.P., 2024 SCC OnLine SC 171

15. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287

16. Gagan Banga Vs Samit Mandal, (2024) 5 SCC 432

17. Kusha Duruka Vs St. of Odisha, (2024) 4 SCC 432

18. K.D. Sharma Vs Steel Authority of India & ors., 2008 (12) SCC 481

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

1. Heard Sri Mukul Rohatgi, Sri Rakesh Dwivedi as well as Sri Anoop Trivedi, learned Senior Advocates assisted

by Sri Raghav Dwivedi, Sri Ankit Banati, Sri Eklavya Dwivedi, Mrs. Devanshi Singh, Sri Rishi Agarwala and Sri Kartikeya Saran, Advocates; Sri Vikram Chaudhari, learned Senior Advocate assisted by Sri Jatin Sehgal, Ms. Devna Soni, Sri Shivashish Dwivedi, Sri Ashish Garg, Sri T. Islam, Sri Adhirath Singh, Sri Raymon Singh and Ms. Yashi Bajpai, Advocates, for the petitioners; Sri Manish Goel, learned Additional Advocate General assisted by Sri Suresh Singh, Advocate, for the Yamuna Expressway Industrial Development Authority (YEIDA), Sri J. K. Upadhyaya, learned AGA for the State; Sri Sikandar B. Kochar as well as Sri Zoheb Hossain (through VC), learned Advocates for the Enforcement Directorate (ED); Sri Vinay Saran, learned Senior Advocate assisted by Sri Prashant Kumar, Sri Sarvesh Kumar Tiwari, Sri Saumitra Dwivedi and Sri Devesh Srivastava, Advocates for the complainant/intervener and Sri Syed Imran Ibrahim, learned Advocate for the private respondent.

2. These three writ petitions have been heard together and are being disposed of by this common judgment. Criminal Misc. Writ Petition No. 10893 of 2023 (Niraj Tyagi and another Vs. State of U.P. and 3 others) is taken as the lead case. These petitions alongwith Writ Petition Nos. 11837 of 2023 & 11838 of 2023 were placed before this Court pursuant to an order of nomination passed by the Hon'ble Chief Justice on 4.3.2024. The other two petitions i.e. Criminal Misc. Writ Petition Nos. 11837 of 2023 and 11838 of 2023 have been allowed by this Court on 15.4.2024 and the First Information Report, dated 22.7.2023, registered as Case Crime No. 611 of 2023, under Sections 420, 120-B IPC read with Section 82 of the Registration Act, 1908, Police Station - Kavi Nagar, District -

Ghaziabad has been quashed. The remaining three writ petitions are now being disposed of by this composite judgment.

3. Two FIR's as well as consequential ECIR registered by Enforcement Directorate (in short 'ED') are under challenge in these three writ petitions. The 1st FIR under challenge is in Case Crime No. 427 of 2023, dated 9.4.2023, lodged pursuant to a direction issued by the Chief Judicial Magistrate, under Section 156(3) Cr.P.C., dated 7.4.2023 under Sections 420, 467, 468, 471, 120B, 323, 504, 506 IPC, Police Station Indirapuram, District Ghaziabad (hereinafter referred to as the '1st FIR'). The order of the Chief Judicial Magistrate, dated 7.4.2023, passed in Complaint Case No. 457 of 2023 filed by Amit Walia in his capacity as the authorized representative of M/s Shipra Estate Private Limited, is also under challenge.

4. The 2nd FIR under challenge in these proceedings is in Case Crime No. 197 of 2023, dated 15.4.2023, under Sections 420, 467, 468, 471 and 120-B IPC, Police Station Beta-2, District Greater NOIDA (hereinafter referred to as the '2nd FIR'), lodged at the instance of Yamuna Expressway Industrial Development Authority (hereinafter referred to as the YEIDA). The 2nd FIR specifically refers to and relies upon the 1st FIR.

5. The petitioners have also challenged the consequential proceedings initiated by ED pursuant to 2nd FIR as ECIR/HIU-I/06/2023. The ED has also subsumed the 1st FIR in its investigation undertaken vide aforesaid ECIR.

6. The order of Chief Judicial Magistrate dated 07.04.2023 as well as the FIR lodged pursuant thereto are the subject matter of challenge in Criminal Misc. Writ

Petition No. 14101 of 2023, while the 2nd FIR as well as ECIR registered by ED, therein, are assailed in Criminal Misc. Writ Petition Nos. 10893 of 2023 & 14053 of 2023. The petitioners in these writs had initially sought a declaration that Section 420 IPC be declared as manifestly arbitrary and ultravires Article 14 and 21 of the Constitution of India but this prayer has been given up, by the petitioners, at the time of hearing of the matter. The prayers in the writs are thus confined to quashing of the above referred two FIRs and the consequential ECIR.

7. The challenge to the two FIRs as also the ECIR, impugned herein, is on the ground that no offences, as alleged therein are made out and the allegations made therein at best disclose existence of pure commercial and civil dispute between the parties, in respect of which initiation of criminal proceedings is nothing but an abuse of the process of law. The short question that arises for our consideration in the facts of the present case is as to whether lodging of the impugned FIRs and the consequential ECIR is an abuse of the criminal process?

8. In order to appreciate the controversy raised in these petitions narration of background facts would be necessary. Indiabulls Housing Finance Limited is a non-banking financial institution registered under the provisions of Indian Companies Act, 1956 (hereinafter referred to as 'Indiabulls'). It claims to be one of the largest premier housing finance company and is regulated by Reserve Bank of India. It is accorded 'AA' rating by CRISIL and ICRA. 'Indiabulls' is petitioner no. 2 in the leading writ petition no. 10893 of 2023, while petitioner no. 1 Niraj Tyagi is its President, Legal.

9. Indiabulls sanctioned loan facility of Rs.2478 crores to M/s Shipra Group of

Companies; comprising various group companies including M/s Shipra Estate Limited; M/s Shipra Leasing Private Limited, M/s Shipra Hotels Limited etc. (hereinafter collectively referred to as 'borrowers') between the years 2017 to 2020. 16 loans were sanctioned pursuant to which loan agreements were executed between Indiabulls and the borrowers. The dispute, herein, pertains to 14 out of these 16 loan agreements through which a loan of Rs.1686.10 crores is alleged to have been disbursed to borrowers.

10. The loan sanction agreements vide which loan amount was released to borrowers envisaged creation of securities, twice the value of the sanctioned loan, in favour of Indiabulls. Such security cover was to continue during subsistence of loan by way of charge over properties mortgaged in favour of Indiabulls in a manner that value of mortgaged properties would at all times be sufficient to maintain two times the value of combined dues of the borrowers. In order to secure the loan availed from Indiabulls the borrowers have mortgaged following properties:-

"A. Mortgage of plot admeasuring 73 acres at Sector 128, NOIDA, UP owned by Kadam Developers Private Limited i.e. in short 'Kadam' (a group company of borrower) by executing a mortgaged deed dated 25.01.2018;

B. Mortgage of Plot No. 9 at Vaibhav Khand, Indrapuram (Shipra Mall) Ghaziabad by executing a mortgage deed dated 08.02.2018;

C. Plot No.10/3 at Vaibhav Khand, Indrapuram Ghaziabad;

D. Land at Dera Bassi;

E. Plot Nos. GH-1C & GH-1B at Sector 43, Noida vide mortgage deeds dated 28.02.2018."

11. The borrowers also executed 22 pledge agreements whereunder shares of various group companies were pledged in favour of Indiabulls. It included 100% shares of Kadam (98% owned by Shipra Estate Limited and 1% each by its promoters, namely Mohit Singh and Bindu Singh) vide pledge agreement dated 06.04.2018. Kadam also mortgaged its sole property i.e. 73 acres of land leased to it by Yamuna Expressway Industrial Development Authority, Gautam Budh Nagar, an authority created under the U.P. Industrial Area Development Act, 1976 (hereinafter referred to as 'YEIDA') in favour of Indiabulls.

12. The mortgage of plot nos. GH-1B & GH-1C, Sector 43, Noida in favour of Indiabulls was pursuant to permission/NOC granted by Noida Authority on 23.2.2018. It transpires that the borrowers failed to clear dues of Noida in respect of these two plots to the tune of Rs.38 crores each, which swelled to Rs.219 crores each, as of 31.7.2020. On account of this default the Noida Authority revoked its permission/NOC for creation of mortgage in favour of Indiabulls vide letters/orders dated 2nd & 4th September, 2020.

13. In terms of the loan agreement, Indiabulls issued a cure notice on 20.10.2020 calling upon the borrowers to cure the impaired security (mortgaged plot no. GH-1B & 1C, Sector 43, NOIDA) within 15 days of the notice. The borrowers apparently took no steps to regularize the impaired securities. Consequently, Indiabulls issued loan recall notices on 5.11.2020 and 15.12.2020, recalling the entire outstanding loan and demanded repayment of Rs.1763.61 crores within 7 days from the receipt of notice. Notice was also issued by Indiabulls under Section 95

of the Insolvency and Bankruptcy Code, 2016 to the personal guarantor of loan agreements Mr. Mohit Singh.

14. On failure of borrowers to respond and clear the dues in terms of the notices issued as per loan agreements Indiabulls proceeded to issue loan recall notice to the borrowers. On 14.1.2021 a notice was also issued invoking provisions of Section 176 of the Contract Act in respect of the pledged shares of Kadam.

15. The amount demanded under the loan recall notices from the borrowers to the tune of Rs. 1763 crores approximately has not been paid. It is alleged by the petitioners that after October, 2020, the borrowers have not paid a single rupee towards repayment of loan and have initiated 43 separate and distinct legal proceedings against Indiabulls and its transferees to avoid repayment of loan availed by it. It is the case of the petitioners that institution of criminal action vide impugned FIRs and ECIR is malicious and is with an intent to gain leverage in the ongoing civil/arbitration proceedings.

16. Various steps have been taken by Indiabulls towards enforcement of securities furnished by borrowers in lieu of the loan amount availed by them. Towards this end, Indiabulls has invoked the provisions of the SARFAESI Act and one of the pledged property i.e. M/s Shipra Mall established over plot no.9, Vaibhav Khand, Indirapuram, Ghaziabad, owned by Group Company M/s Shipra Hotel Private Limited was transferred to M/s Himri Estate Private Limited. A first information report in Case Crime No. 611 of 2023 was lodged pursuant to impugned 1st FIR, at the instance of M/s Shipra Hotel Private Limited, through its authorized

representative. It came to be challenged before this Court in Writ Petition No. 11837 of 2023 and 11838 of 2023. These two writ petitions have been allowed by this Court on 15.4.2024 after holding that lodging of FIR in respect of loan transaction is an abuse of criminal process when issues raised therein are already engaging the attention of Debt Recovery Tribunal under the SARFAESI Act. Operative portion of the judgment, in this regard, is reproduced hereinafter:-

“22. We have carefully perused the allegations made in the impugned First Information Report which are in respect of transfer of secured asset in favour of auction purchaser by the secured creditor/finance company under the SARFAESI Act. Allegations that proceedings have not been lawfully undertaken or that the secured asset is undervalued are aspects which can only be examined in pending proceedings before the Debt Recovery Tribunal. The defaulter company has already approached the Supreme Court twice and such proceedings were withdrawn with liberty to approach the Debt Recovery Tribunal. The defaulter company has already approached the DRT, Lucknow where the matter is pending. Question as to whether the auction purchaser has exceeded its possession beyond the property transferred in auction purchase is also open for examination before the DRT, Lucknow. Such issues are otherwise civil in nature and cannot be allowed to be raised by lodging an First Information Report. Vague and unsubstantiated ancillary allegations made of encroachment, beyond the transferred secured asset, or alleged irregularity in conduct of auction etc. cannot be allowed to be raised by lodging an FIR and thereby vest jurisdiction in the police regarding

civil issues which are required to be adjudicated exclusively by the DRT or the civil court. The tendency of the defaulter to invoke criminal proceedings for resisting coercive action under the SARFAESI Act has to be curbed. The Parliamentary vision of vesting exclusive jurisdiction in specialized tribunal viz DRT, in respect of banking transactions relating to loan, debt etc. has to be respected. Criminal proceedings cannot be pressed into action at the instance of defaulter to scuttle proceedings under the SARFAESI Act on issues exclusively triable by DRT.

23. For the reasons recorded above, these two petitions succeed and are allowed. The First Information Report, dated 22.07.2023, registered in Case Crime No.611 of 2023, under Sections 420, 120-B of IPC and Section 82 of Registration Act, 1908, Police Station - Kavi Nagar, District - Ghaziabad is quashed.”

17. In addition to above, Indiabulls invoked the pledge of shares exercising its authority under the pledge agreement. The borrowers and Kadam filed four separate petitions under Section 9 of the Arbitration and Conciliation Act, 1996 seeking restraint against its transfer. An order of status-quo was initially passed with respect to transfer of pledged shares.

18. Meanwhile, the cheques earlier issued by borrowers for an aggregate value of Rs. 75,03,86,792/- to Indiabulls got dishonoured. Application was filed by Indiabulls in Section 9 proceedings for vacating the status-quo order. The matter in between was carried in appeal where the order of learned Single Judge directing status-quo in respect of transfer of shares was suspended. Indiabulls, however, stated before the Appellate Court that invocation of pledge of shares will be undertaken in a

completely transparent manner, on a fair evaluation of the shares and that the same would also be placed before the learned Single Judge. The Division Bench of Delhi High Court noted this stand of the Indiabulls and observed that any invocation of pledge would be open to challenge before the Court.

19. During the pendency of application under Section 9 of the Act of 1996 before learned Single Judge of Delhi High Court a notice for sale of pledged shares of Kadam was issued by Indiabulls on 16.4.2021. An application was filed by Kadam in pending petition under Section 9 of the Act of 1996 for interim relief. Petitions were also filed under Section 11 of the Act of 1996 for appointment of Arbitrator. An arbitrator was also appointed on 22.4.2021.

20. The order dated 22.4.2021 was unsuccessfully challenged in appeal before the Division Bench of Delhi High Court. Matter was then taken to Supreme Court by Indiabulls. A statement was made on behalf of Indiabulls that till the matters are disposed of by the Court no action would be taken to precipitate the transfer of shares. The matters were revived before learned Single Judge in proceedings under section 9 of the Act of 1996 under orders of the Supreme Court dated 06.05.2021. Learned Single Judge of Delhi High Court disposed of the application under Section 9 of the Act of 1996 vide judgment dated 20.5.2021. The Court prima facie concluded that element of default had occurred as the security in respect of the mortgaged properties was impaired. Learned Single Judge relied upon the statement made on behalf of Indiabulls that shares would be transferred in a fair and transparent manner and noted that

Indiabulls has disclosed the purchaser and also the amount at which the sale is being done. Offer given by Indiabulls to the borrower to redeem the pledged shares on a payment of Rs.900 crores and the inability to avail such offer by borrower was specifically noticed. The Court ultimately rejected section 9 petition after recording its prima facie findings in the matter.

21. Indiabulls and DLF in between had entered into an agreement on 20.4.2021 to sell pledged shares for a consideration of Rs.900 crores. Rs. 750 crores was to be paid by DLF while Indiabulls had to infuse approximately Rs.150 crores in Kadam so as to enable it to repay the loans of M/s Shipra Estate Limited. Mutually settled Share Sale Agreement was to be formalized between the parties within 21 days subject to fulfillment of conditions. Rs.100 crores was paid by DLF to Indiabulls. DLF, however, terminated the agreement and demanded refund of Rs.100 crores which was allowed.

22. Fresh agreement was discussed between the parties and a No Objection Certificate for the sale of property of Kadam to DLF was issued by Indiabulls on 26.5.2021 for consideration of Rs.900 crores. An agreement to sale was thereafter entered into between the parties on 30.5.2021. As per it, DLF agreed to purchase the sale property for Rs.1,250/- crores with shares of Kadam valued at Rs. 900 crores and remaining Rs. 350 crores was to be paid by way of allotment of plots/built up floors in the real estate project to be developed by DLF on the said property of Kadam.

23. Indiabulls, however, sent a legal notice terminating this agreement dated 30.5.2021 as also the No Objection

Certificate vide its communication dated 26.6.2021 on the ground of alleged default in honouring the terms of agreement by borrower and DLF.

24. It is worth noticing that the aforesaid twin attempt of transfer of pledged shares of Kadam was with the consent of the borrower and its value was fixed at Rs. 900 crores. The agreement dated 30.5.2021 was signed by Mohit Singh also in his capacity as promoter of borrower company as well as shareholder of Kadam.

25. Indiabulls then entered into a Share Sale Purchase Agreement with Creative Souls Technology Limited and M3M India Pvt. Limited for sale of pledged shares for a consideration of Rs.900 crores. Out of the aforesaid sum approximately Rs.750 crores was to be paid to Indiabulls by M3M and remaining Rs.150 crores (approx) was to be utilized to repay loans availed by Kadam from the borrower. On 3.7.2021, Rs.749.77 crores was transferred to Indiabulls. It also transpires that Rs.750 crores was earlier transferred by Indiabulls to M3M and, therefore, funds for the transfer of shares was ultimately provided by Indiabulls.

26. DLF Home Developers Limited has invoked the arbitration clause under its agreement to sale dated 30.5.2021 and filed a petition under Section 9 of the Act of 1996 before the Delhi High Court. By a detailed judgment learned Single Judge of Delhi High Court has disposed of the matter vide following orders passed on 8.11.2021:-

“116. In the facts of the present case, this Court is of the view that the balance of convenience lies in favour of

DLF. DLF is a developer and intends to develop the Sale Property. The entire transaction between the parties as recorded in the ATS is premised on the basis that DLF would use the Sale Property for development of its real estate project. Insofar as Indiabulls is concerned, concededly, it is a money lender and its interest is essentially to recover the loans along with interest as claimed by it. Thus, as far as Indiabulls is concerned, it can always be compensated in terms of money. There is no dispute that Kadam is a part of the Shipra Group of entities and admittedly, had mortgaged the Sale Property with Indiabulls to secure the repayment obligations of the

Borrowers. The Borrowers claim that Indiabulls had agreed to accept the consideration payable by DLF under the ATS as full and final settlement of its claims. Plainly, if Kadam and the Borrowers prevail in their case that the dues owed to Indiabulls were fully settled, they would stand discharged of their liability on Indiabulls receiving the consideration as provided under the ATS. However, if they fail in this case, the Borrowers would continue to be liable to discharge their dues. Insofar as Kadam is concerned, Kadam is not one of the Borrowers and its liability is limited to the collateral provided by it for securing the debts owed to Indiabulls, that is, the Sale Property.

117. As noted above, in terms of Clause 10 of the ATS, the parties had agreed that the Sale Property is a ‘special property’ and damages would not be an adequate remedy. Thus, if DLF prevails in its case that it is entitled to specific performance of the ATS, the damages it would suffer in the event the Sale Property is alienated, cannot be compensated in monetary terms. This Court is of the view

that in these facts, the balance of convenience is, plainly, in favour of grant of an interim injunction restraining the parties from creating any third party rights.

118. In view of the above, this Court considers it apposite to direct that status quo as to the title and possession be maintained in respect of the Sale Property till the conclusion of the arbitral proceedings. It is so directed.

119. The parties are at liberty to approach the Arbitral Tribunal as and when the Arbitral Tribunal enters reference, to seek any variation, modification or vacation of the aforesaid order and/or seek any further relief as advised.

120. It is further clarified that all rights and contentions of the parties are reserved and nothing stated in this order shall be construed as a final expression of opinion on the merits of the disputes. The findings and observations made in this order are solely for the purposes of the present application and would not preclude the parties from advancing their respective contentions as may be advised, before the Arbitral Tribunal.

121. The petition is disposed in the aforesaid terms. The pending application is also disposed of.”

27. We may note that though Kadam is a group company of the borrower but it has not availed any loan from Indiabulls. It has a separate and distinct entity as a juristic person. It has only pledged its shares and mortgaged 73 acre land as a collateral for the loan availed by the borrower which is its holding company.

28. As stated Indiabulls has transferred 100% pledged shares of Kadam on 1.7.2021 to M/s Creative Souls Technology India Private Limited, rechristened as Final

Step Developer Private Limited. The transferee Company is the subsidiary company of M/s M3M India Private Limited (Petitioner No. 1 in Writ Petition No. 14053 of 2023). On 1.7.2023, M/s M3M India Private Limited has purchased the entire equity share holding of Kadam from Indiabulls. It is this part of the transaction which is the subject matter of the two FIRs under challenge in these petitions.

29. At this stage, we may note that the loan agreement pursuant to which 100% shares of Kadam were pledged in favour of Indiabulls contained an arbitration clause. This clause has already been invoked by the borrowers and various proceedings therein are already undertaken. Mr. Justice Vikramjit Sen, a retired Judge of the Supreme Court, has already been appointed an arbitrator in the matter.

30. In the arbitration proceedings instituted by M/s DLF Limited also Mr. Justice Vikramjit Sen has been appointed an arbitrator and the proceedings are pending before the learned arbitrator. The Arbitrator has already passed an order of status-quo in respect of the 73 acre mortgaged land of Kadam. These proceedings and the orders passed therein are, however, not referred to in the two FIRs or the complaint of borrower.

31. We shall refer to the proceedings of arbitration, a little later, while considering petitioners' argument that invocation of criminal proceedings vide impugned FIRs are intended to overreach and preempt such civil proceedings.

32. It is in the above backdrop and after the borrowers failed to obtain any protection in respect of transfer of pledged

shares before the Delhi High Court that the 1st FIR came to be lodged pursuant to the order of the Chief Judicial Magistrate, dated 7.4.2023, as Case Crime No. 427 of 2023. This complaint contains assertion to the effect that M/s Shipra Group is engaged in real estate activity through its various group companies and needed finance for its four upcoming housing and commercial projects. The Directors of Indiabulls contacted M/s Shipra Group and offered to provide loan of Rs. 1939 crore on concessional rates and to secure such transaction properties worth Rs. 6 thousand crore was kept as security in favour of Indiabulls by the borrowers i.e. M/s Shipra Group of Companies.

33. The complaint alleges that substantial part of the loan amount disbursed was however unauthorizedly recalled by Indiabulls, from borrowers i.e. M/s Shipra Group of Companies and therefore the entire sanctioned loan amount was not given to the borrowers M/s Shipra Group. Signatures were also obtained from the Managing Director of M/s Shipra Estate Limited, namely Sri Mohit Singh. It is alleged that in collusion with various petitioner companies Indiabulls played fraud and only disbursed Rs. 866.88 crore to Shipra Group while balance amount was arbitrarily retained by it.

34. It is also alleged that loan of Rs. 1686 crore was actually forced upon Shipra Group by Indiabulls and the securities were liquidated notwithstanding the fact that no outstanding loan existed against Shipra Group.

35. It is also alleged that properties of Shipra Group consisting of 73 acres land has been transferred to M/s M3M Group on a kickback taken by Indiabulls. Grievance is

also raised with regard to transfer of M/s Shipra Mall. It is further alleged that 73 acre land is valued at Rs. 4 thousand crore but has been transferred to M/s M3M Private Limited on payment of kickback of Rs. 300 crore. M/s M3M Private Limited is also alleged to have taken possession of 73 acre land in Sector 128 NOIDA. It is further complained that various documents have been forged to dupe M/s Shipra Group of its prime properties and that an appropriate report be lodged in the matter so as to unearth the fraud.

36. It is also alleged that the pledged shares of Kadam was agreed upon to be purchased by M/s DLF for Rs. 1250 crores but eventually it has been transferred to M/s Final Step Developer Private Limited for Rs. 900 crores only. The Mall belonging to Shipra Group has also been unauthorizedly encroached upon by Indiabulls. The FIR allegations further are that as against sanctioned loan of Rs. 1939 crores only Rs. 1256.6 crores has been paid to the borrower and Rs. 683 crore has not been disbursed to the borrower company despite the fact that Rs. 163 crore was paid till March, 2023 to Indiabulls.

37. The 2nd FIR is lodged by YEIDA in furtherance of the 1st FIR. The contents of the subsequent FIR is (i) that the transfer of shares of Kadam pledged with Indiabulls in favour of Creative Souls Technology India Private Limited was without the consent of YEIDA (the informant authority); (ii) non-payment of transfer charges has resulted in financial loss caused to the public authority to the extent of Rs. 200 crore; (iii) the contents of the FIR in Case Crime No. 427 of 2023 is also referred to and relied upon in the subsequent FIR.

38. On the basis of the above two FIRs proceedings have been initiated by the

Enforcement Directorate, pursuant to ECIR//HIU-I/06/2023, and in the consequential investigation so undertaken the ED has found following facts:-

“(a) that there was undervaluation by Indiabulls of the value of shares of Kadam while transferring it to the M/s Creative Souls Technology Private Limited/Final Step Developer Private Limited; (b) purchase of shares of Kadam was funded by Indiabulls through loan and thus there was round tripping; (c) the valuation reports were back dated and thus forged.”

39. In the counter affidavit filed by the Enforcement Directorate following facts are alleged have come to the knowledge of the Enforcement Directorate in respect of the present transaction:-

“i. Indiabulls used the forged documents in the form of valuation report which formed the basis of valuation of shares of Kadam.

ii. The valuation of land owned by Kadam and subsequently that of shares of Kadam was deliberately lowered/reduced which caused loss to public money and YEIDA.

iii. The valuation reports were backdated by the valuers at the instance of Indiabulls.

iv. The two valuers who submitted the report were not the registered valuers.

v. The reports submitted by the valuers were for internal purpose only and the same could not be used for any legal proceeding leave apart for taking away the right of property from any borrower as done by Indiabulls in the present case.

vi. The report was never placed before the board of Indiabulls which passed resolution with regard to sale of shares.

vii. M3M group was assured that it will get the shares of Kadam though Indiabulls was in negotiating with DLF for sale of shares of Kadam.”

40. A chart has also been annexed by the Enforcement Directorate to show that shares of Kadam got transferred from Shipra Group to M/s Final Step Developer Private Limited for which funds were entirely provided by Indiabulls and, therefore, the purchase of shares of Kadam by Final Step Developer Private Limited was entirely funded by Indiabulls showing it to be a case of round tripping.

41. The first information report in Case Crime No. 427 of 2023 is challenged in Writ Petition No. 14101 of 2023 contending that there are three basic allegations levelled in the FIR which are as under:-

“(a) Finance company has disbursed only Rs. 866 instead of Rs. 1686 crore; (b) finance company has the fraudulent intention of grabbing the mortgaged property consisting of 73 acres of land situated at Sector 128 NOIDA in collusion with M/s M3M Private Limited as also grabbing the Shipra Mall situated at Ghaziabad; (c) Shipra Mall is being sold at an undervalued price.”

42. The 1st FIR is challenged on the ground that it is an abuse of the process of law. It is urged that Mr. Amit Walia is the authorized signatory of borrower i.e. M/s Shipra Group, who had filed proceedings before the Delhi High Court, the arbitrator, the debt recovery tribunal and before the Supreme Court of India in respect of the grievances raised in the FIRs wherein the borrower M/s Shipra Group failed to obtain any relief but these facts have been

withheld; the FIR does not disclose any criminal intent; the transactions are entirely fiscal in nature and no criminality is reflected; it is argued that sanction of loan, creation of mortgage and the manner in which the sanctioned loan were to be released are all contractual matters which are governed by the terms of contract and the provisions of the SARFAESI Act and Rules and issues in that regard cannot be raised by lodging an FIR; the impugned FIRs are lodged by the borrowers to escape their liability to repay the dues of the lender and only with an intent to evade repayment of loan malicious proceedings have been initiated with an intent to abuse the lender; no prima facie case of cheating, forgery or criminal conspiracy is made out even on the plain reading of the FIR. Reliance is placed upon the judgment of the Supreme Court in *K. Virupaksha and another Vs. State of Karnataka and another*, (2020) 4 SCC 440 and *Priyanka Srivastava Vs. State of U.P.*, (2015) 6 SCC 287 apart from other judgments to assail the impugned FIRs and the consequential ECIR.

43. Before we proceed to examine the contentions urged in the writ petitions it would be necessary to refer to two orders passed by the Supreme Court of India in respect of the self same subject which would determine the scope of present proceedings.

44. It transpires that the two FIRs under challenge before this Court were subject matter of consideration by the Supreme Court of India in *Gagan Banga v. Samit Mandal*, (2024) 5 SCC 432, wherein following orders were initially passed:-

“4. *Vide order dated 28-4-2023 [Gagan Banga v. State of W.B., 2023 SCC OnLine SC 1814] passed in WP (Crl.) No.*

166 of 2023, criminal proceedings in three such FIRs instituted by borrowers in different States, namely, FIR No. 646/2022 dated 26-10-2022 registered at PS Titagarh, FIR No. 427/2023 dated 9-4-2023 registered at PS Indirapuram and FIR No. 25/2021 dated 27-1-2021 registered at PS EOW, Delhi were stayed.

5. *Further FIR No. 197/2023 dated 15-4-2023 was filed by Yeida at PS Beta-2, Greater Noida, U.P., which also refers to the aforesaid FIR No. 427/2023 dated 9-4-2023 registered at PS Indirapuram with some overlapping facts. It is stated that on the basis of these two connected FIRs, namely, FIR Nos. 427/2023 and 197/2023, now ED has registered ECIR bearing No. ECIR/HIU-1/06/2023 in Delhi. The petitioners have now challenged the said FIRs and ECIR.*

6. *In the circumstances, as it may also involve adjudication on facts, we deem it appropriate to permit the petitioners to approach the respective jurisdictional High Courts to challenge all four FIRs and the ECIR within two weeks from today, with a request to the respective High Courts to consider and decide the petitions expeditiously, not later than six months of their presentation.*

7. *We also direct the DGPs of respective States to look into the matter, examine the contentions of the petitioners in respect of the contents of FIRs, and to take appropriate measures in accordance with law within a period of one month.*

8. *Till final disposal of the respective petitions, interim order dated 28-4-2023 [Gagan Banga v. State of W.B., 2023 SCC OnLine SC 1814] passed in WP (Crl.) No. 166 of 2023 would continue in the three FIRs mentioned therein.*

9. *Insofar as the further FIR No. 197/2023 dated 15-4-2023 filed by Yeida and ECIR bearing No. ECIR/HIU-*

1/06/2023 are concerned, no coercive steps would be taken against the petitioner financial institution and its officers, representatives and managers till final disposal of such petitions by the High Court, and it would be open for the petitioners to seek stay of proceedings which would be considered by the High Court on its own merits. It is clarified that this interim protection would only be applicable to the petitioner financial institution and its officers, representatives and managers, and not to any other person.

10. All contentions available to the parties in law are being kept open to be raised before the High Court and the High Court shall decide the petitions strictly on their own merits and in accordance with law.”

45. It appears that before passing the aforesaid order by the Supreme Court no opportunity of hearing was given to ED in the matter. The ED was impleaded as a party on the very date when the proceedings were concluded by the above orders.

46. The Supreme Court on the application filed for recall of its aforesaid order observed that the above orders were passed unintentionally and consequently modified it vide following directions:-

“15. In the case on hand, the Enforcement Directorate, New Delhi, was impleaded as a party respondent in the writ petition on 04.07.2023, by way of the final order disposing of the case. The final order was passed without putting it on notice and affording it an opportunity of hearing. Therefore, the directions of this Court in the said order in relation to ECIR No. ECIR/HIU-1/06/2023 cannot be sustained. More so, as the final order only records

that the interlocutory applications for impleadment and to bring on record additional facts were allowed and no more. Significantly, I.A. No. 81083 of 2023, seeking permission to file additional documents/facts/annexures, was alone reflected in the Record of Proceedings of that day in relation to the writ petition. I.A. No. 122413 of 2023 was not even listed or shown. In any event, the application for amendment of the prayers was not ordered. In effect, FIR No. 197 of 2023 and ECIR No. ECIR/HIU-1/06/2023 were not even made the subject matter of challenge in the writ petition.

16. Further, though this Court relegated the writ petitioners to the jurisdictional High Courts for challenging the FIRs registered against them, certain errors crept in by oversight while doing so. As regards FIR No. 197 of 2023, this Court directed that no coercive steps should be taken in relation thereto against the petitioner financial institution and its people till final disposal of such a petition by the High Court. Having said that, this Court went on to observe that it would be open to the writ petitioners to seek stay of proceedings in relation thereto, which was to be considered by the High Court on merits. In effect, though they stood protected from coercive action in relation to this FIR, proceedings pursuant thereto were permitted to go on and it was left open to them to seek stay of such proceedings before the High Court. Once, no coercive steps were permitted in connection with the said FIR till the final disposal of the petition which was to be filed, the question of permitting the petitioners to again seek stay of proceedings in relation to the said FIR before the High Court was unnecessary.

17. Further, the stay of proceedings granted by this Court in the

writ petition, in relation to the first three FIRs, was directed to continue till the disposal of the writ petitions to be filed before the High Courts. When a party is relegated to the High Court to pursue its remedies, it would not be proper, in the normal course, to bind the said High Court with directions in relation to the proceedings to be impugned before such Court. Ordinarily, this Court would leave all issues open for the party so relegated to raise and pursue before the High Court. In *Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra*¹¹, a 3-Judge Bench of this Court laid down guidelines for exercise of power under Section 482 CrPC, cautioning that criminal proceedings ought not to be scuttled and Courts, in the usual course, should not thwart investigation into cognizable offences. That being so and as no compelling reasons were recorded by this Court in the order dated 04.07.2023 to justify deviation in the case on hand, it clearly manifests that it was purely unintentional and due to sheer oversight.

18. That apart, such directions can be misconstrued by the High Courts to be observations by this Court on the merits of the matter, thereby influencing the adjudication of the case. Thus, for reasons more than one, we are of the opinion that the order dated 04.07.2023 requires to be modified. The said order shall stand recalled insofar as it pertains to ECIR No. ECIR/HIU-1/06/2023. It is left open to the High Court of Allahabad to consider the challenge thereto in Criminal Miscellaneous Writ Petition No. 10893 of 2023 on merits and in accordance with law, uninfluenced by any observations made in the order dated 04.07.2023. Further, the said order dated 04.07.2023 shall stand modified by substituting the words 'till final disposal of the respective petitions...' in paragraph 8 thereof with the

words 'till the filing of the respective petitions'. This would mean that the High Courts in which proceedings have been instituted against the FIRs would be at liberty to entertain applications for interim relief in relation thereto and consider such applications and also the main cases on their own merits and in accordance with law, uninfluenced by any observations made in the order dated 04.07.2023. The miscellaneous applications and the interlocutory applications are disposed of accordingly.

Registry shall upload and attach a corrigendum to the order dated 04.07.2023 passed in Writ Petition (Crl.) No. 166 of 2023, stating that it stands duly modified by and to the extent indicated in this order."

47. In view of the above orders passed by the Supreme Court the challenge laid to the impugned FIRs and the consequential ECIR are required to be dealt with by this Court, in accordance with law, without being influenced in any manner with the previous orders of the Supreme Court of India.

48. We have carefully examined the contents of the two FIRs and the consequential ECIR, under challenge in these writ petitions. In substance, allegations are that the borrowers needed funds for its housing and commercial projects. The Directors of Indiabulls came to the borrowers and offered to provide an amount of Rs. 1939 crores on rates below the market rate and extend assistance for other projects also provided six properties of borrower are mortgaged with it; market value of these mortgaged properties are about Rs. 6000 crores; intent of Indiabulls from the very beginning was not fair and it wanted to grab the properties of the borrower; by playing fraud Indiabulls

wanted the borrower to be shown as defaulter and thereby grab its properties; Rs.1686 crores were not released to the borrower, instead only Rs. 866.88 crores were credited to the account of borrower and immediately withdrawn and balance Rs. 820 crores were not credited to the account of borrower; false assurances were extended to the borrower by Indiabulls; loan recall notice was issued collusively by Indiabulls; an amount of Rs. 552.76 crores has been fraudulently embezzled by Indiabulls; loan amount as well as dues payable have been inflated contrary to the guidelines of RBI; sanctioned loan amount payable to borrower has been withheld by Indiabulls; Directors of borrower have been ill-treated and threatened; although Rs. 1939 crores were to be credited to the account of the borrower as per loan agreement but only Rs. 1256.6 crores were credited to the account of the borrower and Rs. 683 crores has still not been paid even though borrower has paid Rs. 163 crores till March, 2023; shares of Kadam have been transferred on a kick back of Rs. 300 crores; 73 acre land of borrower in Sector 128 has been misappropriated etc.

49. So far as the 2nd FIR is concerned the YEIDA has alleged that transfer of shares of Kadam is without its consent; it has resulted in loss to public authority of transfer charges to the tune of Rs. 200 crores in addition to the contents of the 1st FIR.

50. We have already noticed that sanction of loan to the borrower is pursuant to various loan agreements which admittedly contain Arbitration clause. The informant in the 1st FIR has made no disclosure about existence of Arbitration clause or the steps taken by the borrower to challenge the action of Indiabulls in

Arbitration proceedings. The proceedings in that regard are relevant for the controversy raised in the FIR and would require its narration.

51. Sanction of loan is a commercial transaction. It is to be regulated by the terms of loan/contract and any dispute in respect thereof would require adjudication in the manner stipulated therein. It is undisputed that sanction of loan to the borrower is pursuant to loan agreement which contain an Arbitration clause. Even the pledge of shares of Kadam is in accordance with the pledge agreement dated 6.4.2018 which contains clause 20 as per which any dispute/disagreement/differences between the lender and pledger and/or confirming party (defined in the pledge agreement i.e. Indiabulls, borrower and Kadam) has to be resolved by way of arbitration.

52. Interestingly, the informant though is aware of the Arbitration clause but has made no reference of it in the complaint. There is complete suppression in the complaint filed before the Chief Judicial Magistrate, Gautam Budh Nagar with regard to the terms of loan agreement; existence of Arbitration clause, therein; invocation of Arbitration clause by the borrower; rejection of application filed by borrower before the Delhi High Court under Section 9 of the Act of 1996 and many other relevant facts which have a material bearing on the issue in question.

53. Shri Amit Walia who has filed the complaint is the authorized representative of the borrower and has instituted most of the proceedings before different forums, yet, he has concealed all previous proceedings in respect of the loan transactions in question.

54. Suppression and concealment of material facts by the borrower while instituting complaint before the Chief Judicial Magistrate cannot be viewed kindly. The effect of such misrepresentation would render the proceedings of borrower tainted. In a recent judgment of *Kusha Duruka v. State of Odisha*, (2024) 4 SCC 432, the Supreme Court of India emphasized the importance of disclosing correct facts before a court of law. Reliance was placed upon a previous judgment of the Court in *K.D. Sharma Vs. Steel Authority of India and others*, 2008 (12) SCC 481, wherein the Court observed as under in para 39:-

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

55. In para 6 & 7 of the judgment in *Kusha Duruka* (supra), the Court observed as under:-

“6. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is “satya” (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values have gone down and now litigants can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenges posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim suppressio veri, expressio falsi i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted. It is nothing but degradation of moral values in the society, may be because of our education system. Now we are more happy to hear anything except truth; read anything except truth; speak anything except truth and believe anything except truth. Someone rightly said that: “Lies are very sweet, while truth is bitter, that's why most people prefer telling lies.”

7. In a recent matter, this Court again came across a litigant who had tried to overreach the Court by concealing material facts in Saumya Chaurasia v.

Enforcement Directorate [Saumya Chaurasia v. Enforcement Directorate, (2024) 6 SCC 401 : 2023 SCC OnLine SC 1674 : 2023 INSC 1073] . It was a case where the appellant before this Court had challenged the order *[Saumya Chaurasia v. Directorate of Enforcement, 2023 SCC OnLine Chh 1907]* passed by the High Court [High Court of Chhattisgarh at Bilaspur in Miscellaneous Crl. Case No. 1258 of 2023] rejecting his bail application. He was accused of committing various crimes under the Penal Code, 1860 and the Prevention of Money-Laundering Act, 2002. His bail application was rejected by the High Court on 23-6-2023 *[Saumya Chaurasia v. Directorate of Enforcement, 2023 SCC OnLine Chh 1907]* . In the pleadings before this Court, it was mentioned that the High Court had committed gross error in not considering the charge-sheet dated 8-6-2023 and the cognizance order dated 16-6-2023, which clearly suggested that there was an error apparent on the fact of it. The fact which was available on record was that an order in the bail application was reserved by the High Court on 17-4-2023 *[Saumya Chaurasia v. Enforcement Directorate, 2023 SCC OnLine Chh 5838]* and pronounced on 23-6-2023 *[Saumya Chaurasia v. Directorate of Enforcement, 2023 SCC OnLine Chh 1907]* . Having some suspicion, this Court directed the appellant to file an affidavit to clarify the aforesaid position. There was no specific reply given to the aforesaid query to the Court. Rather vague statements were made. Considering the facts available, this Court observed that there was a bold attempt by and on behalf of the appellant therein to misrepresent the facts for challenging the order *[Saumya Chaurasia v. Directorate of Enforcement, 2023 SCC OnLine Chh 1907]* impugned therein, regarding the conduct of

the parties and the counsel, this Court made the following observations : *(Saumya Chaurasia case [Saumya Chaurasia v. Enforcement Directorate, (2024) 6 SCC 401 : 2023 SCC OnLine SC 1674 : 2023 INSC 1073]* , SCC para 13)

“13.It cannot be gainsaid that every party approaching the court seeking justice is expected to make full and correct disclosure of material facts and that every advocate being an officer of the court, though appearing for a particular party, is expected to assist the court fairly in carrying out its function to administer the justice. It hardly needs to be emphasised that a very high standard of professionalism and legal acumen is expected from the advocates particularly designated senior advocates appearing in the highest court of the country so that their professionalism may be followed and emulated by the advocates practising in the High Courts and the District Courts. Though it is true that the advocates would settle the pleadings and argue in the courts on instructions given by their clients, however their duty to diligently verify the facts from the record of the case, using their legal acumen for which they are engaged, cannot be obliterated.” (emphasis supplied)

Finally, this Court dismissed the appeal with costs of Rs 1,00,000.”

56. Suppression of material facts by the borrower while invoking criminal proceedings against the lender assumes greater significance in the facts of the present case as repeated attempts made by it to injunct the lender i.e. Indiabulls from proceeding against the pledged property had not succeeded. The non-disclosure of material facts would lead to an inference that criminal proceedings are maliciously instituted with the intent to avoid

repayment of availed loan facility; to secure leverage in pending Arbitration and other proceedings inter-se between the parties; coerce the lender i.e. Indiabulls to succumb to the terms dictated by the defaulter borrower.

57. The borrower, including M/s Shipra Leasing Pvt. Ltd. as well as Kadam and Shipra Estate Limited had already approached the Delhi High Court by invoking its jurisdiction under Section 9 of Act of 1996. The proceedings travelled upto the Hon'ble Supreme Court of India. On remand, the petition under Section 9 of the Act of 1996 came to be decided by an elaborate judgment of the learned Single Judge of the Delhi High Court on 20.05.2021. After noticing the background in which the controversy arose learned Single Judge noticed the contention of borrower in para 5.1 to para 5.19, which are reproduced hereinafter:-

“5.1. The loan facility granted in favour of the Borrowers has been arbitrarily recalled by Indiabulls vide loan recall notices dated 05th November, 2020 and 15th December, 2020, on account of an alleged ‘impairment of the security’ under Clause 12.1.9 of the Loan Agreement. The three ingredients of an Event of Default, as defined under Clause 12.1.9(a), being - (i) ‘impairment of the security’, (ii) causing the security to become ‘unsatisfactory’, and (iii) ‘in the judgment of the lender’ (i.e. Indiabulls) - are not met in the instant case. The same is demonstrated as below:

5.1.1. The term ‘Security’, as defined in Clause 1.1(xxix), has to be read to mean all securities provided by the Borrower, taken as a whole, and will have to be related to ‘borrowers dues’, which are defined in Clause 1.1(iv) to mean outstanding principal and other amounts

payable by the Borrowers. In other words, Clause 12.1.9(a) gets attracted only if ‘the Security’ (i.e. all the securities as a whole) created in favour of Indiabulls become ‘unsatisfactory’.

5.1.2. The ‘Judgment of the lender’ has to be exercised in a reasonable manner, as stipulated in Clause 12.3, which implies that the party cannot exercise unilateral discretion in an arbitrary manner. For this, Indiabulls should have taken into consideration whether the existing security was sufficient for fulfillment of all obligations, i.e., the outstanding principal amount. Indiabulls did not act in a reasonable manner, as the value of the security did not fall below the borrower's dues as they stood as on 05th November, 2020. Therefore, no Event of Default can be said to have occurred for Indiabulls to have recalled the loan.

5.1.3. In fact, neither the cure notice as well as the loan recall notices state that the security has become ‘unsatisfactory’, as required under Clause 12.1.9(a). Thus, the same are illegal and arbitrary.

2X SECURITY COVER MAINTAINED

5.2. Mr. Wadhwa strongly relies upon Indiabulls' own communication dated 3rd October, 2019 to highlight that Indiabulls offered to release the mortgage charge on one of the non-impaired properties at Noida (being Plot No. GH-1C, Sector 43, Noida). He contends that it is unfathomable how the impairment of a property of this quantum, could justify the cancellation of the entire loan amount of approximately Rs. 1600 crores, specially when the total security mortgaged towards Indiabulls was more than Rs. 5000 crores.

5.3. Indiabulls' conduct itself is indicative of the fact that there is no Event of Default. As recently as 9th September,

2020, Indiabulls had issued a satisfaction letter certifying that the loan account of the Borrowers was standard and satisfactory.

5.4. The cure notice dated 5th November, 2020 was only with respect to property situated at GH-1B mortgaged by VCL. However, even if the value of the allegedly impaired securities is deducted from the total value of security cover offered, Indiabulls still holds mortgaged properties to the extent of approx. Rs. 5200 crores - which is more than the 2x security cover required under Clause 2.3 of the Loan Agreements (which amounts to Rs. 3372 crores).

NO FINANCIAL DEFAULTS IN PAYMENTS

5.5. There has never been a default in repayment of loans on the part of the Borrowers. They have followed the repayment schedule in letter and spirit. In fact, Indiabulls has, at its sole discretion, rescheduled the loan agreements various times in the past, however, it has never been the case that any rescheduling charges were imposed on Borrowers. Further, on account of the outbreak of COVID-19 pandemic, revised loan repayment schedule was provided to the Borrowers, towards which further PDCs and UDCs were obtained by Indiabulls from the Borrowers. Rescheduling charges towards loans rescheduled on account of the COVID-19 pandemic is inconceivable even in terms of the guidelines provided by the RBI.

5.6. Indiabulls has further concealed that a sum of Rs. 3.33 crores is currently lying in the escrow account of the Shipra Group which is in complete control and custody of Indiabulls.

5.7. In the past, Indiabulls has never banked on any of the security cheques provided by the Petitioners at the

time of execution of the loan agreements/rescheduling.

5.8. Out of the total amount of Rs. 759 crores paid by the Petitioners, an amount of approx. Rs. 80 crores was adjusted from the Escrow Account and about Rs. 679 crores was paid by way of RTGS/new Cheques, as can also be seen from Additional Affidavit dated 12th April 2021.

5.9. Further, Indiabulls by presenting the post-dated cheques of the Borrowers, has acted in contravention of the Loan Agreements. In fact, post-dated cheques were part of the original repayment schedule and not a part of the new repayment schedule that was agreed upon in September, 2020 and payments were, in fact, to be made by other modes such as withdrawal from escrow accounts, RTGS and through new cheques, and the same cannot be denied by Indiabulls."

58. After referring to the objections of Indiabulls and hearing the defaulters in rejoinder the Court analyzed the issues and returned specific findings on the issues raised before it. In paragraph 11 and 12 learned Single Judge held that if a security is impaired the event of default would get triggered regardless of the availability of other securities to satisfy the borrower's dues. The Court interpreted various clauses of the loan agreement to hold that the consequence of the two impaired mortgaged properties (Plot Nos. GH-1B & GH-1C, Sector 43, Noida) held as collaterals for the borrower's dues served as assets guaranteeing repayment and on its nullification provided justification for Indiabulls to invoke the pledged shares. Para 11 & 12 of the judgment are reproduced hereinafter for ready reference:-

“11. In the prima facie opinion of the court, the clauses of the loan agreement cannot be interpreted as propounded by Mr. Chib. The term ‘Security’ as defined in Clause 1.1 (xxix) of the Loan Agreement is widely worded and means, ‘as the context requires’ - a mortgage, charge, hypothecation, escrow, guarantee, pledge, lien and/or other security interest created in the favour of the Lender. It cannot be construed that ‘impairment of the security’ as an Event of Default has to mean impairment of all the securities as a whole, or that, as long as the ‘the Security’ (meaning all the securities as a whole) provided by Borrowers was sufficient to secure fulfilment of obligations, the judgment exercised by the Lender under Clause 12.1.9(a) would not be reasonable in terms of Clause 12.3. The clear use of ‘and/or’ in the Clause is indicative that the meaning of the word ‘security’ can be taken to either mean either each security individually, or to mean all the securities jointly. In such a situation, we are guided by the introductory part of the clause, which clearly stated that the meaning thereof has to be understood ‘as the context requires’. Further, Clause 12.1.9(a) uses the phrase ‘impairment of the Security, if any, or any part thereof’. Thus, even if we were to hypothetically accept that security must mean all securities as a whole, there is a clear provision for any part of the same to become impaired, leading to it becoming unsatisfactory in the judgment of the Lender, in which case, an Event of Default would occur. This argument, therefore, does not hold any water. Though, the correlation between the ‘Securities’ and the ‘Borrower’s dues’ is a novel argument, it is not a persuasive one, and would amount to misinterpretation of clause 2.2 for the purpose deciding whether an Event of Default has occurred. If a security is

impaired, which causes it to become unsatisfactory as to character or value, the Event of Default would get triggered, regardless of the availability of other Securities to satisfy the borrower’s dues.

12. As regards the exercise of discretion, we must note that the parties have contractually agreed, on a plain reading of Clause 12.1.9(a), that the question whether the ‘impairment of the security’ has rendered the security ‘unsatisfactory as to character or value’ has to be decided by the Lender alone. That apart, one must bear in mind the dominant purpose of accepting collaterals as security is to minimize the risk undertaken by a lender. In case of a default by a borrower, a lender can immediately take recourse against the same to offset its loss. In the instant case, the two impaired mortgaged properties were essentially collaterals for the Borrower’s Dues and served as assets guaranteeing repayment. With the nullification of the mortgage, the option to offset the loss from these collaterals is now not available to Indiabulls. Thus, prima facie in the given facts, the exercise of discretion by Indiabulls cannot, by any stretch of imagination, be held to be unreasonable or arbitrary.”

59. Learned Single Judge also held that impairment of securities occur when security twice over the borrowed sum ceases to exist. The Court discussed the facts extensively to hold in para 19 to 22 that an event of default has occurred in terms of the loan agreement. Para 22 of the judgment is reproduced hereinafter:-

“22. The legal effect of the aforesaid communications is that the mortgage created by the Mortgagers, today, has perished, which puts Indiabulls in a serious jeopardy. Today, if Indiabulls

were to enforce this collateral, it cannot do so. This is not just impairment but a complete obliteration of the prime securities. Indiabulls' request for additional security has gone un-responded. In these circumstances, the requirement stipulated in Clause 12.1.9(a), that the security has become impaired, has occurred. There cannot be reservations or uncertainty about this aspect. The payment of Rs. 38,19,24,525/-, in terms of NOC issued by Noida Authority was to be done immediately. Borrowers defaulted in making the payment leading this to not only become overdue but it has burgeoned to Rs. 219 crores each. This court finds merit in the contention of Indiabulls that the default did not occur on the date of cancellation of NoC, but was a continuing default, as the amount of Rs. 38 crores was payable "immediately" on 23rd February, 2018 when the NoC was first granted. Thus, this is nothing less than a wilful impairment. Today, the court can only speculate as to the circumstances whereunder, without the payment to Noida Authority, the Mortgage Deed got registered, or the reasons for the delayed action of Noida Authority. These aspects would have to be examined in arbitration. Nevertheless, the fact of the matter is that Indiabulls cannot enforce the impaired securities, and is constrained to recall the loan. In these circumstances, the question arises whether the Court can interdict Indiabulls from taking recourse to the provisions of the Loan Agreement for enforcing other securities. The answer to this question has to be in the negative."

60. Upon consideration of borrower's plea regarding non-existence of financial default learned Single Judge held that an event of default has occurred and that such default is more serious and fundamental than dishonour of an EMI. The Court

consequently rejected the application of borrower under Section 9 of the Act of 1996 vide observations made in para 25 and 26 of the judgment, which are reproduced hereinafter:-

"25. Without getting into the above controversy, Even if, one were to accept that there is no financial default, it cannot discern the fact that there has been an Event of Default on the date of issuance of recall notices. The significant fact is that loan recall notices are dated 05th November 2020 and 15th December 2020. Indiabulls has recalled the loans on the sole ground of 'impairment of the security' under Clause 12.1.9(a) and recalled the loan facility claiming the entire outstanding amount of Rs. 1763 crores. In pursuance to the said recall notices, Indiabulls proceeded to issue a purported Notice stating that it shall invoke the Pledge Agreements on 14th January, 2021. Thus, the afore-noted default in payments, with respect with EMI amounts due as on 5th April, 2021, are undeniably, after the issuance of the recall notices.

26. It cannot be denied that an Event of Default has occurred, irrespective of whether there is financial default or not. It is not as if the default, categorised as a 'financial default', in comparison to a default contemplated under Clause 12.1.9(a), have different consequences. The fact that the collaterals/mortgaged properties are not available for enforcement is, in fact, a default far more serious and fundamental than dishonour of an EMI. Therefore, this argument of the Petitioner does not convince this Court to grant the interim relief as sought for."

61. The grievance of borrower regarding undervaluation of the shares of Kadam also fell for consideration before

the learned Single Judge of Delhi High Court in proceedings under Section 9 of the Act of 1996. The observations made by the Court in para 29 to 32 of the judgment are clearly apposite in the context of pleas raised, herein, and are reproduced hereinafter:-

“29. Indiabulls is bound by the statement recorded in the said order, that the pledge of shares will be undertaken in a completely transparent manner on a fair evaluation of the shares. Prima facie the Court finds that the sale of the pledge shares is being done in a transparent manner. Indiabulls has disclosed the purchaser and also the amount at which the sale has been done. When the Petitioners filed an application asking for furnishing of documents, Indiabulls provided the same without hesitation. In fact, before commencement of arguments, Mr. Nayar candidly disclosed the amount of sale and offered that in case the Borrowers were interested to redeem the security, they could do so on payment of Rs. 900 crores. However, no interest was shown by the Borrowers.

30. On the aspect of valuation, we note that KDPL, the company whose shares have been sold by Indiabulls to DLF, is a lease-holder and the title-holder of the plot of land, which is its only valuable asset. Thus, the valuation of the shares of KDPL has been done primarily on the basis of the value of the parcel of land, the shares having no other intrinsic value. Indiabulls supports its valuation on the basis of the reports on record, which are disputed and countered by the Petitioners. The valuation of land is not an exact science. It requires expertise, and certainly cannot be gone into in the present proceedings. The credibility of rival reports would be examined during the arbitration to determine which one is

correct and realistic. At this juncture, the Court only has to see if the contractual terms as agreed between the parties under the Pledge Agreement have been adhered to. Undisputedly, notice of invocation had been issued by Indiabulls giving Borrowers and the Pledgor an opportunity to redeem, before proceeding with the sale of pledged shares. The Borrowers have neither provided additional security, nor redeemed the pledge. They have even failed to agree to the proposal of Indiabulls to pay/deposit Rs. 900 crores, being the sale consideration that it is receiving from DLF. Yet, the Borrowers seek restrain on the sale, alleging that there is mala fide motive in the sale, and that the shares are being sold for a song.

31. Indiabulls' interest lies in maximising the return from the sale of assets, in order to offset the cost of loans. Petitioners' contentions - that the sale of shares of KDPL for a trifling sum implies that shares are undervalued, and that the sale of shares to a competitor of the Borrowers at a discount is mala fide - are assumptions without any foundation. The urgency demonstrated by Indiabulls is predictable, as the assets secured are impaired and as per its contention no other asset is sufficient to realize the outstanding dues. The circle rates of land alone cannot determine its market value and several other factors often come into play. The Judgment in GNCTD v. CTA Apparels (supra), relied upon by Mr. Wadhwa, is distinguishable on facts and does not support the case as sought to be advanced by the Petitioner. In fact, it goes against the Petitioners' arguments and states that circle rates ought not to be relied upon when disputes as to valuation have arisen. Relevant extract is as follows:

“On the basis of this circle rate, the Registering Authority can, at best

mechanically determine the valuation of the instrument, but, whenever the dispute arises, the exact market valuation, ought to be arrived at, by the Collector as mandated by Section 47A of the Act. Circle rate cannot be mechanically followed by Collector, as a sole factor, to determine market value of the property in question.”

32. As discussed above, the objection made by Shipra Group on valuation of sold pledged shares is a matter of accounts, which can be only adjudicated upon by the Arbitral Tribunal, and the remedy available with the Borrowers is to claim damages. The Court cannot enter into the arena of what constitutes a fair valuation of shares. Does it mean that till the time the Arbitrator examines this question, Indiabulls should refrain from taking recourse as available to it under contract? In the opinion of the Court, having regard to the provisions in question, this Court cannot interfere on this aspect, and deprive Indiabulls from enforcing its right under the Pledge Agreement.”

62. In light of the above discussions, learned Single Judge of the Delhi High Court rejected the borrower's petition under Section 9 of the Act of 1996. The undertaking given by the counsel for Indiabulls, at an earlier stage of the proceedings, were discharged. The Court also observed that observations made by it are prima facie in nature and would not come in the way of arbitral tribunal in adjudicating the dispute between the parties.

63. The aforesaid judgment of learned Single Judge was unsuccessfully assailed by the borrower in appeal preferred before the Division Bench of Delhi High Court. After referring to various observations of learned Single Judge the Division Bench

concluded that in view of categorical observations made in last para of the judgment of learned Single Judge the apprehension of borrower that the observations of learned Single Judge would prejudice the arbitral proceedings is non-existent. The appeal was disposed of accordingly. The matter rests at it.

64. We are rather amazed that the borrower instead of pursuing the remedy of Arbitration available to it, in terms of the loan agreement, which it has already invoked/availed, choose to short circuit such proceedings available in law to it and instead has lodged the impugned FIRs for adjudication of issues already raised in arbitration so as to seek determination of civil/commercial causes in criminal proceedings.

65. We also find absolutely no reason disclosed in the criminal complaint with regard to unexplained delay in lodging the complaint. The transfer of shares of Kadam was on 1.7.2021. The complaint has been filed in April, 2023, which is nearly two years after the event. This is after the borrower invoked the Arbitration clause and its application under Section 9 of the Act of 1996, for interim relief against transfer of shares stood rejected and the matter is still pending before the Arbitrator. Unexplained delay in instituting criminal proceedings in the facts of the present case also renders the proceedings questionable.

66. The borrower is admittedly a group of companies dealing in real estate sector for fairly long. It is well aware that availing of loan from a non-banking finance company is a transaction with commercial flavour and is governed by the terms of contract. It is not the case of borrower that it has not signed the loan

agreements. Having done so, with open eyes, it would not lie in the mouth of the borrowers to accuse the lender of putting unreasonable terms for offering loan or having fraudulent intent in offering loan to the borrower particularly when proceedings are initiated against it for default in repayment of loan.

67. Initiation of criminal action by a defaulter, against the lender, would be viewed with suspicion when the defaulter conceals previous adjudications, inter-se between the parties, in arbitral proceedings. It otherwise remains undisputed that the loan transaction contains an arbitration clause which is already invoked and issues raised in criminal proceedings are pending adjudication before the arbitrator appointed by the Delhi High Court.

68. Nevertheless, we have examined the allegations made in the two FIRs as also the ECIR within the limited scope of this Court to interfere in it as is settled by the Supreme Court in *Madhu Limaye Vs. The State of Maharashtra*, 1977 (4) SCC 551; *The State of Haryana and others Vs. Bhajan Lal and others*, 1990 SCR Suppl. (3) 259; *State of Telangana Vs. Habib Abdullah Jeelani and others*, (2017) 2 SCC 779 and *Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others*, (2021) 19 SCC 401.

69. The allegation in the FIRs that the Directors of Indiabulls contacted the borrower and induced the borrower to avail loan on rates lower than the market rate so as to grab the property of borrower cannot be countenanced. At the cost of repetition, we may reiterate that borrower herein is an established company which is aware of normal financing practices as also the terms on which loan is offered to it. To avail

finance on terms indicated in the loan agreement is a commercial/managerial decision of the borrower. Availing of finance cannot be foisted upon the borrower by a non-banking finance company. Admittedly, loan was sanctioned to the borrower vide 16 separate loan agreements executed between 2017 to 2020. The event of default occurred in early 2021 itself. The borrower availed of remedies in Arbitration proceedings against Indiabulls and its interim application against coercive action has already failed.

70. Interestingly, in the Arbitration proceedings there are no allegations that Directors of Indiabulls made any misrepresentation or inducement or that loan was offered to the borrower with an intent to grab its properties. Such allegation in the complaint/FIRs are made after several years of default in repayment of loan for the first time. It would not be open for the borrower to come up with arguments that are otherwise available to a poor man who has gone to a village money lender having evil eyes on his property.

71. The petitioners' contention that in the Arbitration proceedings the defaulter made no allegation of inducement by Indiabulls in the grant of loans or that Indiabulls had secured its loan by obtaining securities on the strength of forged or fabricated documents is not denied in the counter affidavit. The limited case set up by the borrower in proceedings under Section 9 of the Act of 1996 was that no event of default had taken place. This argument of borrower has prima facie been rejected in proceedings under Section 9 by the Delhi High Court and issues, in that regard, are yet to be finally determined in Arbitration proceedings. The petitioners' assertion, in this regard, made in para 9 of

the writ petition has been vaguely denied in para 65 of the counter affidavit by stating that scope of Section 9 petition is altogether different.

72. The allegation that disbursal of loan of Rs. 1686 crore had in fact not taken place is also levelled for the first time in criminal proceedings vide complaint dated 23.3.2023 under Section 156(3) Cr.P.C. Otherwise, the disbursal of loan amount was not questioned in proceedings under Section 9 of the Act of 1996 and the Delhi High Court has rightly left all accounting issues, between the parties, in respect of the loan transaction to be resolved in Arbitration.

73. We find substance in the petitioners' argument that the conduct of borrower in initiating criminal action vide Complaint instituted under Section 156(3) Cr.P.C. on 23.3.2023 is lacking in bona fide. Admittedly, the borrower with open eyes had entered into commercial transaction with the Indiabulls and having prima facie defaulted in honouring the terms of contract, availed the remedy in respect of the coercive action taken against it. After having failed at it the borrower has initiated criminal action, concealing the orders of Delhi High Court in pending Arbitration proceedings as per which the issues raised are required to be resolved in Arbitration. Institution of criminal action can therefore be said to be with oblique motive.

74. Various issues in respect of the loan transaction are to be determined in accordance with the terms of contract. Any differences between the parties, in respect of such contract has to be resolved by Arbitration. The borrower as of now is prima facie a defaulter and its claim

requires determination in Arbitration, which is pending before Hon'ble Mr. Justice Vikramjit Sen (Retired). We are, therefore, not required to enter into various claims of parties with any sense of definiteness regarding loan agreement or its performance when the issues are seized before the Arbitrator.

75. The allegation that entire loan amount was not disbursed or that a lesser amount was actually released to the borrower is also a grievance raised for the first time in criminal proceeding instituted with unexplained delay. Such claims can otherwise be determined only in accordance with the terms of loan agreement/contract and the disputes or differences between the parties, raised for the first time in criminal proceedings cannot be appreciated.

76. Any adjudication, in criminal proceedings, of issues that requires determination in pending Arbitration would only amount to preempting and overreaching the Arbitration proceedings where commercial transactions are yet to be determined as per the contract.

77. The Delhi High Court in proceedings under Section 9 of the Act of 1996 has rightly observed that issues with regard to undervaluation of the shares of Kadam since are to be determined in Arbitration, therefore, no adjudication on that aspect is warranted. Once that position is settled inter se between the parties we would not be justified in allowing such issues to be raised in criminal proceedings. Allowing such criminal proceedings would not only be an abuse of the process of law but may result in preempting the issues that are yet to be determined in proper proceedings.

78. We may reiterate that transfer of pledged shares of Kadam in favour of M/s M3M is on a consideration of Rs. 900 crores. In the earlier two attempts at transfer of these shares also the value of pledged shares were determined at Rs. 900 crores. In the second such attempt the borrower was itself was a party to the transaction where the pledged shares were valued at Rs. 900 crores. Once that be so, transfer of shares at Rs. 900 crores, prima facie, no criminality can be attached to such transaction. We find substance in the argument of Sri Mukul Rohatgi in this regard.

79. So far as the arguments advanced on behalf of the borrower that parallel civil and criminal proceedings are maintainable is concerned, there is no quarrel on this proposition. Ordinarily, where civil suit and criminal case both are pending the civil proceedings would ordinarily be stayed as such proceedings would take a longer time to resolve. However, whether civil or criminal proceedings ought to be given preference in a given case will depend upon the facts and circumstances of each case. The borrower has placed reliance upon the judgments of the Supreme Court in *M.S. Sheriff & another Vs. State of Madras*, AIR 1954 SC 397; *P. Swaroopa Rani Vs. M. Hari Narayan @ Hari Babu*, 2008 (5) SCC 765 and *Syed Askari Hadi Ali Augustine Imam Vs. State (Delhi Administration)*, 2009 (5) SCC 528.

80. In *M.S. Sheriff* (supra) the Court held as under in para 12 and 13 of the judgment:-

“12. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of

opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

13. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.”

81. The last judgment relied upon by the borrower in *Syed Askari* (supra) has referred to the previous judgments on the point and explicitly enumerates the guiding principle on the issue. The Court has clearly held that determination of the

question whether civil or criminal proceedings are to be given preference has to be case specific and no hard and fast rule can be laid down. Reliance was placed by the Court on Sardool Singh Vs. Nasib Kaur, 1987 Suppl. SCC 146 wherein the Court observed as under in para 2:-

“2. A civil suit between the parties is pending wherein the contention of the respondent is that no will was executed whereas the contention of the appellants is that a will has been executed by the testator. A case for grant of probate is also pending in the court of learned District Judge, Rampur. The civil court is therefore seized of the question as regards the validity of the will. The matter is sub judice in the aforesaid two cases in civil courts. At this juncture the respondent cannot therefore be permitted to institute a criminal prosecution on the allegation that the will is a forged one. That question will have to be decided by the civil court after recording the evidence and hearing the parties in accordance with law. It would not be proper to permit the respondent to prosecute the appellants on this allegation when the validity of the will is being tested before a civil court. We, therefore, allow the appeal, set aside the order of the High Court, and quash the criminal proceedings pending in the Court of the Judicial Magistrate, First Class, Chandigarh in the case entitled Smt Nasib Kaur v. Sardool Singh. This will not come in the way of instituting appropriate proceedings in future in case the civil court comes to the conclusion that the will is a forged one. We of course refrain from expressing any opinion as regards genuineness or otherwise of the Will in question as there is no occasion to do so and the question is wide open before the lower courts.”

82. The Court distinguished the judgment in Sardool Singh (supra) by observing that in Syed Askari (supra) a criminal case had already been instituted and the question before it was as to whether it should be allowed to continue or not? It was in that context that the Court allowed the criminal proceedings to go on as not only the aspect of forgery of will, pending adjudication in civil proceedings was the subject of criminal trial but even trespass was alleged in the FIR. The Court held as under in para 43:-

“43. The FIR was lodged not only in regard to forgery of the will but also on the cause of action of a trespass. The appellant admittedly is facing trial under Sections 420, 468 and 448 IPC. It is, thus, possible that even if the will is found to be genuine and that no case under Section 468 IPC is found to have been made out, the appellant may be convicted for commission of other offences for which he has been charged against, namely, trespass into the property and cheating. If it is found that the appellant is guilty of trespass, he may be asked to hand over possession of the premises in question to the complainant.”

83. The judgment in Syed Askari therefore has no applicability in the facts of the present case. In this case criminal proceedings are being initiated after almost two years by suppressing and concealing the fact that borrowers' interim application against transfer of shares is already rejected, subject to issues being resolved in arbitration. On facts, we do not approve the initiation of criminal action belatedly, on the strength of suppression and concealment of facts, when issues are otherwise pending before the Arbitrator pursuant to orders passed by the Delhi High

Court, which have attained finality inter se between the parties.

84. In this Case we find that Indiabulls has recalled the loans sanctioned in favour of the borrower in December, 2020. Arbitration clause in the loan agreement was invoked in 2021 and the Arbitrator came to be appointed by the High Court under Section 11 of the Act of 1996. Application filed under Section 9 of the Act of 1996 was adjudicated against the borrower and its appeal was also dismissed on 30th November, 2022.

85. We are also informed that the Arbitrator has passed an order of status quo in respect of 73 acre land owned by Kadam. It is much thereafter that criminal action has been initiated notwithstanding the civil proceedings having progressed between 2021 to the start of the year 2023. The question before us is as to whether the FIRs and the ECIR be allowed to continue notwithstanding the orders passed by the Delhi High Court in proceedings under Section 9 of the Act of 1996 as per which all issues relating to loan transaction and valuation of pledged shares of Kadam has to be resolved in Arbitration.

86. We may also note that after the defaulter's application under Section 9 of the Act of 1996 came to be rejected by the Delhi High Court it made an offer to settle all dues of Indiabulls by offering Rs. 1300 crores (Interest free) as one time settlement vide proposal of informant Amit Walia vide Mail dated 1st July 2021. This proposal has been rejected by Indiabulls on 5th July, 2021. This fact is also suppressed by Amit Walia in his complaint filed before the Chief Judicial Magistrate, Gautambuddh Nagar.

87. The borrowers' contention in the criminal complaint that no event of default has taken place or that securities twice above the loan are pledged/mortgaged and, therefore, Indiabulls cannot proceed against the pledged shares of Indiabulls also cannot be countenanced in view of specific findings returned by learned Single Judge of the Delhi High Court in the judgment dated 20th May, 2021, against which no interference is made in appeal by the Division Bench of Delhi High Court on 30th November, 2022.

88. Once the contention of borrower that no event of default has taken place or that securities twice above the loan are pledged/mortgaged and, therefore, Indiabulls cannot proceed against the pledged shares of Indiabulls is rejected by the Delhi High Court and issues in that regard are to be finally determined in Arbitration by virtue of loan agreements it would not be appropriate to allow such issues to be raked up in criminal proceedings. This is so as inter se between the parties it is decided that these issues are to be resolved by way of Arbitration. The borrower's anxiety to overreach this position by seeking criminal adjudication of civil issues would clearly amount to abuse of the process of law.

89. So far as the stand of ED is concerned, we find that its allegation about undervaluation of shares on the strength of report of valuers or that the valuers report are manipulated has to be examined in the context of the financial transaction in its entirety. The valuers report is only an input for the determination of the value of pledged shares of Kadam. To what extent such report of the valuer is binding on Indiabulls would again be a matter to be

determined as per the terms of pledge agreement in Arbitration proceedings.

90. Our attention has not been invited to any specific clause in the pledge agreement outlining the role of valuer in determining the value of share for its transfer on account of default in repayment of loan. The counter affidavit filed by ED alleges that the valuers report is ante-dated. It also says that the valuers were not authorized to undertake valuation of shares.

91. In the event valuers were not authorized to value the shares the question of its report being ante-dated or manipulated loses much of its importance. In either of the situation the larger issue that remains is as to whether the shares of Kadam have been undervalued?

92. Once the Delhi High Court has specifically left the issue of valuation of shares of Kadam to be determined in pending Arbitration proceedings, which are yet to be concluded, it would not be prudent to allow such issues to be dealt with in criminal proceedings. It would amount to prejudging the issue of valuation of shares. Even otherwise, if the Arbitrator finds any criminality having crept in the transaction the initiation of criminal action, at such stage, would not be barred. However, we are of the considered opinion that issues specifically entrusted for adjudication to the Arbitrator under the loan agreement cannot simultaneously be allowed to be adjudicated in criminal proceedings belatedly instituted on the strength of concealment and misrepresentation overlooking the scheme for adjudication.

93. So far as the plea of round tripping of funds for purchase of transferred shares

is concerned, the allegation stems from a flawed understanding of the banking system itself. These are standard banking practices and unless it is shown to be violating any law that makes it an offence the institution of criminal proceedings would be impermissible. No such violation of law is pointed out by the defaulter. Moreover, issues being pending before the Arbitrator any further comments on this aspect, by us, would be unwarranted.

94. While adjudicating the instant cause we are mindful of the fact that the informant in the 1st FIR is a representative of the borrower which has defaulted in repayment of loan. Its objection against revocation of loan and coercive steps against pledged property has prima facie not found favour with the Delhi High Court in proceedings under Section 9 of the Act of 1996 and the issues, in that regard, are yet to be determined by the Arbitrator already appointed by the Delhi High Court under Section 11 of the Act of 1996. It is in this background that we are not inclined to sustain the invocation of criminal adjudicatory process by suppressing binding adjudications already done between the parties.

95. So far as the 2nd FIR lodged by YEIDA is concerned, the same is substantially based upon the allegations made in the 1st FIR. In a way the 2nd FIR is an offshoot of the 1st FIR.

96. So far as the allegation with regard to non obtaining of permission before transfer of shares of Kadam is concerned the petitioners allege that there are no applicable provision in law which required any permission to be obtained before such transfer of shares.

97. The 2nd FIR records that YEIDA had granted permission on 9.1.2018 for 73

acre land owned by Kadam to be mortgaged to Indiabulls. The 2nd FIR refers to the lodging of 1st FIR as well as complaint made by the borrower to YEIDA and records that no permission is obtained from it by Indiabulls before transferring the shares of Kadam. It also records that transfer of shares has caused expected loss of nearly Rs. 200 crores on the strength of fraud, misrepresentation and concealment, etc.

98. The petitioners state that the 73 acre land of Kadam is part of the concession agreement dated 7th February, 2003 between Taj Expressway Industrial Development Authority and M/s Jaiprakash Industries Limited which contains Clause 4.3(d) quoted hereinafter:-

“The Concessionaire shall be entitled to further sub-lease developed/undeveloped land to sub-lessees/end-users in its sole discretion without any further consent or approval or payment of any charges/fee etc. to TEA or any other relevant authority.”

99. Clause 4.4 of the agreement dated 7th February, 2003 is also relied upon which provides that no permission would be needed for transfer of land covered under the concession agreement and the only restriction would be to follow the applicable master plan or any other regulations.

100. The Concessionaire M/s Jaiprakash Industries in turn executed sub-lease on 31.3.2008 in respect of 73 acre land to Kadam.

101. So far as ownership of 73 acre land of Kadam under sub-lease from YEIDA is concerned, the first charge of

authority i.e. YEIDA under sub-lease is intact. In case of any dispute YEIDA continues to have first charge over such land.

102. With regard to transfer of shares of Kadam pledged to Indiabulls the petitioners allege that on the date of transfer of shares i.e. 1.7.2021 there existed no law or policy of YEIDA requiring imposition of transfer charges on the change in shareholding of a lessee. Such a policy has been introduced only on 8.10.2021. YEIDA was otherwise informed about the transfer of shares by Kadam on 29.7.2021 but no objection to it was taken nor any demand towards transfer charges was levied then.

103. YEIDA issued a demand notice only on 11.4.2023 imposing transfer charges on account of change of shareholding against Kadam pursuant to the complaint of borrower which led to lodging of the 2nd FIR. Kadam challenged the demand by filing writ petition no. 16196 of 2023 wherein an interim protection was granted. During pendency of the writ YEIDA withdrew the notice dated 11.4.2023 and consequently the writ petition was disposed of.

104. It is on 27.1.2014, after nearly 9 months of the registration of FIR that a demand notice for Rs. 243.73 crores on account of transfer of shares is again issued by YEIDA against Kadam. This notice is sub-judice before this Court wherein an interim order is operating.

105. The issue as to whether any transfer charges is payable on account of transfer of shares of Kadam is yet to be determined in pending writ proceedings before this Court where an interim order is

operating. In our opinion the right of YEIDA to recover such transfer charges would have to be determined in the pending writ proceedings before this Court and such claim in no way would be effected by the outcome of the present petitions filed for quashing of the FIRs. If it is ultimately held by this Court in pending Writ Petition that transfer charges are payable the amount so determined would remain recoverable from Kadam on account of first charge over it by YEIDA notwithstanding the outcome of present petitions.

106. The 2nd FIR is otherwise in continuation to the 1st FIR and is on the prompting of the borrower. The transfer of pledged shares of Kadam by the Indiabulls pursuant to pledge agreement is on account of default by the borrower. Such exercise of authority under the pledge agreement is not shown to be an offence. Except for bald allegations no criminality in the transaction is shown in light of the discussions contained in this judgment. The levy of transfer charges is otherwise an issue pending adjudication before this Court in a separate writ and, therefore, no observations on that count are warranted by us.

107. The 2nd FIR is otherwise lodged pursuant to the direction of the authority contained in the letter dated 11.4.2023 which has since been withdrawn by YEIDA. What survives is the issue of transfer charges which is subjudice before this Court. In such circumstances, the 2nd FIR also cannot be sustained when no criminality is even *prima facie* indicated and the issues raised by the borrower in the 1st FIR are yet to be determined in appropriate proceedings.

108. It may also be noticed that at the time when pledged shares of Kadam were

proposed to be transferred and proceedings were pending before the Delhi High Court under Section 9 of the Act of 1996 an offer was given to the defaulter to claim the pledged shares upon payment of Rs. 900 crores but this opportunity was also not availed by the borrower. This is specifically noticed in the order of the learned Single Judge of Delhi High Court.

109. In the context of the facts placed on record and for the discussions held hereinabove we are of the considered view that the impugned FIRs cannot be sustained as its lodging is an apparent abuse of the process of law.

110. So far as proceedings undertaken by ED are concerned, the counter affidavit filed by it only demonstrates that the investigation undertaken by it casts a doubt on the genuineness of valuers report as well as round tripping of funds for purchase of pledged shares of Kadam.

111. In any case the valuers report is at best an input for assessing the value of shares of Kadam. Since the larger issue of undervaluation of such transferred shares of Kadam is an aspect to be gone into by the Arbitrator, at the first instance, it would not be proper to allow the ED to proceed in the matter at this stage and overreach the proceedings of the Arbitrator.

112. Whether at all there is undervaluation of the shares of Kadam is to be determined finally in Arbitration, first. It is only thereafter that it can be ascertained as to whether the valuers report had played any role in such undervaluation or not? Not much reliance can be placed upon the correctness or otherwise of the valuers report, without first ascertaining the aspect of undervaluation of shares.

113. Further, the borrower has already alleged undervaluation before the Arbitral Tribunal and has also sought alleged damages in respect of it. Thus, this question cannot be agitated in the present criminal proceedings.

114. In *K. Virupaksha v. State of Karnataka*, (2020) 4 SCC 440, the Supreme Court dealt with a similar case of defaulter initiating criminal action against the lender bank. After examining the issue the Court held as under:-

9. *As noted, the undisputed fact is that the complainant had approached Canara Bank for financial assistance, wherein the appellants herein were the officers in the circle office. The complainant had availed the loan facility to the tune of Rs 2.68 crores on 16-3-2009. Though the complainant contends that the entire amount of Rs 2.68 crores was not released, but only a sum of Rs 90 lakhs was released and the remaining amount was adjusted as repayment, the question would be as to whether that aspect and the other aspects as raised with regard to the non-consideration of OTS as also the value for which the property was sold and the manner in which it was sold could be investigated into by the police, merely, because allegations are made and certain sections of the Penal Code, 1860 are invoked when the action is resorted to and regulated under the Sarfaesi Act. While taking note of the sequence of events it is noticed that the secured asset though sold in the auction conducted on 31-1-2014 and the grievances as sought to be put forth at this point in the criminal complaint was available at that juncture, it is not as if the complaint was immediately filed. On the other hand, when the auction notice dated 13-10-2013 was issued, no grievance was*

made out by the complainant before any judicial forum. However, the sale did not take place for want of the purchasers and a fresh auction notice dated 30-12-2013 was issued indicating the reserve price at Rs 1.10 crores.

14. *The issue, however is, as to whether such proceedings by the police in the present facts and circumstances could be permitted. At the outset, the sanction of loan, creation of mortgage and the manner in which the sanctioned loan was to be released are all contractual matters between the parties. The complainant is an industrialist who had obtained the loan in the name of his company and the loan account was maintained by Canara Bank in that regard. The loan admittedly was sanctioned on 16-3-2009. When at that stage the amount was released and if any amount was withheld, the complainant was required to take appropriate action at that point in time and avail his remedy. On the other hand, the complainant had proceeded with the transaction, maintained the loan account until the account was classified as NPA on 15-1-2013. Initially, the issue raised was only with regard to the undervaluation of the property when it was brought to sale. On that aspect, as taken note, the writ proceedings were filed and the learned Single Judge having examined, though did not find merit had reserved liberty to raise it before DRT, which option is also availed. It is only, thereafter, the impugned complaint was filed on 20-5-2016.*

15. *The Sarfaesi Act is a complete code in itself which provides the procedure to be followed by the secured creditor and also the remedy to the aggrieved parties including the borrower. In such circumstance, as already taken note of by the High Court in writ proceedings, if there is any discrepancy in the manner of*

classifying the account of the appellants as NPA or in the manner in which the property was valued or was auctioned, DRT is vested with the power to set aside such auction at the stage after the secured creditor invokes the power under Section 13 of the Sarfaesi Act. This view is fortified by the decision of this Court in Indian Overseas Bank v. Ashok Saw Mill [Indian Overseas Bank v. Ashok Saw Mill, (2009) 8 SCC 366 : (2009) 3 SCC (Civ) 403] wherein it is held as hereunder : (SCC pp. 375-76, paras 34-37)

“34. The provisions of Section 13 enable the secured creditors, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realising secured assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error

or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr Gopalan and Mr Altaf Ahmed that the DRT has no jurisdiction to deal with a post-Section 13(4) situation, cannot be accepted.”

(emphasis supplied)

16. We reiterate, the action taken by the Banks under the Sarfaesi Act is neither unquestionable nor treated as sacrosanct under all circumstances but if there is discrepancy in the manner the Bank has proceeded it will always be open to assail it in the forum provided. Though in the instant case, the application filed by the complainant before DRT has been dismissed and Appeal No. 523 of 2015 filed before DRAT is also stated to be dismissed the appellants ought to have availed the remedy diligently. In that direction, the further remedy by approaching the High Court to assail the order of DRT and DRAT is also available in appropriate cases. Instead the petitioner after dismissal of the application before the DRT filed the impugned complaint which appears to be an intimidatory tactic and an afterthought which is an abuse of the process of law. In

the matter of present nature, if the grievance as put forth is taken note of and if the same is allowed to be agitated through a complaint filed at this point in time and if the investigation is allowed to continue it would amount to permitting the jurisdictional police to redo the process which would be in the nature of reviewing the order passed by the learned Single Judge and the Division Bench in the writ proceedings by the High Court and the orders passed by the competent court under the Sarfaesi Act which is neither desirable nor permissible and the banking system cannot be allowed to be held to ransom by such intimidation. Therefore, the present case is a fit case wherein the extraordinary power is necessary to be invoked and exercised."

115. In *M.N. Ojha Vs. Alok Kumar Srivastav*, (2009) 9 SCC 682, the Supreme Court observed as under in paras 33, 34 & 35 of the judgment, which are reproduced:-

33. This is one case where the averments and allegations made in the complaint do not disclose the commission of any offence by the appellants or any one of them. They were merely discharging their duties to realise and recover the amounts due to the Bank from the borrower as well as the guarantors. The complaint obviously has been filed as a counterblast to the proceedings already initiated by the Bank including the first information report lodged by the first appellant against the complainant and the borrower for the offences of cheating and misappropriation.

34. Sequence of events undoubtedly suggests that the criminal proceedings have been maliciously instituted with an ulterior motive of wreaking vengeance on the appellants and with a view to spite them due to personal

grudge. It was clearly intended to prevent the public servants from discharging their duties. The criminal law has been set in motion by the learned SDJM on mere asking to do so by the complainant.

35. The High Court almost abdicated its duty in refusing to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure though the case on hand required its interference in order to prevent abuse of the process by a court subordinate to it. A clear case is made out requiring our interference to secure the ends of justice."

116. In *Mitesh Kumar J. Sha Vs. State of Karnataka* (2022) 14 SCC 572, the Supreme Court observed in para 38, 40, 41 and 45, as under:-

*38. Having considered the relevant arguments of the parties and decisions of this Court we are of the considered view that existence of dishonest or fraudulent intention has not been made out against the appellants. Though the instant dispute certainly involves determination of issues which are of civil nature, pursuant to which Respondent 2 has even instituted multiple civil suits, one can by no means stretch the dispute to an extent, so as to impart it a criminal colour. As has been rightly emphasised upon by this Court, by way of an observation rendered in *Indian Oil Corpn. v. NEPC India Ltd.* [*Indian Oil Corpn. v. NEPC India Ltd.*, (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] , as under : (SCC p. 749, para 14)*

"14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal

proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."

40. On an earlier occasion, in *G. Sagar Suri v. State of U.P.* [*G. Sagar Suri v. State of U.P.*, (2000) 2 SCC 636 : 2000 SCC (Cri) 513], this Court has also observed : (SCC p. 643, para 8)

"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

41. Furthermore, in the landmark judgment of *State of Haryana v. Bhajan Lal* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] regarding exercise of inherent powers under Section 482CrPC, this Court has laid down the following categories of instances wherein inherent powers of the Court can be exercised in order to secure the ends of justice. These are : (SCC pp. 378-79, para 102)

"102. ... (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute

any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

45. *In view of the above facts and discussions, the impugned order dated 13-8-2019 [Ramanlal M. Sha v. State of Karnataka, 2019 SCC OnLine Kar 3504] passed by the High Court of Karnataka is set aside. The impugned FIR No. 185 of 2016 dated 29-3-2016 and proceedings in CC No. 20609 of 2017 on the file of VIth Additional CMM, Bengaluru, in pursuance of charge-sheet dated 29-3-2017 against the appellants for the offences under Sections 406, 419, 420 read with Section 34 IPC stands quashed."*

117. In *Vijay Kumar Ghai Vs. State of West Bengal*, (2022) 7 SCC 124, the Supreme Court observed in Paras 24, 25, 37, 38, as under:

24. *This Court in G. Sagar Suri v. State of U.P. [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636 : 2000 SCC (Cri) 513] observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.*

25. *This Court has time and again cautioned about converting purely civil disputes into criminal cases. This Court in Indian Oil Corpn. [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The Court further observed that : (Indian Oil Corpn. case [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188], SCC p. 749, para 13)*

"13. ... Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure

through criminal prosecution should be deprecated and discouraged."

37. *The following observation made by this Court in Uma Shankar Gopalika v. State of Bihar [Uma Shankar Gopalika v. State of Bihar, (2005) 10 SCC 336 : (2006) 2 SCC (Cri) 49] with almost similar facts and circumstances may be relevant to note at this stage : (SCC pp. 338-39, paras 6-7)*

"6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of the complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-BIPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs 4,20,000, they would pay a sum of Rs 2,60,000 to the complainant out of that but the same has never been paid. ... It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the consumer forum in relation to the claim of Rs 4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception that there was intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420IPC.

7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-BIPC

and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482CrPC which it has erroneously refused."

38. There can be no doubt that a mere breach of contract is not in itself a criminal offence and gives rise to the civil liability of damages. However, as held by this Court in Hridaya Ranjan Prasad Verma v. State of Bihar [Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168 : 2000 SCC (Cri) 786] , the distinction between mere breach of contract and cheating, which is criminal offence, is a fine one. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis of the offence of cheating. In the case at hand, complaint filed by Respondent 2 does not disclose dishonest or fraudulent intention of the appellants."

118. In Sarabjit Kaur Vs. State of Punjab, 2023 (5) SCC 360, the Summit Court held as under in para 11 to 13 of the report, which are reproduced:

11. Still not satisfied as the result of the earlier complaint was not to the liking of Respondent 2. He filed another complaint on 23-1-2017. Thereafter, another complaint was filed by Respondent 2 on 15-6-2017 on the basis thereof FIR in question was registered. On the facts of the case in hand, it is evident that the effort of Respondent 2 was merely to put pressure

on the appellant while involving her in a criminal case to get his money back whereas there is nothing pleaded that Respondent 2 that he was ever ready and willing to get the sale deed registered. There was no effort made by Respondent 2 or the vendee in the agreement to sell to initiate any civil proceedings to get the sale deed executed on the basis of the agreement to sell. In fact, the last date fixed for execution of the sale deed even after extension was 24-12-2014.

12. There is nothing on record to suggest that any notice was issued by Respondent 2 or the vendee to the appellant to get the sale deed registered just either before expiry of the last date fixed for execution of sale deed or immediately thereafter. No civil proceedings were also initiated rather Respondent 2 proceeded only by filing complaints with the police two of which were earlier filed. Had there been any civil proceedings initiated, the question of readiness and willingness of the vendee is also an aspect to be examined by the court.

13. A breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up promise will not be enough to initiate criminal proceedings. From the facts available on record, it is evident that Respondent 2 had improved his case ever since the first complaint was filed in which there were no allegations against the appellant rather it was only against the property dealers which was in subsequent complaints that the name of the appellant was mentioned. On the first complaint, the only request was for return of the amount paid by Respondent 2. When the offence was made out on the basis of the first complaint, the second complaint was filed

with improved version making allegations against the appellant as well which was not there in the earlier complaint. The entire idea seems to be to convert a civil dispute into criminal and put pressure on the appellant for return of the amount allegedly paid. The criminal courts are not meant to be used for settling scores or pressurise parties to settle civil disputes. Wherever ingredients of criminal offences are made out, criminal courts have to take cognizance. The complaint in question on the basis of which FIR was registered was filed nearly three years after the last date fixed for registration of the sale deed. Allowing the proceedings to continue would be an abuse of process of the court.”

119. Similarly, in *Lalit Chaturvedi and others Vs. State of Uttar Pradesh, 2024 SCC OnLine SC 171*, the Court held as under in paras 5, 6, 7, 9, 10, 11:-

“5. This Court, in a number of judgments, has pointed out the clear distinction between a civil wrong in the form of breach of contract, non-payment of money or disregard to and violation of the contractual terms; and a criminal offence under Sections 420 and 406 of the IPC. Repeated judgments of this Court, however, are somehow overlooked, and are not being applied and enforced. We will be referring to these judgments. The impugned judgment dismisses the application filed by the appellants under Section 482 of the Cr. P.C. on the ground of delay/laches and also the factum that the chargesheet had been filed on 12.12.2019. This ground and reason is also not valid.

6. In “Mohammed Ibrahim v. State of Bihar”⁴, this Court had referred to Section 420 of the IPC, to observe that in order to constitute an offence under the

said section, the following ingredients are to be satisfied:—

“18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of “cheating” are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).”

7. Similar elucidation by this Court in “V.Y. Jose v. State of Gujarat”⁵, explicitly states that a contractual dispute or breach of contract per se should not lead to initiation of a criminal proceeding. The ingredient of ‘cheating’, as defined under Section 415 of the IPC, is existence of a fraudulent or dishonest intention of making initial promise or representation thereof, from the very beginning of the formation of contract. Further, in the absence of the averments made in the

complaint petition wherefrom the ingredients of the offence can be found out, the High Court should not hesitate to exercise its jurisdiction under Section 482 of the Cr. P.C. Section 482 of the Cr. P.C. saves the inherent power of the High Court, as it serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years, when no criminal offence is made out. It is one thing to say that a case has been made out for trial and criminal proceedings should not be quashed, but another thing to say that a person must undergo a criminal trial despite the fact that no offence has been made out in the complaint. This Court in V.Y. Jose (supra) placed reliance on several earlier decisions in "Hira Lal Hari Lal Bhagwati v. CBI"⁶, "Indian Oil Corporation v. NEPC India Ltd."⁷, "Vir Prakash Sharma v. Anil Kumar Agarwal"⁸ and "All Cargo Movers (I) (P) Ltd. v. Dhanesh Badarmal Jain"⁹."

9. We will assume that the assertions made in the complaint are correct, but even then, a criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered. The ingredients to allege the offence are neither stated nor can be inferred from the averments. A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.

10. The chargesheet also refers to Section 406 of the IPC, but without pointing out how the ingredients of said

section are satisfied. No details and particulars are mentioned. There are decisions which hold that the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously.¹⁰ For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in case of criminal breach of trust there must exist a relationship between the parties whereby one party entrusts another with the property as per law, albeit dishonest intention comes later. In this case entrustment is missing, in fact it is not even alleged. It is a case of sale of goods. The chargesheet does refer to Section 506 of the IPC relying upon the averments in the complaint. However, no details and particulars are given, when and on which date and place the threats were given. Without the said details and particulars, it is apparent to us, that these allegations of threats etc. have been made only with an intent to activate police machinery for recovery of money.

11. It is for the respondent no. 2/complainant - Sanjay Garg to file a civil suit. Initiation of the criminal process for oblique purposes, is bad in law and amounts to abuse of process of law."

120. Upon elaborate consideration of the issues raised in this matter, we have no hesitation in holding that initiation of criminal proceedings at the instance of borrower are instituted on the strength of suppression and concealment of relevant facts, with unexplained delay and malicious intent to thwart legitimate steps taken by Indiabulls to recover the financial assistance extended to the borrower. Such proceedings are also intended to create leverage in ongoing civil/arbitration proceedings inter se between the parties. The criminal proceedings are, therefore,

clearly an abuse of the process of law and deserve to be quashed.

121. We may clarify that any observation made in this judgment will not influence the ongoing inter-se proceedings between the parties before the Arbitrator or pending before this Court. All contentions of the parties in respect of the issues pending before the competent forums are also left open for its adjudication in accordance with law.

122. For the reasons recorded above, the writ petitions succeed and are allowed. The FIRs in Case Crime No. 427 of 2023, dated 9.4.2023, under Sections 420, 467, 468, 471, 120B, 323, 504, 506 IPC, Police Station Indirapuram, District Ghaziabad as also in Case Crime No. 197 of 2023, dated 15.4.2023, under Sections 420, 467, 468, 471 and 120-B IPC, Police Station Beta-2, District Greater NOIDA as well as the proceedings initiated by ED pursuant thereto registered as ECIR/HIU-I/06/2023 are quashed. Parties to bear their own costs.

(2024) 12 ILRA 511
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ- B No. 1190 of 2024
 And
 Writ B No. 1192 of 2024

Salik Ram & Ors. ...Petitioner
Versus
Dy. Director of Consolidation, Sravasti & Ors. ...Respondents

Counsel for the Petitioner:
 Rajeiu Kumar Tripathi

Counsel for the Respondents:
 C.S.C., Rakesh Kumar Srivastava

A. U.P. Consolidation of Holdings Act, 1953 - Abatement of proceedings - Sections 5 & 9-A — Once consolidation operation starts on the publication of notification u/s 4, then any right, interest, and title in respect of any land which is the subject matter of such consolidation operations is to be determined by the Consolidation Authorities and none else. Once the consolidation proceedings had commenced, the consolidation proceedings could not have abated to await the outcome of the civil proceedings; rather, it would be the civil proceedings which would abate in the light of commencement of proceedings under U.P. Consolidation of Holdings Act, 1953. Consolidation courts do not have the right to cancel an instrument, but at the same time, once a title lis is before the Consolidation Authority, it is legally bound to consider the impact and give its finding thereon and determine whether the deed or instrument was a void or voidable document. (Para 18)

B. U.P. Consolidation of Holdings Act, 1953 - In the instant case, before the Consolidation Officer, three sets of objections were filed: (i) by the petitioners, who claimed rights on the basis of the sale deed dated 29.10.1986; (ii) by respondent Nos. 3 to 5, who claimed rights on the basis of the agreement to sale dated 30.04.1970 and sale deed dated 17.01.1997; and (iii) by Ram Sudhi, who acknowledged the sale deed executed dated 17.01.1997 but disputed the sale deed dated 29.10.1986. - Consolidation Officer allowed objections of private respondent Nos. 3 to 5 - SOC found favour with the sale deed of the petitioners dated 29.10.1986 and accordingly allowed the appeal. DDC, considering that the suit for cancellation of the sale deed was still pending, held that the parties were required to get their rights adjudicated in the civil court, hence, it abated the proceedings. Held: Once a

title lis is before the Consolidation Authority, it is legally bound to consider the impact and give its finding thereon and determine whether the deed or instrument was a void or voidable document. Either way, it is not appropriate or open for the DDC to have abated the proceedings. (Para 18)

Allowed. (E-5)

List of Cases cited:

1. Ram Nath Vs Munna 1976 RD 220
2. Dharma Devi Vs DDC 1976 SCC OnLine All 259
3. Madhuri Devi & ors. Vs DDC Sitapur Camppt 2017 SCC OnLine All 6407
4. Khursheed & anr. Vs Shaqoor 2024 SCC OnLine SC 2929

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

1. This order will decide the instant petition as well the connected Petition No.1192 Writ-B of 2024. However, for the sake of convenience the facts are being noticed from Writ-B No.1190 of 2024.

2. In both the writ petitions, the order passed by the DDC dated 27.08.2024 is under challenge.

3. Heard Shri Rajeiu Kumar Tripathi, learned counsel for the petitioners. Notice on behalf of respondent Nos.1 and 2 has been accepted by Dr. Krishna Singh and Shri Upendra Singh, learned counsel for the State- respondents. Shri Vikram Pandey, Advocate holding brief of Shri Pankaj Gupta, learned counsel has accepted notice on behalf of the Gaon Sabha, who is impleaded as respondent No.6 in connected petition and Shri Rakesh Srivastava, Advocate has filed Vakalatnama on behalf

of contesting respondent Nos.3 to 5, which is taken on record.

4. At this stage, it will be relevant to mention that the present respondent Nos.3 to 5, namely, Dileep Kumar, Ashok Kumar and Smt. Dulara Devi are the petitioners in the connected Petition No.1192 Writ-B of 2024, wherein Salik Ram, Ram Sagar and Ram Chandra are respondents (these three persons are the petitioners in the instant petition No.1190 Writ-B of 2024).

5. Shri Rajeiu Kumar Tripathi, learned counsel for the petitioners in Writ-B No.1190 of 2024 has filed his Vakalatnama on behalf of respondent Nos.3 to 5 in the connected Writ-B No.1192 of 2024, which is also taken on record.

6. Since, the controversy involved in the instant petitions is common between the parties and both are aggrieved by the same order, hence with the consent of learned counsel for the respective parties in both the petitions, the petitions are being disposed of finally at the admission stage without calling any counter affidavit as the facts are not in dispute and learned counsel appearing for the respective parties in both the petitions agreed that the order impugned is not sustainable in law.

7. In order to put the controversy in a perspective, the record indicates that the property in question initially belonged to one Ram Sudhi. The dispute relates to plots Nos.453 and 454 situated in Village-Khargaura Basti, Pargana & Tehsil- Ikauna, District- Shravasti. The petitioners of Writ-B No.1190 of 2024 claim rights to the property of Ram Sudhi on the basis of a sale deed dated 29.10.1986, whereas the private respondents in the said petition (who are the petitioners in the connected

petition) claim rights from Ram Sudhi based on an agreement to sale dated 30th April, 1976.

8. The dispute arose on account of fact that the petitioners claiming title on the basis of the sale deed dated 29.10.1986. It was executed by Ram Sudhi in favour of Shri Bagawati and Smt. Badka (parents of the petitioners). It is also stated that on the strength of the said sale deed, the names of the parents of the petitioners was duly mutated in the revenue records on 30th June, 1987.

9. Contemporaneously, the record reveals that since the private respondents, who are successor-in-interest of Parashu Ram, who claim that Ram Sudhi had executed an agreement to sale dated 30th April, 1976 in respect of the property in dispute, but did not honour his commitment, which led Parashu Ram to institute a suit bearing No.272 of 1990. The said suit came to be decreed ex parte on 29.01.1996. However, before the said decree could be put into execution, Ram Sudhi executed the sale deed dated 17.01.1997 in favour of Parashu Ram. The impact was that in respect of the property in question two sale deeds were set up, one by the predecessor-in-interest of the present petitioners and other by the predecessor-in-interest of private respondent Nos.3 to 5.

10. In the meantime, once the petitioners became aware of the sale deed dated 17.01.1997 executed in pursuance of the ex parte decree dated 29.01.1996, hence, an application under Order 9 Rule 13 of the CPC came to be filed seeking to recall the ex parte judgement and decree dated 29.01.1996. The said application came to be allowed on 07.10.1998 and it has been informed that this order was put to

challenge before the revisional court as well as before this Court, but it do not find favour and the said order remained intact.

11. Another set of litigation was initiated by Ram Sudhi, who filed a suit seeking cancellation of the sale deed dated 29.10.1986 before the competent civil court, which was registered as R.S. No.191 of 1990. Shri Triapthi, learned counsel appearing for the petitioners in Writ-B No.1190 of 2024 submits that insofar as the pendency of this suit for cancellation, i.e., R.S. No.191 of 1990 is concerned, the petitioners are not aware of the same nor they are aware of the stage of the said suit as they have not been served.

12. In the aforesaid factual matrix, the proceedings before the Consolidation Officer came to be contested and three sets of objections were filed before the Consolidation Officer; (i) by the present petitioners, who claimed rights on the basis of the sale deed dated 29.10.1986; (ii) another set of objections filed by private respondent Nos.3 to 5 (herein) who claimed rights on the basis of the agreement to sale dated 30.04.1970 and sale deed dated 17.01.1997; and (iii) by Ram Sudhi himself, who stated and acknowledged the sale deed executed in favour of Parashu Ram dated 17.01.1997 but disputed the sale deed dated 29.08.1986.

13. The record further reveals that before the Consolidation Officer a compromise was arrived at between Parashu Ram and Ram Sudhi on 22.05.2003, which has been brought on record as Annexure No.14 in the connected Petition No.1192 Writ-B of 2024. However, the Consolidation Officer, after hearing the parties and considering three issues which had been framed, came to the

conclusion that the objections filed by the present petitioners as well as the objections of Ram Sudhi were rejected and the objections of private respondent Nos.3 to 5 came to be allowed.

14. This order dated 16.10.2003 came to be challenged by the petitioners before the SOC. In light of the submissions made before the SOC, it found that insofar as the sale deed executed in favour of the petitioners dated 29.10.1986 is concerned, the same has not yet been cancelled or set aside by any competent court of law. It also noticed that the ex parte decree dated 29.01.1996 passed in favour of Parashu Ram in regular suit No.272 of 1990 had been set aside on an application under Order 9 Rule 13 moved by the present petitioners vide order dated 17.10.1998. As a consequence, the sale deed executed by Ram Sudhi in favour of Parashu Ram would also not confer any right and to that extent it found favour with the sale deed of the petitioners dated 29.10.1986, accordingly, it allowed the appeal of the petitioners vide judgement and order dated 10.07.2008.

15. The order passed by the SOC was assailed by private respondent Nos.3 to 5 by filing a revision before the DDC and the DDC vide its judgement dated 27.08.2024 taking note of the sequence of the litigation in between the parties including considering that the suit for cancellation of the sale deed is still pending and held that the parties were required to get their rights adjudicated in the civil court, hence, it abated the proceedings vide order dated 27.08.2024.

16. It is in the aforesaid backdrop of facts that the present petitioners assail the order passed by the DDC. The private

respondents also assail the same order dated 27.08.2024, though for different reasons. Learned counsel for the parties are not at variance to the basic proposition that once the consolidation proceedings had commenced, the consolidation proceedings could not have abated to await the outcome of the civil proceedings rather it would have been the civil proceedings, which would abate in the light of commencement of proceedings under U.P. Consolidation of Holdings Act, 1953.

17. It is in this context that both the parties have come up before this Court in their respective petitions. As per the petitioners, the abatement would have deleterious effect on the rights of the petitioners, whereas a similar contention has been made by learned counsel for the private respondents that by the same order of abatement, it would also have an unfavorable impact on the rights of private respondent Nos.3 to 5, which stood crystallized in the light of the sale deed, which was executed by Ram Sudhi dated 17.01.1997. It is thus urged that it was open for the DDC to have heard the parties on merits and would have decided the issue/lis either way, but it was not open for the DDC to have abated the proceedings leaving it open for the parties to get their rights adjudicated in the civil court.

18. After hearing the parties, this Court finds that there are several contentious issues in between the parties. The impact of the sale deed executed by Ram Sudhi in favour of Parashu Ram in furtherance of ex parte decree dated 29.01.1996 viz-a-viz the sale deed dated 29.10.1986 allegedly executed by Ram Sudhi in favour of Bhagwati and Smt. Badka (the predecessor-in-interest of the petitioners). The date of commencement of

consolidation operations and the fact whether any subsequent notification under Section 52 of U.P. Consolidation of Holdings Act, 1953 has been made or not is also an important issue, which ought to have been taken note of before considering the rights of the respective parties and when and which proceedings will abate. It may be true that the consolidation courts do not have the right to cancel an instrument but at the same time once a title 'lis' is before the Consolidation Authority, it is legally bound to consider the impact and give its finding thereon and determine whether the deed or instrument was a void or voidable document. Either way it is not appropriate or open for the DDC to have abated the proceedings as that is per se a jurisdictional error, which mars the judgement dated 27.08.2024.

19. This aspect of the matter was considered by a Full Bench of this Court in **Ram Nath Vs. Munna 1976 RD 220**, wherein it was observed as under:-

“The Full Bench observed that the documents which are voidable can be cancelled by the civil court only and the consolidation authorities have no jurisdiction to ignore those documents, instead they are under a duty to give effect to these documents till they are cancelled by a competent court of law. If a sale deed or document of transfer is void the consolidation authorities have jurisdiction to disregard the same while determining title to the land but if the document is voidable then the consolidation authorities have no jurisdiction to disregard sale deed in that even the civil court is the only proper forum to adjudicate upon the validity of the sale deed and the consolidation authorities are bound to give effect to the sale-deed.”

20. This was also noticed by this Court in **Dharma Devi Vs. DDC 1976 SCC OnLine All 259**, wherein the Full Bench decision in the case of **Ram Nath (supra)** was followed and in para 8 and 9, it held as under:-

“8. In Ram Nath v. Munna, a Full Bench of this Court considered the effect of the Judgment of the Supreme Court. The Full Bench observed that the documents which are voidable can be cancelled by the civil court only and the consolidation authorities have no jurisdiction to ignore those documents, instead they are under a duty to give effect to these documents till they are cancelled by a competent court of law. The effect of the Full Bench judgment is that if a sale deed or document of transfer is void the consolidation authorities have jurisdiction to disregard the same while determining title to the land but if the document is voidable then the consolidation authorities have no jurisdiction to disregard sale deed in that event the civil court is the only proper forum to adjudicate upon the validity of the sale deed and the consolidation authorities are bound to give effect to the sale-deed. In Second Appeal No. 1909 of 1972 decided on 4th September, 1974, G.C. Mathur, J. expressed similar view. In Writ Petition No. 6035 of 1972 (Bind Basi V.D. D.C. Azamgarh), decided on 11th October, 1973, Ojha, J. also expressed a similar view.

9. It is necessary to keep in mind that the respondent Tribhuwan Nath himself raised objection to the jurisdiction of the civil court and his objection was upheld as a result of which Smt. Dharam Devi challenged the sale deed before the consolidation authorities. Admittedly, both the parties produced oral and documentary evidence before the consolidation

authorities in support of their case. The Settlement Officer (Consolidation) recorded finding that the sale deed was void for want of consideration. In revision the Deputy of Consolidation did not consider of record any finding on that question, He did not consider the evidence produced by the parties, nor he recorded any finding as to whether the sale deed was void or voidable. He set aside the order of the Settlement Officer (Consolidation) on the ground that the consolidation authorities had no jurisdiction to disregard the sale deed. As already discussed the consolidation authorities have jurisdiction to disregard a void sale deed but if the sale deed is voidable they have no jurisdiction to ignore the same. The Deputy Director of Consolidation failed to appreciate this aspect of the question. The Settlement Officer (Consolidation) had already recorded a finding that the sale deed was void for want of consideration. The Deputy Director of Consolidation should have considered that finding on merits on appreciation of evidence. Since he failed to do that, his order is liable to be quashed.”

21. This issue was once again considered by this Court in **Madhuri Devi and others Vs. DDC Sitapur Camp 2017 SCC OnLine All 6407** and in para 13 to 15, it held as under:-

“13. Once Section 4 notification is published under the Act, 1953 then its consequences ensue as prescribed under Section 5 thereof and all rights and every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any Court or

authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending stand abated.

14. A joint reading of Sub-section 2 of Section 5 and Section 9-A leave no doubt that once consolidation operation starts on the publication of notification under Section 4, then, any right, interest and title in respect of any land which is the subject matter of such consolidation operations, is to be determined by the Consolidation Authorities and none else, however, as far as cancellation of deeds are concerned it is the prerogative of the Civil Courts and Consolidation Authorities do not have any jurisdiction to cancel instruments i.e. sale deed or gift deed etc., but, this does not mean that in proceedings under Section 9-A (2) the Consolidation Courts can not take into consideration such sale deeds etc. for the purposes of determination of rights, title and interest of the parties in the land in question. This question fell for consideration before the Supreme Court way back in 1970 itself in the case of Gorakh Nath Dube's case (*supra*), wherein the Supreme Court took note of a Division Bench Judgment of this Court in Jagarnath Shukla v. Sita Ram Pande, 1969 ALJ 768, wherein, the question whether a suit for cancellation of a sale deed, which was pending on the date of notification under Section 4 of the Act abates under Section 5(2) of the Act. The jurisdiction of the Consolidation Authorities to go into questions relating to the validity of the sale deeds, gift deeds and wills also fell for consideration. The Supreme Court after noticing the aforesaid judgment found therein a fairly comprehensive discussion of the relevant authorities of the Allahabad High Court, the preponderating weight of which was

cast in favour of view that question relating to the validity of sale deeds, gift deeds and wills could be gone into in proceedings before the Consolidation authorities because such questions naturally and necessarily arose and had to be decided in the course of adjudication on rights or interests in land which are the subject matter of consolidation proceedings. The Supreme Court opined that a distinction can be made between cases where a document is wholly and partially invalid so that it can be disregarded by any Court or authority and one where it has to be actually set-aside before it can cease to have legal effect. It held that an alienation made in excess of power to transfer would be, to the extent of excess of power, invalid. It further held that an adjudication on the effect of such purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to the rights or interests in land which are the subject matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction by the necessary implication of their statutory powers to adjudicate upon such rights and interest in land, to declare such documents effective or ineffective, but, where there is a document the legal affect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it opined that it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it.

15. In view of what was held by the Supreme Court the legal position which can be culled out is that the validity of sale deed can also be looked into by the

Consolidation Authorities, although, they do not have the jurisdiction to cancel it. They can very well see as to whether the deed in question on the basis of which any right, title or interest is claimed is a void document, if so, then they can very well ignore it by declaring it to be ineffective, however, if the legality being pointed out in respect of the document is such that it would at best be voidable at the instance of the aggrieved party, then, in such an event the Consolidation Courts are bound to give effect to such documents, unless and until it is cancelled by a Court of competent Civil jurisdiction, meaning thereby, voidable documents can not be ignored by the Consolidation Courts. This is the crux of the legal position with regard to the jurisdiction of the Consolidation Courts in this regard.”

22. Lately, the Apex Court in ***Khursheed and another Vs. Shaqoor 2024 SCC OnLine SC 2929*** in paras 9 to 11 held as under:-

*“9. Invoking the extra-ordinary writ jurisdiction of the High Court under Article 226/227 of the Constitution of India, the respondent challenged the order dated 22.11.2018 of the Additional District Judge, Laksar by filing a Writ Petition before the High Court of Uttarakhand. The learned Single Judge of the High Court, by passing the impugned order dated 02.08.2019 allowed the Writ Petition filed by the Respondent & set aside the order dated 22.11.2018 of the Additional District Judge, Laksar and consequently ordered that the Civil Suit filed by the Respondent be restored to the file of the Civil Judge (Junior Division), Laksar, District-Haridwar. The learned Single Judge, after placing his reliance upon a judgment of this Court in *Gorakh Nath Dube v. Hari**

Narain Singh, (1973) 2 SCC 535, came to the conclusion that as the allegation is that the sale deed was executed by playing fraud and by impersonation, it would be a "voidable" document and thus, any suit, for cancellation of a voidable sale deed will not abate by virtue of Section 5(2)(a) of the Consolidation Act. The distinction between 'void' and 'voidable' documents was made by this Court in the case of Ningawwa v. Byrappa, (1968) 2 SCR 797 and this is what was held:

4..... It is well established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded. "The fact that the contract has been induced by fraud does not make the contract void or prevent the property from passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that 'the party defrauded' has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, 'his' election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract." (*Clough v. L. & N.W. Ry.*) *[[L.R.] 7 Exch. 26, 34].*

5. The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the

document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. (emphasis supplied)

10. This Court, in *Dularia Devi v. Janardan Singh*, 1990 Supp SCC 216 : AIR 1990 SC 1173 relying upon the law laid down in *Ningawwa (supra)* and *Gorakh Nath Dube (supra)* had held that a "voidable" document continues to be in force until it is set aside and such a document can only be set aside by a competent civil court. Further, such documents were held to be binding upon the Consolidation Authorities so long as they are not cancelled or set aside by a Court vested with the jurisdiction to do so. Moreover, in *Ram Sakal Singh v. Mosamat Monako Devi*, (1997) 5 SCC 192 this Court has held that the consolidation authorities do not have the jurisdiction and power to cancel a document, which is required to be set aside or cancelled and the document will continue to be valid till it is cancelled by a Competent Court i.e. a Civil Court. This court also held that if the document is void, it would be open for the Consolidation Authorities to disregard such a document & in such a case, they would get the exclusive jurisdiction to proceed with the matter. But if the document is voidable, the Civil Court is vested with the jurisdiction to declare the same to be voidable. In the case of voidable documents, not only would the Consolidation Authorities have no power to cancel such documents, but even the proceedings pending before any competent Civil Court would not abate.

11. The allegation here is that the fraudulent misrepresentation was by petitioner No. 1's mother, who executed the sale deed dated 09.08.2016 by

impersonation, it would make the sale deed voidable, but not void. As such, in view of the law laid down by this Court in Gorakh Nath Dube (supra), the Sale Deed dated 09.08.2016 will be binding on the Consolidation Authorities unless it is set aside by a competent Civil Court and there would be no bar on jurisdiction of the Civil Court to try a suit for cancellation of such a sale deed."

23. In light of the aforesaid discussions, this Court is of the clear view that impugned order dated 27.08.2024 passed by the DDC, Shravasti in Revision No.412 of 2023 is not sustainable and, accordingly, it is set aside. The revision shall stand restored on the Board of the DDC concerned.

24. A direction is issued to the DDC, Shravasti that it shall after affording full opportunity of hearing to the parties concerned shall decide the revision afresh taking note of the decisions referred herein-above and after taking note of the respective submissions advanced by learned counsel for the respective parties and decide the revision preferably within a period of three months from the date a certified copy of this order is placed before the authority concerned.

25. It is also made clear that the impugned order has been set aside purely on the ground that the DDC had no jurisdiction to abate the proceedings directing the parties to get their rights adjudicated in the civil court without considering the twice impact of the two sale deeds and without recording a finding whether the two deeds were void or voidable and how the law operate. This fact apart, the Court has not expressed any opinion on merits insofar as the respective

rights of the parties are concerned, which is left open to be considered by the DDC.

26. It is further provided that till the decision of the DDC in terms of this order, the parties shall maintain status quo that is to say that none of the parties will alienate, change the nature of the property or create any third party right.

27. With the aforesaid, both the writ petition No.1190 of 2024 and 1192 of 2024 are **allowed**.

28. Costs are made easy.

(2024) 12 ILRA 519
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ- B No. 9423 of 1984

Jagdish

...Petitioner

Versus

Sahayak Sanchalak, Chakbandi Adhikari & Ors.

...Respondents

Counsel for the Petitioner:

Mr. C.B. Singhal

Counsel for the Respondents:

Mr. Sharad Chandra Singh, Addl. C.S.C.,
 Mr. Anil Kumar Mishra

Civil Law - Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 12 - Hindu Adoptions and Maintenance Act, 1956 - Sections 6 & 16 - Registration Act, 1908 - Section 17 - Unregistered Adoption Deed Dated 25.10.1974 - Richpal Singh, who was recorded over the chak, died on 21.1.1975; petitioner filed an application u/s 12 of the U.P. C.H. Act claiming that he was adopted by Richpal Singh through

the adoption deed dated 25.10.1974 and is thus entitled to be recorded in his place; the respondents (Richpal's sisters) also filed an application claiming their rights. Adoption was found duly proved by oral and documentary evidence. Alit was clearly St.d in the adoption deed that Richpal's wife had left his house about 18–20 years earlier, and there was no evidence that she was alive or living with him at the time of adoption, so the finding that her consent was necessary was wrong; further, as the amendment to Section 16 came into effect only from 1.1.1977, the registration of the adoption deed was not required before that date; accordingly, the appellate and revisional orders were set aside, and the Consolidation Officer's order in favour of the petitioner was upheld.

Allowed. (E-5)

List of Cases cited:

1. Smt. Reena Singh Vs St. of U.P. & ors., *Writ Petition No. 25238 (S/S) of 2018*
2. Govind Kausik & ors. Vs St. of U.P. & ors., *Writ A No. 10686 of 2024, dated 29.07.2024*
3. Neerja & ors. Vs St. of U.P. & ors., *Writ A No. 9970 of 2024, dated 14.08.2024*
4. Jitendra Singh Rajput & anr. Vs St. of U.P. & ors., *Writ A No. 11049 of 2024*
5. Sarita Rani & ors. Vs St. of U.P. & ors., *Writ A No. 19345 of 2018, order dated 12.09.2018*
6. U.P. Gram Panchayat Adhikari Sangh & ors. Vs Daya Ram Saroj & ors., *(2007) 2 SCC 138*
7. Mary Pushpam Vs Televi Curusunary & ors., *Civil Appeal No. 9941 of 2016*
8. Pandit M.S.M. Sharma Vs Dr. Shri Krishan Sinha & ors., *AIR 1960 SC 1186*
9. Charanjit Lal Vs U.O.I., *AIR 1951 SC 41*
10. U.O.I. Vs Elphinstone Spinning and Weaving Co. Ltd., *(2001) 1 SCC 139*

11. St. of Uttaranchal Vs Sandeep Kumar Singh & ors., *(2010) 12 SCC 794*
12. St. of M.P. Vs Narmada Bachao Andolan & anr., *(2011) 7 SCC 639*
13. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., *(2005) 2 SCC 42*
14. Bilkis Yakub Rasool Vs U.O.I., *(2024) 5 SCC 481*
15. Census Commissioner & ors. Vs R. Krishnamurthy, *(2015) 2 SCC 796*
16. Ramesh Chandra Sharma & ors. Vs St. of U.P. & ors., *(2024) 5 SCC 217*
17. Association for Democratic Reforms & anr. (Electoral Bond Scheme) v. U.O.I. & ors., *(2024) 5 SCC 1*
18. Senior Superintendent of Post Office Vs Izhar Hussain, *(1989) 4 SCC 318*
19. St. of U.P. & ors. Vs Anand Kumar Yadav, *SLP No. 32599 of 2015*
20. Amarendra Kumar Mohapatra Vs St. of Orissa & ors., *(2014) 4 SCC 583*

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. C.B. Singhal, learned counsel for the petitioner, Mr. Anil Kumar Mishra, learned counsel for respondent nos. 3 & 4 and Mr. Sharad Chandra Singh, learned Addl. C.S.C. for the state-respondents.

2. Brief facts of the case are that village Kapoorpur, Pargana + Tehsil-Hapur, District Ghaziabad came under the operation of Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as U.P. C.H. Act"). In the basic year of consolidation operation, Richpal Singh was recorded over chak no.10. Richpal Singh

expired on 21.1.1975. Respondent nos. 3 & 4 filed an application under Section 12 of the U.P. C.H. Act, stating that they are the sisters of deceased Richpal Singh, as such, they are entitled to be recorded in place of Richpal Singh. Petitioner also filed an application under the guardianship of his natural mother Smt. Shanti Devi under Section 12 of the U.P. C.H. Act, stating that petitioner was adopted by Richpal Singh on 25.10.1974 on the basis of adoption deed executed on 25.10.1974, accordingly, petitioner is entitled to be recorded in place of Richpal Singh. The aforementioned applications under Section 12 of the U.P. C.H. Act were registered as Case No.4/753-75/2012, Mst. Imriti vs. Richpal Singh. Both the parties adduced oral and documentary evidence in support of their cases. Two issues were framed before the Consolidation Officer. The 1st issue was as to whether Smt. Imriti and Smt. Gomti are entitled to be recorded in place of Richpal Singh as sisters of deceased Richpal Singh and 2nd issue framed was whether petitioner Jagdish is entitled to be recorded in place of Richpal Singh, on the basis of adoption deed alleged to be executed in his favour by Richpal Singh. The Consolidation Officer, considering the evidence adduced by both the parties, has held that petitioner is entitled to be recorded on the basis of adoption deed and claim set up by respondent nos. 3 & 4 Mst. Imriti Devi and Mst. Gomti Devi was rejected vide order dated 4.6.1982. Against the order of the Consolidation Officer dated 4.6.1982, an appeal under Section 11(1) of the U.P. C.H. Act was filed before the Settlement Officer of Consolidation by respondent no. 3 which was registered as Appeal No.197 (Mst. Imriti Devi vs. Jagdish and Others). The Settlement Officer of Consolidation heard the aforementioned appeal and vide order dated

16.9.1983, allowed the appeal filed by respondent no.3 and directed to record the name of respondent nos. 3 & 4 / Mst. Imriti Devi and Mst. Gomti Devi in place of deceased Richpal Singh. Against the appellate order dated 16.9.1983, a revision under Section 48 of the U.P. C.H. Act was filed by petitioner Jagdish which was registered as Revision No.1480. The Deputy Director of Consolidation under the impugned order dated 19.6.1984 dismissed the revision filed by the petitioner. Hence, this writ petition for the following relief:-

“Issue a writ, order or direction in the nature of certiorari, calling upon the opposite parties nos. 1 & 2 to submit their record to the Hon’ble High Court for ascertaining the illegality, if any, and for quashing the order dated 16.9.1983 “Anneuxre No.3” and order dated 19.6.1984 “Annexure No.4”.”

3. This Court entertained the matter on 13.7.1984 and stayed the dispossession of the petitioner from the land in dispute. In pursuance of the order dated 13.7.1984, parties have exchanged their affidavits.

4. Learned counsel for the petitioner submitted that adoption deed in question dated 25.10.1974 does not require registration, as such, the impugned appellate order as well as revisional order passed by the appellate court / revisional court, cannot be sustained in the eye of law. He further submitted that Richpal Singh in the adoption deed has mentioned that there was no issue from the wedlock of Richpal Singh and his wife and Richpal Singh was deserted by his wife. He also submitted that there is no evidence on record that wife of Richpal Singh was alive at the time of execution of adoption deed, as such, the finding recorded by respondent nos. 1 & 2

that consent of natural mother was necessary, is erroneous. He further submitted the evidence on record fully demonstrates that adoption took place and adoption deed was properly executed. He further submitted that respondent nos. 1 & 2 have not considered the evidence filed at the instance of the petitioner in the form of irrigation receipt, revenue receipts, certificate from the headmaster of the school, kutumb register, etc. He further placed the provisions contained under Section 58 of the Evidence Act in order to demonstrate that the impugned orders have been passed by the respondent nos. 1 & 2 in arbitrary manner. He further submitted that there is no pleadings before the consolidation authorities that the wife of Richpal Singh was alive at the time of execution of adoption deed. He submitted that the impugned orders passed by respondent nos. 1 & 2 be set aside and the order passed by the Consolidation Officer be maintained. He also placed reliance on the decisions of the Hon'ble Apex Court, of this Court and that of the Delhi High Court in support of his arguments:-

“1. AIR 1995 Supreme Court 995, N. Jayalakshmi Ammal and Another vs. R. Gopala Pathar and Another;

2. 1993 0 Supreme (SC) 180, Ram Bilas and Another vs. Jagat Narain Shrivastava (dead) by Lrs.;

3. AIR 1967 Supreme Court 1134, Ramrati Kuer vs. Dwarika Prasad Singh and Others;

4. AIR 1973 Allahabad 507, Bihari vs. The State of U.P.;

5. AIR 1982 Delhi 520, Nanak Chand and Others vs. Chander Kishore and Others;

6. AIR 1983 Supreme Court 114, Madhusudan Das vs. Smt. Narayani Bai and Others; &

7. AIR 1961 Supreme Court 1378, Lakshman Singh Kothari vs. Smt. Rup Kanwar.”

5. On the other hand, Sri Anil Kumar Mishra, learned counsel for respondent nos. 3 & 4 submitted that no interference is required against the impugned order passed by respondent nos. 1 & 2. He further submitted that the adoption deed was never executed by Richpal Singh. He submitted that the alleged adoption deed is not registered, as such, no reliance can be placed upon the same. He also submitted that Richpal Singh was married with Smt. Musti who was alive at the time of alleged execution of adoption deed but no consent of Smt. Musti was taken, as such, the adoption deed cannot be relied upon. He further submitted that in view of the provisions contained under Section 7 of the Hindu Adoption & Maintenance Act, 1956, there is no illegality in the impugned order passed by respondent nos. 1 and 2. He also submitted that respondent nos. 1 and 2 have recorded concurrent finding of fact, that adoption deed was not executed in accordance with the provision of the Act, as such, the same cannot be relied upon. He submitted that Richpal Singh died within 25 days from the alleged adoption ceremony, as such, the adoption deed is surrounded by suspicious circumstances. He submitted that unregistered adoption deed dated 25.10.1974 is forged and fictitious document, hence, no title will accrue in favour petitioner on the basis of the alleged adoption deed dated 25.10.1974. He submitted that no interference is required in the matter and the writ petition is liable to be dismissed. He placed reliance upon the following

judgments of the Hon'ble Apex Court and that of this Court in order to demonstrate that the adoption deed alleged to be executed by Richpal Singh in favour of respondent nos. 3 and 4, cannot be relied upon:-

1. AIR 2008 SC 1056, Brajendra Singh vs. State of M.P., &

2. AIR 2021 Allahabad 19, Bhanu Pratap Singh vs. State of U.P. and Others.

6. I have considered the arguments advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that the claim under Section 12 of the U.P. C.H. Act set up by the petitioner as well as respondent nos. 3 & 4 was decided by the Consolidation Officer for recording the name of the petitioner on the basis of adoption deed dated 25.10.1974 and rejecting the claim of respondent nos. 3 and 4. There is also no dispute about the fact that in appeal filed by respondent nos. 3 & 4, the order of the Consolidation Officer, has been set aside and respondent nos. 3 & 4 were ordered to be recorded as legal heirs of Richpal Singh. There is also no dispute about the fact that the revision filed by the petitioner against the appellate order, has been dismissed under the impugned revisional order dated 19.6.1984.

8. In order to appreciate the controversy involved in the matter, perusal of Sections 6 and 16 of the Hindu Adoptions and Maintenance Act, 1956 will be relevant which are as under:-

6. Requisites of a valid adoption.—No adoption shall be valid unless—

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

16. Presumption as to registered documents relating to adoption.— Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

STATE AMENDMENT

Uttar Pradesh.— Renumber Section 16 as sub-section (1) thereof, and after sub-section (1) as so re-numbered, insert the following sub-section (2), namely:-

“(2) In case of an adoption made on or after the first day of January, 1977 on Court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption, except a document recording an adoption, made and signed by the person giving and the person taking the child in adoption, and registered under any law for the time being in force;

Provided that secondary evidence of such document shall be admissible in the circumstances and the manner laid down in the Indian Evidence Act, 1872 (1 of 1872).” [Vide Uttar Pradesh Act 57 of 1976, s. 35]”

9. In the instant matter, the title objection was filed on behalf of the petitioner on the basis of adoption deed dated 25.10.1974. The original copy of the adoption deed was filed before the Consolidation Officer. The issue relating to adoption deed was framed by the Consolidation Officer and both the parties adduced oral and documentary evidence in support of their cases. The Consolidation Officer, considering the evidence adduced by the parties, recorded finding of fact that adoption deed has been rightly executed and there is no necessity for the registration of the adoption deed. The Consolidation Officer, accordingly, ordered to record the name of the petitioner in place of Richpal Singh, on the basis of adoption deed dated 25.10.1974.

10. The appellate court has set aside the order of the Consolidation Officer on misconceived grounds that adoption deed has not been executed in accordance with the provisions of the Hindu Adoptions and Maintenance Act, 1956, as such, the same cannot be relied upon. The finding recorded by the appellate court/Settlement Officer of Consolidation cannot be sustained in the eye of law as the adoption has been found to be proved before the Consolidation Officer, considering the oral and documentary evidence adduced by the parties.

11. It is also material to mention that in the adoption deed dated 25.10.1974 it was clearly mentioned by Rich Pal Singh that his wife has left his house as well as marital relationship about 18-20 year before & there are no male or female child from their wedlock, as such, he is adopting Jagdish son of Omvir & Smt. Shanti Devi who have given Jagdish in adoption to me. The aforementioned

adoption deed dated 25.10.1974 has been proved by the witnessess in proper manner.

12. So far as presence of wife of Richpal Singh at the time of execution of adoption deed is concern, the clearcut averment has been made by Richpal Singh in the adoption deed dated 25.10.1974 that his wife has left his house about 18-20 year before. There is no evidence on record that wife of Richpal Singh was residing alongwith Richpal at the time of execution of adoption deed or even after execution of adoption deed as such the order passed by Settlement Officer Consolidation for rejecting the claim of petitioner on the basis of adoption deed is wholly illegal.

13. It is also material to mention that in the adoption deed it was mentioned that Jagdish has become owner of entire movable & immovable property belonging to Richpal Singh, as such there is no illegality in the execution of adoption deed dated 25.10.1974.

14. It is also material that the U.P. Amendment in Section 16 has taken place in the year 1976 which was made operative w.e.f. 1.1.1977, as such, according to the provisions contained under Section 16 of the Hindu Adoptions and Maintenance Act, 1956, there shall be presumption that adoption has been made in compliance of the provisions of the Act unless and until it is disproved. In the instant matter, the adoption deed was executed on 25.10.1974, as such, non registration of the adoption deed in question will not make any difference.

15. In view of the finding of fact recorded by the Consolidation Officer,

there was no scope for interference by the appellate court to ignore the adoption deed executed on 25.10.1974.

16. The Deputy Director of Consolidation has not decided the revision in proper manner and maintained the appellate order for recording the name of contesting respondent in place of Richpal Singh.

17. This Court in the case reported in **(2024) 164 RD 226, Munder vs. Deputy Director of Consolidation and Others** has considered the provisions of Section 16 of the Hindu Adoptions and Maintenance Act, 1956 as well as Sections-17 of the Registration Act and has held that registration was not required prior to 1.1.1977 with respect to execution of adoption deed.

18. Considering the entire facts and circumstances of the case, as mentioned above, the impugned appellate order dated 16.9.1983 and the revisional order dated 19.6.1984 are liable to be set aside and the same are hereby set aside.

19. **The writ petition stands allowed.**
The order passed by the Consolidation
Officer dated 4.6.1982 is hereby affirmed.

20. No order as to costs.

(2024) 12 ILRA 525
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2024

BEFORE

**THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.**

Application U/S 482 No. 24124 of 2021

Ram Sharan Singh ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Ashok Kumar Singh, Sanjeev Singh

Counsel for the Respondents:
Vikas Singh

Criminal Law-Criminal Procedure Code, 1973 — Section 482 — Negotiable Instruments Act, 1881 — Section 138 — Cheque dishonour — “Legally enforceable debt or liability” — Advance cheque not issued in discharge of existing debt — Complaint not maintainable — Mandatory inquiry under Section 202 Cr.P.C. not held — High Court’s inherent powers under Section 482 Cr.P.C. discussed-Proceedings and Summoning order quashed-Application allowed. (Paras 91 to 97)

HELD:

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the St. and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. (Para 91)

It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilizing the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court's time and public money to achieve his ends. (Para 92)

It is well settled that inherent powers under Section 482 Cr.P.C. have to be exercised to secure the ends of justice, to prevent abuse of process of any Court and to make such orders as may be necessary to give effect to any order under the Cr.P.C. depending upon the facts of given case. In the instant case, it appears that there is miscarriage of justice, thus relying upon the Judgement of Hon'ble Apex Court in the matter of West Bengal St. Electricity Board v. Dilip Kumar Ray (supra) as well as in the interest of justice and to protect the interest of applicant, who is victimized of false accusation due to personal grudge of opposite party no.2, who has managed the complaint without disclosing the real relationship of lawyer and client, normally this Court would have directed to get the matter investigated by C.B.I. but seeing the arguments as placed by learned counsel for the parties and the conduct of opposite party no.2, the matter is being decided finally to secure the ends of justice. (Para 93)

In the facts of the present case, where it has been established that opposite party no.2 has not approached the Court with clean hand, noticing his conduct as is clear from the records, this Court finds it to be a fit case for exercising powers under Section 482 Cr.P.C. Keeping in mind that criminal prosecution is a serious matter, it effects the liberty of a person, no greater damage can be done to the reputation of a person than dragging him in a criminal case, continuance of prosecution would be nothing but an abuse of the process of law and will be a mental trauma to the applicants, it becomes necessary for this Court to invoke inherent powers under Section 482 Cr.P.C. in

present facts and circumstances of his case. (para 94)

Therefore, in view of above discussion, this Court finds a good ground for quashing the impugned summoning order as well as entire proceedings of the aforesaid case. (para 96)

Application allowed. (E-14)

List of Cases cited:

1. Indus Airways Pvt. Ltd. & ors. Vs Magnum Aviation Pvt. Ltd. & anr., reported in 2014 (12) SCC 539
2. Sunil Todi & ors. Vs St. of Gujarat & anr., reported in (2022) 16 SCC 762
3. Suo Moto Writ Petition (Crl.) No.2 of 2020
4. Indian Bank Association & ors. Vs U.O.I. & ors. reported in (2014) 5 SCC 590
5. K. Ramesh Vs K. Konthandaraman reported in (2024) SCC OnLine SC 531
6. Ripudaman Singh Vs Balakrishna reported in (2019) 4 SCC 767
7. Surjit Singh Vs Nanak Singh, RSA No.3124 of 2004 decided on 25.09.2008 by the High Court of Punjab and Haryana At Chandigarh
8. Dasharathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel, reported in (2023) 1 SCC 578
9. Sampelly Satyanarayana Rao Vs Indian Renewable Energy Development Agency Limited reported in (2016) 10 SCC 458
10. Sayed Sibte Haider Vs Mohammad Askari Ali & anr., passed in Criminal Misc. Application Under Section 482/378/407 Cr.P.C. 115 of 2018
11. Vijay Dhanuka Vs Najima Mamta, (2014) 14 SCC 638
12. Abhijir Pawar Vs Hemant Madhukar Nimbalkar & anr., (2017) 2 SCC 528
13. Kali Ram Vs St. of H.P., reported in (1973) 2 SCC 808

14. Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Pyarelal, reported in (1999) 3 SCC 35

15. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., reported in (2006) 6 SCC 39

16. Krishna Janardhan Bhat Vs Dattatraya G. Hegde, reported in (2008) 4 SCC 54

17. Kumar Exports Vs Sharma Carpets, reported in (2009) 2 SCC 513

18. Rangappa Vs Sri Mohan, reported in (2010) 11 SCC 441

19. West Bengal St. Electricity Board Vs Dilip Kumar Ray reported in AIR 2007 SC 976

20. R.P. Kapur Vs St. of Pun.; AIR 1960 SC 866

21. St. of Haryana & ors. Vs Ch. Bhajan Lal & ors.; 1992 Supp.(1) SCC 335

22. St. of Bihar & anr. Vs P.P. Sharma & anr.; 1992 Supp (1) SCC 222

23. Zandu Pharmaceuticals Works Ltd. & ors. Vs Mohammad Shariful Haque & anr.; 2005 (1) SCC 122

24. M.N. Ojha Vs Alok Kumar Srivastava; 2009 (9) SCC 682

25. M.N. Ojha Vs Alok Kumar Srivastava, reported in 2009 (9) SCC 682

26. Prashant Bharti Vs St. of NCT of Delhi reported in (2013) 9 SCC 293

27. Parbatbhai Ahir Vs St. of Gujarat reported in (2017) 9 SCC 641

28. Monica Kumar (Dr.) anr. Vs St. of U.P. reported in (2008) 8 SCC 781

29. Anand Kumar Mohatta Vs St. (Govt. of NCT of Delhi), reported in (AIR) 2019 SC 210: 2018 SCC Online SC 2447

30. St. of Karn. Vs L. Muniswamy (1977) 2 SCC 699

31. Indian Oil Corp. Vs NEPC India Ltd. & ors. reported in (2006) 6 SCC 736

32. Mr. Abhishek Gupta & anr. Vs St. of NCT of Delhi & anr. passed in CRL MC 1064/2022 and CRLMA 4586/2022 decided on 16.03.2022

33. Karnataka Emta Coal Mines Limited & ors. Vs Central Bureau of Investigating reported in 2024 SCC Online SC 2250

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Sanjeev Singh assisted by Mr. Ramesh Kumar Singh and Mr. Ashok Kumar Singh, learned counsels for the applicant, Mr. Ram Sharan Singh/applicant appearing in person, Mr. Vikas Singh, learned counsel for opposite party no.2 as well as Mr. Amit Singh Chauhan and Mr. Mayank Awasthi, learned counsels for the State.

2. This application u/s 482 has been filed by the applicant with the prayer to quash the entire proceedings of Complaint Case No.1738/2020, under Section 138 of Negotiable Instrument Act (Alok Singh Niranjana vs. Ram Sharan Singh) as well as quash the summoning order dated 13.01.2021 issued by the Chief Judicial Magistrate, Jalaun, Police Station-Kotwali Orai, District- Jalaun, pending in the Court of Judicial Magistrate, Jalaun.

3. Brief facts of the case are that the opposite party no.2 filed a complaint under Section 138 Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) on 03.08.2020 against the applicant stating therein that the opposite party no.2 is working as Assistant Teacher at Janta Vidya Mandir Inter College, Orai-Jalaun. The Manager of the aforesaid is Dilip Kumar Singh, who is real brother-in-law

(Saadhu Bhai) of the applicant. Due to the good relations between the two, they used to have money transactions with each other. It has been further alleged that on 25th September, 2016, the applicant requested for 10 to 15 lakh rupees from opposite party no.2 as he wanted to purchase a plot at Allahabad. The applicant requested the opposite party no.2 to make arrangements for the money, for which he was ready to pay interest also. It has been further alleged that as relations between the two were good and they had maintained honest relationship of money transactions with each other, therefore, opposite party no.2 requested the applicant to come to his house to take the money on 02.10.2016, hence the applicant on the same date i.e. 02.10.2016, reached the residence of opposite party no.2 at about 4:00 pm and took the money. Rs.12,25,000/- were paid to the applicant in the presence of one Vinod Kumar Srivastava son of Shiv Shankar Srivastava and one Hamir Singh son of Sri Ratan Singh both residents of Jalaun. The applicant had promised to return the amount in January, 2017 but he did not do so, taking an excuse that he could not purchase the plot due to demonetization (note bandi) on 08.11.2016. Since then, the applicant is taking some or the other excuse for not returning the money. When the opposite party no.2 exerted pressure by stating that he will take legal recourse in case the applicant did not return the money, the applicant promised to make some arrangements to return the money.

4. On 19.03.2020, the applicant reached the residence of opposite party no.2 and gave a cheque bearing "Cheque No.390917" issued from SBI, Branch High Court Allahabad at Allahabad of Rs.11,00,000/- which was presented by the

opposite party no.2 at Allahabad Bank, Orai to be deposited in the Account No.00000020222722742. The aforesaid cheque was returned with an information "insufficient fund" on 21.04.2020.

5. After coming to know about the dishonor of the aforesaid cheque, the applicant informed the opposite party no.2 that he will return the money after lockdown due to COVID-19 and requested him to present the cheque on 15.06.2020. As requested by the applicant, the opposite party no.2 presented the cheque on 15.06.2020 and the same was again returned on 16.06.2020 with an information that there was "insufficient fund". The applicant was well aware of the fact that there was insufficient fund in his account, however he had asked the opposite party no.2 to present the cheque again with a planned manner having no intention to return the money.

6. A legal notice was sent through registered post on 24.06.2020 and the same was received by the applicant on 08.07.2020, however no money was returned, therefore, the present complaint was filed. The affidavit in the aforesaid complaint was filed on 07.09.2020 and the applicant has been summoned on 13.01.2021.

7. The following contentions have been raised by learned counsel for the applicant :-

(i) The complaint has been filed with malicious intention which is clear from the fact as the opposite party no.2 has concealed his relationship of being client of the applicant as well as the fact that the relations between opposite

party no.2 and applicant were due to one Dilip Kumar Singh who happens to be brother-in-law of the applicant and was Manager of the Institution in which the opposite party no.2 was working as Assistant Teacher at the relevant point of time, whereas the real fact is that in the year 1997 Mr. Narendra Pal Singh was the Manager of the said Institution whereas at the time of filing the complaint Sri Dilip Kumar Singh was the Manager.

(ii) The opposite party no.2 had approached the applicant to engage him as a counsel in Writ Petition No.4926 of 1997 (Alok Singh Niranjana vs. District Inspectors of Schools and Others) filed by opposite party no.2 before this Court. The aforesaid writ petition was disposed of vide order dated 29.11.2001 directing the respondents to pay the salary for the period the petitioner discharged his duty in the Institution. After the aforesaid order, the applicant and the opposite party no.2 were not in contact from 2002 till January, 2017.

(iii) The opposite party no.2 again approached the applicant to file Writ No.11135 of 2018 (Alok Singh Niranjana vs. State of U.P. and Others) for regularization of his service. The same was disposed of vide order dated 03.05.2018 with a direction to the concerned respondent to consider the petitioner's claim for regularization, in accordance with law within a period of three months. As the claim of the petitioner was rejected by the concerned respondent, therefore,

opposite party no.2 requested the applicant to file Writ Petition No.1250 of 2020 (Alok Singh Niranjana vs. State of U.P. and Others) which is still pending before this Court. Thus, from the aforesaid, it is clear that the opposite party no.2 has deliberately and maliciously concealed his relations of client and lawyer which clearly shows his mala fide intention of framing the applicant in a false case.

(iv) The opposite party no.2 had come to applicant's house in February, 2020 to inquire about his matter which was still pending and the applicant had expressed that he wants to purchase a car, on which the opposite party no.2 informed the applicant that he intends to sell his car (Innova Crysta, 2019 model) which had run 10,000 kms only. The opposite party no.2 stated that he had incurred huge expenses in the past four years for his daughter's and son's marriages, repair and renovation work of his house as well as purchase of the aforesaid car. He was in strong need of money in order to pay back his debts, therefore, he wanted to sell his Innova Crysta car. The pictures and videos of the said car were shown to the applicant and a demand of Rs.15,00,000/- for the vehicle was raised. The applicant stated that he would only pay Rs.12,00,000/- for the vehicle on which the opposite party no.2 requested for time to think on the offer as made by the applicant for purchase of the car in Rs.12,00,000/-.

(v) After one month, the applicant and opposite party no.2 agreed on the amount of Rs.12,25,000/- as price for the Innova car. On 20.03.2020, the opposite party no.2 along with his colleague Vinod Kumar Srivastava, Assistant Teacher at Janta Vidya Mandir Inter College, Orai came to the house of the applicant in relation to some work. The opposite party no.2 requested for the payment for purchase of the car on which cash of Rs.1,25,000/- was paid and a cheque of Rs.11,00,000/- bearing Cheque No.390917 was given to the opposite party no.2 by the applicant requesting that the same may be presented to the bank only when the car loan, as to be applied by the applicant, was sanctioned and the money accordingly dispersed in his account. In so many words, the applicant had indicated the opposite party no.2 to present the cheque only when the loan is sanctioned and information regarding this was to be given by the applicant to opposite party no.2. The aforesaid was possible due to the client-lawyer trust relationship as built between the applicant and the opposite party no.2. Thus, the cheque was issued as an advance payment for purchase of Innova car.

(vi) It was agreed between the parties that the possession of the Innova Crysta car will be given to the applicant only when full amount is received by the opposite party no.2.

(vii) In this regard, a consent/agreement letter was

prepared on 20.03.2020 which was signed by applicant as well as opposite party no.2 in the presence of Vinod Kumar Srivastava son of Sri Shivshankar Srivastava as well as Mr. Vimlendra Kumar son of Sri Chhabiram Pal resident of District Moradabad who was also a client of the applicant.

(viii) The agreement between the applicant and the opposite party no.2 was a contingent contract under Section 31 of the Indian Contract Act, 1872 and as the condition of grant of car loan in favour of applicant was not fulfilled, therefore, such contract became void as per Section 32 of the Indian Contract Act, 1872 (hereinafter referred to as I.C.A.).

(ix) Learned counsel for the applicant further submits that as per Section 65 of the I.C.A., it was the obligation of the opposite party no.2 to return the cash amount of Rs.1,25,000/- as well as the cheque of Rs.11,00,000/- which he had received from the applicant on 20.03.2020 as the consideration in the said agreement had now turned void.

(x) When the applicant asked the opposite party no.2 for returning him the cash amount of Rs.1,25,000/- along with his cheque bearing Cheque No.390917, he assured that he will return the same after the lock down when the pandemic of COVID 19 comes to an end. The opposite party no.2 instead of returning the cash and the cheque, started pressurizing the applicant to get the case of regularization, which is pending, decided.

(xi) In order to exert pressure upon the applicant, the opposite party no.2 instead of returning the cheque, presented the same in the bank on 21.04.2020 and then on 15.06.2020 but the same was returned due to insufficient funds.

(xii) The opposite party no.2 sent a notice under Section 138 N.I. Act on 24.06.2020 based on a false and concocted story. In the said notice it was mentioned that the brother-in-law of the applicant was Manager of the Institution in 1997 where the opposite party no.2 was working as Assistant Teacher which was the basis of relation which was formed between the applicant and the opposite party no.2 but as already stated, the reality was that in the year 1997 one Narendra Pal Singh was the Manager of the said Institution. The aforesaid fact shows the conduct of the opposite party no.2 and falsifies the entire story as narrated in the complaint.

(xiii) In the complaint, wrong facts have been mentioned about Rs.12,25,000/- being given by opposite party no.2 in cash to the applicant on 02.10.2016 in the house of opposite party no.2 in the presence of Vinod Kumar Srivastava and Sri Hamir Singh. It is relevant to mention that Vinod Kumar Srivastava who is working as Assistant Teacher in the same Institution has also signed the consent letter dated 20.03.2020 and Hamir Singh is brother-in-law of opposite party no.2.

(xiv) Presuming that the opposite party no.2 has stated that

he arranged the cash of Rs.12,25,000/- within five working days creates suspicion and doubt as to how and from where such huge amount could be managed, thus falsifying the entire version of the complaint.

(xv) In the complaint as well as the notice, it has been mentioned that the applicant and the opposite party no.2 had long history of money transactions. However, except the fees as paid by opposite party no.2 as client to his lawyer/applicant, there is no other transaction between the two. The fact of client-lawyer relationship has been deliberately concealed by the applicant hence the complaint has not been filed with clean intention.

(xvi) Learned counsel for the applicant further submits that the story as narrated in the complaint also appears to be doubtful as at the time of demonetization, how could such a huge amount be arranged by the opposite party no.2 has also not been disclosed. The applicant does not have any plot nor is a property dealer, therefore, it cannot be said that any amount has been received by him from opposite party no.2 for purchasing a plot.

(xvii) Learned counsel for the applicant further submits that as per the complaint, the applicant is alleged to have taken Rs.12,25,000/- from opposite party no.2 for purchase of some plot but there is no averment with respect to Rs.1,25,000/- which is the excess amount other than that mentioned in the complaint nor in the notice or

statement of the opposite party no.2 as recorded under Section 200 Cr.P.C. which raises suspicion and goes to prove the fact of false complaint being lodged by opposite party no.2 on the basis of concocted story.

(xviii) The online complaint has been filed on 03.08.2020 without any affidavit whereas the affidavit has been filed on 07.09.2020. In paragraph no.14 of the said affidavit, it has been stated that the contents of paragraph no.1 to 12 of the affidavit are true to the knowledge of opposite party no.2, however, the opposite party no.2 has not mentioned the paragraphs in the complaint case/application filed by him under Section 138 of N.I. Act before C.J.M., District- Jalaun in his affidavit. This is a legal irregularity and thus the complaint case/application is not maintainable in the eyes of law.

(xix) It has been alleged in the complaint that the cheque was returned due to insufficient funds and a notice in this regard was given on 24.06.2020 which was served upon the applicant on 08.07.2020 and the complaint has been filed on 03.08.2020 without the affidavit. From the aforesaid, it can be said that the alleged complaint is simply a miscellaneous application as it does not satisfy the ingredients of a complaint, hence should not have been entertained. The affidavit being of 07.09.2020 is not maintainable as it is beyond the period of one month as required under law.

(xx) The opposite party no.2 has given an affidavit on 24.12.2020 with a prayer to treat the same as statement under Section 200 Cr.P.C. The aforesaid affidavit cannot be considered as statement under Section 200 Cr.P.C.

(xxi) Though, a list of witnesses has been submitted by the opposite party no.2 but the learned C.J.M. has without calling the witnesses to record their statements under Section 202 of Cr.P.C. has passed the impugned summoning order on 13.01.2021 which is against the mandatory provisions of law. It is also to be noted that the date of filing of list of witnesses before the said court and the date of issuance of summoning order is the same, which is again a legal irregularity played on the part of the court concerned.

8. Learned counsel for the applicant submits that for purposes of Section 138 N.I. Act, the cheque should be issued for legally enforceable debt or other liability. Relying upon a judgment passed by Hon'ble Apex Court in the case of *Indus Airways Pvt. Ltd. and Others vs. Magnum Aviation Pvt. Ltd. and Another*, reported in **2014 (12) SCC 539** the Court in **paragraph no.9** has opined that the explanation appended to Section 138 explains the meaning of the expression "debt or other liability" for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The Explanation leaves no manner of doubt that

to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of an existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in considered view of the Apex Court, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

9. In paragraph no.15 of the aforesaid judgment, the Apex Court has held that if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, the cheque cannot be said to have been drawn for an existing debt or liability.

10. In the light of the aforementioned judgment, coupled with the facts of this case, the cheque which was issued by the applicant as an advance payment for the purchase of the vehicle, cannot be said to be issued in discharge of an existing liability and therefore the same creates no legally enforceable debt as against the applicant.

11. The term legally enforceable debt has also been explained in the case of ***Sunil Todi and Others vs. State of Gujarat***

and Another, reported in ***(2022) 16 SCC 762*** wherein the Court has opined that the term “debt” also includes a sum of money. Learned counsel for the applicant thus emphasizes that the cheque was not issued for payment of legally enforceable debt or other liability as it was for the purposes of advance payment towards purchase of Innova car.

12. Learned counsel for the applicant further submits that the inquiry as required under Section 202 Cr.P.C. is mandatory in cases where the accused resides beyond the territorial jurisdiction of the concerned Magistrate before whom the complaint is made. Placing reliance upon the judgment in the case of ***Suo Moto Writ Petition (Crl.) No.2 of 2020***, the Apex Court has stated that the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. It has been recommended that the Magistrate should come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused.

13. Learned counsel for the applicant thus submits that in view of the aforementioned, it is necessary for the Magistrate to conduct an inquiry on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused in cases where the accused resides beyond the territorial jurisdiction of the Magistrate Court.

14. Learned counsel for the opposite party no.2 submits that the complaint as filed by the opposite party no.2 under Section 138 of N.I. Act fulfills the ingredients as required i.e. :-

- (i) drawing of cheque.
- (ii) presentation of cheque to the bank.
- (iii) return of cheque unpaid by the drawee bank.
- (iv) giving notice in writing to the drawer of the cheque demanding payment of a cheque
- (v) failure of the drawer to make payment within 15 days of receipt of notice.

15. Once cheque has been signed and issued in favour of the holder of the cheque then there is a statutory presumption under Section 139 of N.I Act that the cheque was issued in discharge of a legally enforceable debt or liability hence, there is sufficient material on record to show that the prosecution under Section 138 of N.I. Act has been validly instituted by the opposite party no.2.

16. He further submits that no such agreement was entered into between the applicant and the opposite party no.2 but instead the applicant who was his lawyer had taken his signatures on blank papers and the same has been used to procure the agreement on which the applicant has placed reliance, thus the agreement is a manufactured document. One of the alleged witnesses namely Vinod Kumar Srivastava had also engaged the applicant as lawyer, therefore, the applicant had blank papers bearing his signature which has been used for manufacturing the alleged agreement.

17. He further submits that the opposite party no.2 has given money to the applicant as the relations between the two were cordial because opposite party no.2 knew the applicant's Saadhu Bhai-Dilip Kumar Singh who was the Manager of the Institution where opposite no.2 was

working as Assistant Teacher and there is no mala fide intention on his part in filing the present complaint. The provisions of I.C.A. do not apply in the present case as the agreement as alleged to have been entered into between the applicant and opposite party no.2 is a manipulated one. The opposite party no.2 does not own any Innova car, therefore, there is no question of entering into any such agreement of selling Innova car.

18. Learned counsel for the opposite party no.2 further submits that there is no illegality in summoning the applicant as the complaint under Section 138 of N.I. Act when presented before the court concerned shall be scrutinized by the concerned court and if the complaint is accompanied by an affidavit and the affidavit and the documents, if any, are found to be in order, the court concerned shall proceed to take cognizance and direct for issuance of summons. The complaint so filed by the applicant fulfils all the ingredients of Section 138 N.I. Act, therefore, the same was scrutinized and the applicant has been summoned. In support of his submissions, he has relied upon a judgement passed by the Hon'ble Apex Court in the case of ***Indian Bank Association and Others vs. Union of India and Others*** reported in (2014) 5 SCC 590.

19. Learned counsel for the opposite party no.2 further submits that the applicant has not denied the fact that he has handed over the aforesaid cheque to the opposite party no.2 nor has denied his signatures on the same, hence, in view of the judgment passed by the Hon'ble Apex Court in the case of ***K. Ramesh vs. K. Konthandaraman*** reported in (2024) SCC OnLine SC 531, even if a blank cheque leaf is voluntarily signed and handed over

by the accused towards some payment, it would attract the presumption under Section 139 of N.I. Act and in the absence of any cogent evidence to show that the cheque was not issued in discharge of debt, the presumption would hold good.

20. Relying upon a judgment of *Sunil Todi and Others vs. State of Gujarat & Another* reported in (2022) 16 SCC 762, learned counsel for the opposite party no.2 submits that the evidence of complainant can be given by him on an affidavit. The Court has no reason for insisting on the evidence of witnesses to be taken on oath. Consequently in the aforesaid decision, it has been held that Section 202 (2) Cr.P.C. is inapplicable to complaints under Section 138 N.I. Act in respect of the examination of witnesses on oath. The Court further held that evidence of witnesses on behalf of complainant can be permitted on oath. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine the witnesses and in suitable cases the Magistrate can examine the documents to satisfy that there was sufficient grounds for proceeding under Section 202 Cr.P.C.

21. Relying upon a judgment of *Ripudaman Singh vs. Balakrishna* reported in (2019) 4 SCC 767, the learned counsel for opposite party no.2 submits that the present application is not maintainable to test allegations with regard to correctness of an agreement to sell which can only be tested in trial when evidence is adduced in this regard. In view of the above, the present application deserves to be dismissed.

22. Heard learned counsel for the parties and perused the record.

(i) From the records as well as submissions of the learned counsel for the parties, this Court finds that the fact regarding lawyer-client relationship has not been disclosed by the opposite party no.2 in the complaint, thus the opposite party no.2 while filing the complaint has not approached the court concerned with clean hands.

(ii) Learned counsel for the opposite party no.2 has admitted about the long standing relationship between him and the applicant, due to relative of applicant being Manager of the Institution where opposite party no.2 was working as an Assistant Teacher. However, the aforesaid fact has been denied by the applicant as at the relevant point of time when the opposite party no.2 had approached the applicant for engaging him as counsel in his matters, the applicant's relative was not the Manager of the said Institution. Be that as it may, the fact of non-disclosure of lawyer-client relationship itself proves that the complaint has been filed with mala fide intention and hence should not have been entertained.

(iii) Learned counsel for the opposite party no.2 has denied the alleged agreement between the parties, however, in this regard no statements of the witnesses mentioned in the agreement have been recorded nor they have been examined on oath to prove the same. It is for the first time in the counter affidavit a stand has been taken of engaging the applicant as a lawyer in few cases by the opposite party no.2 as well as alleged

witness of the agreement-Vinod Kumar Srivastava from whom the applicant had taken blank papers. This Court finds it difficult to believe the opposite party no.2 as he had not disclosed about this relationship in the complaint, therefore, he cannot turn around and take the aforesaid stand at this juncture.

(iv) The averment about using blank papers for purposes of agreement also cannot be taken as correct as signatures of witnesses are there on the same alleged blank paper, which cannot be possible in case it is believed that blank paper was used.

(v) It is settled preposition of law that if a person admits his signature on some document then the onus shifts on the person who admits his signatures on a document to prove that it was obtained on blank papers or was taken under undue influence or under pressure. The aforesaid fact has been held in the case of ***Surjit Singh vs. Nanak Singh, RSA No.3124 of 2004 decided on 25.09.2008*** by the High Court of Punjab and Haryana At Chandigarh.

(vi) In the facts of the present case, the opposite party no.2 has for the first time spoken about signatures on blank papers being taken by the applicant hence, it was for him to mention the aforesaid fact in the complaint as filed by him that the signatures on such blank papers were taken under undue influence or under pressure. It is admitted position that the opposite party no.2 being client of

the applicant had signed the papers not being under any undue influence or under any pressure and the argument as placed that the blank papers have been used for the purpose of the agreement which is now being denied by the opposite party no.2 could not be believed as he has not disclosed the relationship of client and lawyer in his complaint.

23. For a complaint to be entertained under Section 138 of N.I. Act, the Court has to see the aforesaid :-

(i) Firstly that the cheque has been given in favour of the applicant, the same is presented to the bank, it is returned unpaid, a notice in writing is given to the drawer demanding payment of the cheque amount and failure of withdrawer to make payment within 15 days of receipt of notice.

(ii) Once the cheque has been signed and issued in favour of holder of cheque, there is a statutory presumption under Section 139 of the N.I. Act that the cheque was issued in discharge of legally enforceable debt or liability.

24. Thus, in the present case it is to be seen whether the cheque as given by the applicant was in discharge of a legally enforceable debt/liability or not.

25. For the aforesaid, the terminology “legally enforceable debt” has to be understood. A “legally enforceable debt” refers to a financial obligation recognized by law where borrower is obligated to repay the lender. This type of debt meets specific legal criteria that allows

the lender to seek legal recourse if the borrower fails to repay.

26. From the above discussion, it is clear that for commission of an offence under Section 138 N.I. Act, the cheque that is dishonoured must represent a legally enforceable debt not only on the day when it was drawn but also on the date of its maturity/presentation. If the cheque presented for collection of total value of the cheque without endorsing the part payment made by the drawer is dishonoured no offence under Section 138 N.I. Act would be attracted, as being held in the case of ***Dasharathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel***, reported in (2023) 1 SCC 578.

27. In the present case, the opposite party no.2 has mentioned that he had given Rs.12,25,000/- in cash to the applicant for purposes of purchasing property. Although, in the complaint as well as notice, the complainant has spoken about returning of Rs.11,00,000/- by giving a cheque in this regard but there is no whisper about Rs.1,25,000/-. In case it is taken that Rs.1,25,000/- has already been paid, therefore, as part payment was already made, the complaint under Section 138 N.I. Act could not have been entertained.

28. Be that as it may, once the complainant i.e. opposite party no.2 has not disclosed the lawyer and client relationship between him and the applicant and as for the first time admitted the aforesaid fact in his counter affidavit, the story in the complaint of giving advance in cash without disclosing as to how and from where such an arrangement was made also gives benefit to the applicant who under such relationship as admitted by the

opposite party no.2 in his counter affidavit has mentioned about an agreement which cannot be disbelieved by this Court.

29. This Court finds that where payment was made by cheque in nature of advance payment, it indicates that at the time of withdrawal of cheque, there was no existing liability as such the complaint under Section 138 N.I. Act is not maintainable.

30. The aforesaid fact has been held in the case of ***Indus Airways Pvt. Ltd and Others vs. Magnum Aviation Pvt. Ltd and Another***, reported in 2014 (12) SCC 539. The same was reiterated by the Hon'ble Apex Court in the case of ***Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited*** reported in (2016) 10 SCC 458 wherein it was made abundantly clear that culpability under Section 138 of the Act is extinguished only when the dishonoured cheque was issued for the purpose of an advance payment.

31. The facts of the present case where the lawyer-client relationship is admitted by the opposite party no.2, the agreement as entered into between the parties for purchase of Innova car for which advance payment of Rs.11,00,000/- were made cannot be denied. Thus, on the aforesaid fact that the payment of Rs.11,00,000/- by means of cheque was towards advance payment for purpose of purchase of Innova car which makes the complaint not maintainable.

32. It is undisputed that the applicant was residing beyond the jurisdiction of the concerned court hence, the concerned Magistrate was duty bound to follow the procedure as prescribed under

Section 202 (1) Cr.P.C. amended in the year 2006.

33. The aforesaid issue has been dealt with in the case of **Sayed Sibte Haider v. Mohammad Askari Ali and Another**, passed in Criminal Misc. Application Under Section 482/378/407 Cr.P.C. 115 of 2018, vide order dated 28.2.2019 wherein the Court has held that an inquiry under Section 202 Cr.P.C. is mandatory before issuing process in cases where alleged accused is residing beyond jurisdiction of concerned Magistrate.

34. As the counsel for the applicant while challenging the summoning order has turned upon Section 202 Cr.P.C., hence the following is extracted below:

"202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, 1 [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding."

35. As per the provision of Section 202 Cr.P.C. as amended with effect from 23.6.2006, the requirement is that in those cases where the accused is residing at a

place beyond the area in which the concerned Magistrate exercises his jurisdiction, it is mandatory on the part of Magistrate to conduct an enquiry or investigation before issuing the process. That means, in case, if such an enquiry is not conducted in cases where the accused resides at a place beyond the area in which the Magistrate exercises his jurisdiction, the purpose of amendment in Section 202 Cr.P.C. would frustrate.

36. The essence of purpose of amendment has been captured by this Court in case of **Vijay Dhanuka v. Najima Mamta**, (2014) 14 SCC 638:

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment,

in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

'False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.' The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we (2014) 14 SCC 638 find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints."

37. As per provisions of Section 202(1) Cr.P.C. the enquiry or investigation, as the case may be, is mandatory before

summons are issued against the accused living beyond the territorial jurisdiction of the concerned Magistrate, which has been held in the case of **Abhijir Pawar v. Hemant Madhukar Nimbalkar and another, (2017) 2 SCC 528**. The relevant para of the aforesaid judgement is as under :

"Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process. Section 202 Cr.P.C. was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22-6-2006 by adding the words 'and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction?'. There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far-off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proposing the said amendment."

38. Similar view has been taken in the Supreme Court judgement in the case of

Sunil Todi vs. The State of Gujarat, (2022) 16 SCC 762, wherein enquiry by the concerned Magistrate is mandatory, in case, where the accused is residing at a place beyond the area of its jurisdiction prior to issuance of process.”

39. Thus, the impugned order of summoning the applicant without conducting mandatory inquiry under Section 202 (1) Cr.P.C. is liable to be quashed.

40. Coming to the merits of the case, it would be appropriate to reproduce Sections 118, 138 and 139 of Negotiable Instruments Act, 1881 for proper adjudication of the matter.

"118. Presumptions as to negotiable instruments.-Until the contrary is proved, the following presumptions shall be made:-

(a) of consideration -that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date -that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance -that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements -that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps -that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course -that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

138. Dishonour of cheque for insufficiency, etc., of funds in the account.-Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be

punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

139. Presumption in favour of holder.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

41. From the above, it is manifestly clear that a dishonour would constitute an offence only if the cheque is returned by the bank 'unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. Now, for an offence under Section 138 N.I. Act, it is essential that the cheque must have been issued in discharge of legal debt or liability by accused on an account maintained by him with a bank and on presentation of such cheque for encashment within its period of validity, the cheque must have been returned unpaid. The payee of the cheque must have issued legal notice of demand within 30 days from the receipt of the information by him from the bank regarding such dishonour and where the drawer of the cheque fails to make the payment within 15 days of the receipt of the aforesaid legal demand notice, cause of action under Section 138 N.I. Act arises.

42. From the Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act, which was introduced in statute by Act 66 of 1988, it is also apparently clear that the object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument, whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for

payment. To that end Section 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gain saying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

43. This Court having noticed the facts of the case and the evidence on the record needs to note the legal principles regarding nature of presumptions to be drawn under Section 139 of the Act and the manner in which it can be rebutted by an accused. Section 118 provides for presumptions as to negotiable instruments. The complainant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to

burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

44. A Three-Judge Bench of the Apex Court in the case of **Kali Ram v. State of Himachal Pradesh**, reported in (1973) 2 SCC 808, has laid down following :

"23. One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the Courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If

some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

45. Further the Apex Court in ***Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal***, reported in (1999) 3 SCC 35, had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No. 12 following has been laid down :

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the

negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the Court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist....."

46. In ***M.S. Narayana Menon Alias Mani v. State of Kerala and another***,

reported in (2006) 6 SCC 39, the Apex Court had considered Sections 118(a), 138 and 139 of the Act, 1881 and held that presumptions both under Sections 118(a) and 139 are rebuttable in nature. Explaining the expressions "may presume" and "shall presume" referring to an earlier judgment, following was held in paragraph No. 28 :

"28. What would be the effect of the expressions 'may presume', 'shall presume' and 'conclusive proof' has been considered by this Court in Union of India v. Pramod Gupta, (2005) 12 SCC 1, in the following terms: (SCC pp. 30-31, para 52) 'It is true that the legislature used two different phraseologies 'shall be presumed' and 'may be presumed' in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-a-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words 'shall presume' would be conclusive. The meaning of the expressions 'may presume' and 'shall presume' have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the Court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression 'shall presume' cannot be held to be synonymous with 'conclusive proof'."

47. In view of the above, it is clear that the expression "shall presume" cannot be held to be synonymous with conclusive proof. Referring to definition of words "proved" and "disproved" under Section 3 of the Evidence Act, following was laid down by the Apex Court in paragraph No. 30 of the aforesaid judgment:

"30. Applying the said definitions of 'proved' or 'disproved' to the principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

48. The Apex Court has already held that what is needed is to raise a probable defence, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence and even the evidence adduced on behalf of the complainant can be relied upon. Dealing with standard of proof, following was observed in paragraph No. 32 of the above mentioned case :

"32. The standard of proof evidently is preponderance of probabilities. Inference of

preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies."

49. In **Krishna Janardhan Bhat v. Dattatraya G. Hegde**, reported in (2008) 4 SCC 54, the Apex Court has held that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. Following was laid down in Paragraph No. 32 :

"32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different."

50. The Apex Court again reiterated that whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". In paragraph No. 34, following was laid down of the above mentioned case :

"34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of

preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."

51. In **Kumar Exports v. Sharma Carpets**, reported in (2009) 2 SCC 513, the Apex Court again examined as to when complainant discharges the burden to prove that instrument was executed and when the burden shall be shifted. In paragraph Nos. 18 to 20, following has been laid down :

"18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. *The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.*

20. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration

of which, the Court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist....."

52. A Three-Judge Bench of the Apex Court in the case of **Rangappa v. Sri Mohan**, reported in (2010) 11 SCC 441, had elaborately considered provisions of Sections 138 and 139 of N.I. Act. In the above case, trial Court had acquitted the accused in a case relating to dishonour of cheque under Section 138. The High Court had reversed the judgment of the trial Court convicting the accused. In the above case, the accused had admitted signatures on the cheque. This Court held that where the fact of signature on the cheque is acknowledged, a presumption has to be raised that the cheque pertained to a legally enforceable debt or liability, however, this presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. In Paragraph No. 13, following has been laid down :

"13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 0886322 dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the

High Court found that the defence raised by the accused was not probable."

53. After referring to various other judgments of this Court, the Apex Court in the aforementioned case held that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability, which, of course, is in the nature of a rebuttable presumption. In paragraph No. 26, following was laid down :

"26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54, may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

54. Elaborating further, the Apex Court has held that Section 139 of the Act is an example of a reverse onus and the test of proportionality should guide the construction and interpretation of reverse onus clauses on the defendant-accused and

the defendant-accused cannot be expected to discharge an unduly high standard of proof. In paragraph Nos. 27 and 28, following was laid down:

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable

defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

55. From the above discussion, it is clear that the opposite party no.2 has not been able to prove his case that the amount of Rs.11,00,000/- was not given as advance payment as agreed between the parties for the purpose of purchasing Innova car hence, the probable defence as raised by the applicant creates doubt about the existence of a legally enforceable debt of liability.

56. The present case appears to be a case of malicious prosecution wherein the opposite party no.2 has concealed the real fact of lawyer-client relationship and has wrongly disclosed about Dilip Kumar Singh who is related to the applicant being Manager of the Institution where opposite party no.2 was working at the relevant point of time to which the Court cannot close its eyes as at the instance of relative of the applicant, the present complaint has been filed concealing the real relationship of lawyer & client.

57. It would be appropriate to understand the meaning of malicious prosecution as defined by the Supreme Court in the case of ***West Bengal State Electricity Board v. Dilip Kumar Ray*** reported in ***AIR 2007 SC 976***. Relevant part of the said judgement reads thus:

"14.

MALICIOUS. Done with malice or an evil design; wilful; indulging in malice, harboring ill-will, or enmity malevolent, malignant in heart; committed wantonly, wilfully, or without cause, or done not only wilfully and intentionally, but out of cruelty, hostility of revenge; done in wilful neglect of a known obligation.

"MALICIOUS" means with a fixed hate, or done with evil intention or motive; not the result of sudden passion.

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Malicious abuse of legal process. A malicious abuse of legal process consists in the malicious misuse or misapplication of process to accomplish a purpose not warranted or commanded by order of Court - the malicious perversion of a regularly issued process, whereby an improper result is secured.

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Malicious Prosecution – Malice. Malice means an improper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill-will. It may be due to a desire to obtain a collateral advantage. The principles to be borne in mind in the case of actions for malicious prosecutions are these: Malice is not merely the doing a wrongful act intentionally but it must be established that the defendant was actuated by mains animus, that is to say, by spite of ill- will or any indirect or improper motive. But if the defendant had

reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.

OTHER DEFINITIONS OF "MALICIOUS PROSECUTION".

"A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it."

"A prosecution begun in malice, without probable cause to believe that it can succeed and which finally ends in failure."

"A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor or thorough mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause."

"A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy."

The term "malicious prosecution" imports a causeless as well as an ill-intended prosecution.

'MALICIOUS

PROSECUTION" is a prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy.

In malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favorably to the defendant therein.

1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. 2. The cause of action resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages - Also termed (in the context of civil proceedings) malicious use of process. (Black, 7th Edn., 1999)

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58. In the facts of the present case, it is admitted position that the opposite party has not disclosed about the client-lawyer relationship and hence has not approached this Court with clean hands, this itself goes to show that the proceedings have been initiated with malicious intention in order to harass the applicant.

59. The earlier discussion of the litigations of the cases of opposite party no.2 as filed by the applicant as a lawyer also goes to prove that the opposite party no.2 has instituted the proceedings with an

ulterior motive for wreaking vengeance on the accused as relative of applicant is said to be Manager of the Institution wherein the opposite party no.2 was working as an Assistant Teacher and the cases as filed were related to his service in the Institution, therefore, the presumption goes in favour of the applicant that being influenced by the management, the present case was lodged against the applicant.

60. Now, this Court comes on the issues whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants. The aforesaid issue has elaborately been discussed by the Apex Court in the following judgments:

(i) *R.P. Kapur v. State of Punjab*; AIR 1960 SC 866,

(ii) *State of Haryana and others v. Ch. Bhajan Lal and others*; 1992 Supp.(1) SCC 335,

(iii) *State of Bihar and another v. P.P. Sharma and another*; 1992 Supp (1) SCC 222,

(iv) *Zandu Pharmaceuticals Works Ltd. and others v. Mohammad Shariful Haque and another*; 2005 (1) SCC 122, and

(v) *M.N. Ojha v. Alok Kumar Srivastava*; 2009 (9) SCC 682.

61. In the case of *R.P. Kapur (Supra)*, the following has been observed by the Apex Court in paragraph 6:

"Before dealing with the merits of the appeal it is necessary

to consider the nature and scope of the inherent power of the High Court under Section 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under Section 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be

exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations

made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under Section 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Ohandra Mozumdar v. Queen Empress, ILR 26 Cal 786), Dr. Shanker Singh v. The State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Ray v. Govind Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyan v. K.

Sivarama Subrahmanya Ayyar, ILR 47 Mad 722: (AIR 1925 Mad 39)."

62. In the case of ***State of Haryana and others v. Ch. Bhajan Lal and others (Supra)***, the following has been observed by the Apex Court in paragraph 105:

"105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any,

accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the

proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

63. In the case of **State of Bihar and another v. P.P. Sharma and another (Supra)**, the following has been observed by the Apex Court in paragraph 22 :

*"22. The question of mala fide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorised purpose. There is no material whatsoever in this case to show that on the date when the FIR was lodged by R.K. Singh he was activated by bias or had any reason to act maliciously. The dominant purpose of registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge-sheet before the Court. There is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. This Court in **State of Bihar v J.A.C. Saldhana and others, [1980] 2 SCR 16**, has held that when the information is lodged at the police station and an offence is registered, the mala fides of the informant would be of secondary importance. It is the material collected during the investigation which decides the fate of the accused person. This Court in **State***

of Haryana and others v. Ch. Bhajan Lal and others, JT 1990 (4) SC 650, permitted the State Government to hold investigation afresh against Ch. Bhajan Lal in spite of the fact the prosecution was lodged at the instance of Dharam Pal who was inimical towards Bhajan Lal."

64. In the case of **Zandu Pharmaceuticals Works Ltd. (Supra)**, the following has been observed by the Apex Court in paragraphs Nos. 8 to 12:

"8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes

and preserves inherent powers of the High Courts. All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a Court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone Courts exist. Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse. It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the

Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In **R.P. Kapur v. State of Punjab (AIR 1960 SC 866)** this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the First Information Report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would

not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases.

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a

legitimate prosecution. The High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: Janata Dal v. H.S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under

Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P.P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O.C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O.P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Government of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi (1999 (3) SCC 259.

12. The above position was recently highlighted in State of Karnataka v. M. Devendrappa and another (2002 (3) SCC 89)." (emphasis added)

65. Thereafter, in the case of **M.N. Ojha v. Alok Kumar Srivastava, reported in 2009 (9) SCC 682**, has made observations in paragraphs 25, 26, 27, 28, 29 and 30 regarding the exercise of power under Section 482 Cr.P.C. as well as the principles governing the exercise of such jurisdiction :

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself alongwith the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction.

26. This Court in Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, (1998)5 SCC 749, held:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable

thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even advertng to the basic facts which were placed before it for its consideration.

29. It is true that the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the

allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. Interference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest. But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint." (emphasis added)

66. After the aforesaid discussion, it is also relevant to point out the fact that scope and ambit of Section 482 Cr.P.C. is a very agitated and debatable issue. Nevertheless, there are some cases which

have got wide acceptance in the legal fraternity and hence, are used as the minor guidelines/principles governing the cases of quashing criminal proceedings.

67. The Hon'ble Apex Court in the case of ***Prashant Bharti Vs. State of NCT of Delhi*** reported in ***(2013) 9 SCC 293*** has held that, in order to determine the veracity of prayer for quashing the criminal proceedings raised by an accused u/s 482 Cr.P.C., the following questions are to be raised before the High Court, if the answer to all the following questions was in affirmative, then the High Court should quash the proceedings by exercising its power u/s 482 Cr.P.C.

"1. Whether the material relied upon by the accused is sound, reasonable and indubitable, i.e. material is of sterling and in impeccable quality?"

2. Whether the material relied upon by the accused is sufficient to reject and over rule the factual assertions contained in the complaint, i.e. material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusation as false?"

3. Whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or that the material is such, that it cannot be justifiably refuted by the prosecution/complainant?"

4. Whether proceeding with the trial would result in an abuse, of process of the Court and hence, would not serve the end of Justice?"

68. The Apex Court in the case of ***Parbatbhai Ahir Vs. State of Gujarat*** reported in ***(2017) 9 SCC 641***, referring to various caases has summarized following principles to govern powers of High Court under Section 482 Cr.P.C.:-

"15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) *While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;*

(v) *The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;*

(vi) *In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;*

(vii) *As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;*

(viii) *Criminal cases involving offences which arise from*

commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) *In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and (x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."*

69. Thus, the Hon'ble Apex Court has discussed 3 clauses of cases in which criminal proceeding can be quashed. They are as follows:-

"(a) where there is a legal bar against institution or continuance of criminal proceedings;

(b) where the allegation in FIR do not disclose or constitute an offence, even if taken at face value and not their entirety.

(c) where the allegation made constitute an offence but there is no evidence which can prove them."

70. Limitation of power under Section 482 Cr.P.C. has been discussed by the Hon'ble Apex Court and held in the case of **Monica Kumar (Dr.) Anr. Vs State of U.P.** reported in **(2008) 8 SCC 781** as well as many other judgements of the Apex Court, that Section 482 Cr.P.C. powers are to be ex-debito justitiae (as a matter of right) in a manner to ensure real and substantial justice, and the administration of justice is why Court exists.

71. In recent relevant judgement of the Apex Court in the case of **Anand Kumar Mohatta Vs. State (Govt. of NCT of Delhi)**, reported in **(AIR) 2019 SC 210: 2018 SCC Online SC 2447**, it was observed;

"18-It is a settled principle of law that the High Court can exercise jurisdiction u/s 482 Cr.P.C. even when discharge application is pending with the trial Court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegation are materialized in a charge sheet. On the contrary, it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of the power of any Court."

72. This Court time and again has examined the scope of jurisdiction of the

High Court under Section 482 Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 Cr.P.C. A three-Judges Bench of this Court in **State of Karnataka v. L. Muniswamy (1977) 2 SCC 699** held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated :

"7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a

proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

73. Further it has been held in various judgements that in proceeding u/s 482, the High Court will not enter into any finding of facts, particularly when the matter has been concluded by the concurrent finding of facts.

74. However, in the judgment of Apex Court in the case of **Indian Oil Corporation Vs. NEPC India Ltd. And Ors.** reported in **(2006) 6 SCC 736**, the Apex Court observes the following principles:-

"1. The High Courts, should not exercise the inherent powers to repress a legitimate prosecution. The power to quash criminal complaints should be used sparingly and with abundant caution.

2. The criminal complaint is not required to verbatim reproduce of legal ingredients of the alleged offence. If the necessary factual foundation is laid in the criminal complaint, merely on the ground that a few ingredients have not been stated in detail, the criminal proceeding should not be quashed. Quashing of complaint is warranted only where complaint to bereft of even the basic facts which are absolutely necessary for making out the alleged offence.

3. It was held that a given set of facts may make out (a) purely a Civil wrong, or (b) purely or criminal offence or (c) a civil wrong as also a criminal offence. A commercial or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence."

75. As such, the High Court u/s 482 Cr.P.C. has very wide scope and is an essential part of the functioning in order to meet the end of justice, it must be noted that the power so assigned is so vast and can easily be misinterpreted. So, it becomes important for the Courts to use it wisely and according to the guidelines laid down by the Hon'ble Apex Court.

76. Section 482 of Cr.P.C. has made its space in Cr.P.C. in order to not only enable the High Court to provide proper justice but also to curb the filing of fictitious complaints.

77. In the present case as forwarded by/from both the sides, the Hon'ble Court may surely take judicial notice that contain facts as provided u/s 57 of the Evidence Act, 1872 and set the law in motion by delivering substantial justice and balance be struck between the statutory obligations of investigation and rights of affected parties.

78. Further, even the framers of legislation while enacting section 482 Cr.P.C. had started with a non-obstante clause and completed the section with "or otherwise to secure the ends of justice" which lays obligation upon the power of High Court to prevent the society from criminals and law-breakers and should be

exercised to stop the public from filing fictitious complaints just to fulfill their personal grudges.

79. In the present case, a balance has to be struck while considering the rival submissions made by the parties in order to arrive at a judicious conclusion. The landmark judgments have been cited by both the parties considering which this Court has to arrive at a conclusion considering the guidelines and principles setup by the Hon'ble Apex Court in various cases.

80. In the present case, this Court finds that the opposite party no.2 has not disclosed about the lawyer-client relationship between the applicant and himself thus, the very basis of filing of complaint is dislodged as the fact of legally enforceable debt cannot be proved unless the real relationship is disclosed, due to which the alleged cheque was given by the applicant.

81. The learned counsel for the opposite party no.2 has tried to support his case by giving names of such witnesses who have also not been examined and has for the first time admitted the lawyer-client relationship in his counter affidavit, therefore, he cannot now turn around to take a different stand in support of his case. It can also be a case where the opposite party no.2 may have been annoyed by the applicant for not getting favourable orders from the Hon'ble High Court in the cases which had been filed by the applicant as had been engaged by the opposite party no.2 as his lawyer. The fact about brother-in-law of applicant being in the management of the Institution where opposite party no.2 has also been working as Assistant Teacher as admitted by the

opposite party no.2 in his complaint which also proves the malice as cases regarding his service had been filed by the applicant before this Hon'ble Court. Thus, possibilities and probabilities go in favour of the applicant as false story has been cooked up by the opposite party no.2 not disclosing the real relationship between the applicant and himself.

82. Further more, the opposite party no.2 has not been able to disclose as to how he made arrangements of such a huge amount of money that too at the time of COVID-19. Hence, the story as narrated by the opposite party no.2 in the complaint is highly doubtful.

83. Final contentions as forwarded by the learned counsel for opposite party no.2 is that the material placed on record before the concerned Magistrate was sufficient to pass order of summoning the accused and that concerned court cannot discard the fact that the cheque has been issued by the applicant so the trial cannot be stalled by merely raising some suspicion or doubt in allegations against the applicant.

84. In this regard, it is noted that present application is moved by the applicant invoking power under Section 482 Cr.P.C. of the High Court, challenging summoning order dated 13.01.2021 as well as the entire proceedings of the criminal case. To be precise, the power of the court concerned while passing order summoning the applicant and power of the High Court U/s 482 Cr.P.C. are two different things. The court below was bound to pass appropriate orders and had to content with what is on record and cannot come to the conclusion about reliability of evidence at the initial stage, however in exercise of

power u/s 482 Cr.P.C., this Court has different scope than what magistrate could have applied in the given situation.

85. The Hon'ble Apex Court in ***Bhajan Lal case (supra)***, after considering several judgments, distilled the principles governing the exercise of extra ordinary power of the court under Article 226 of the Constitution of India, 1950 or its inherent power u/s 482 Cr.P.C. Several categories of cases by way of illustrations were also listed out, the same has been earlier discussed for ready reference. But, at the same time, the Apex Court also recorded a note of caution.

86. From the entire discussion, what is subtly clear is that FIR and charge sheet can be quashed if allegation or evidence do not establish the commission of an offence. Upon analysis, the Court noted that the facts of each case would determine the exercise of the discretion vested in the Court to quash criminal proceedings in order to prevent abuse of process of Court.

87. In the recent judgment delivered by the Single Bench of High Court of Delhi in the case of ***Mr. Abhishek Gupta and another vs. State of NCT of Delhi and another*** passed in ***CRL MC 1064/2022 and CRLMA 4586/2022 decided on 16.03.2022***, even while denying to interfere, not finding the case to be suitable one to exercise power u/s 482 Cr.P.C., observed, inherent powers would be predicated on the facts of each case and no court would have any qualm in quashing of FIR and charge-sheet, if commission of offence is not established.

88. Inherent powers of High Court under Section 482 Cr.P.C. are meant to act

ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the Court. These inherent powers can be exercised in the following category of cases: (i) to give effect to an order under the Code; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice.

89. Now applying the ratio laid down in the above referred several judgments, only in the circumstances that the registration of the case itself is an abuse of process of law, inherent powers can be exercised to prevent abuse of process of law. This Court finds that this case stands to the category when the registration of case itself is an abuse of process of law.

90. This Court while invoking inherent powers under Section 482 Cr.P.C. can always interfere in considering the present facts of the case where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

91. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into weapon of harassment or persecution. In a criminal case, the veiled

object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.

92. It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilizing the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court's time and public money to achieve his ends.

93. It is well settled that inherent powers under Section 482 Cr.P.C. have to be exercised to secure the ends of justice, to prevent abuse of process of any Court and to make such orders as may be necessary to give effect to any order under the Cr.P.C. depending upon the facts of given case. In the instant case, it appears that there is miscarriage of justice, thus relying upon the Judgement of Hon'ble Apex Court in the matter of ***West Bengal State Electricity Board v. Dilip Kumar Ray (supra)*** as well as in the interest of justice and to protect

the interest of applicant, who is victimized of false accusation due to personal grudge of opposite party no.2, who has managed the complaint without disclosing the real relationship of lawyer and client, normally this Court would have directed to get the matter investigated by C.B.I. but seeing the arguments as placed by learned counsel for the parties and the conduct of opposite party no.2, the matter is being decided finally to secure the ends of justice.

94. In the facts of the present case, where it has been established that opposite party no.2 has not approached the Court with clean hand, noticing his conduct as is clear from the records, this Court finds it to be a fit case for exercising powers under Section 482 Cr.P.C. Keeping in mind that criminal prosecution is a serious matter, it effects the liberty of a person, no greater damage can be done to the reputation of a person than dragging him in a criminal case, continuance of prosecution would be nothing but an abuse of the process of law and will be a mental trauma to the applicants, it becomes necessary for this Court to invoke inherent powers under Section 482 Cr.P.C. in present facts and circumstances of his case.

95. While dealing with the inherent powers of the High Court under Section 482 Cr.P.C., the the Apex Court in the case of ***Karnataka Emta Coal Mines Limited and Ors. vs. Central Bureau of Investigating*** reported in ***2024 SCC Online SC 2250*** has arrived at the following conclusion :-

“18.7. As can be gathered from the above, Section 482 Cr.P.C. recognizes the inherent powers of the High Court to quash initiation of prosecution against the accused

to pass such orders as may be considered necessary to give effect to any order under the Cr.P.C. or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is a statutory power vested in the High Court to quash such criminal proceedings that would dislodge the charges levelled against the accused and based on the material produced, lead to a firm opinion that the assertions contained in the charges levelled by the prosecution deserve to be overruled.

18.8. While exercising the powers vested in the High Court under Section 482, Cr.P.C., whether at the stage of issuing process or at the stage of committal or even at the stage of framing of charges, which are all stages that are prior to commencement of the actual trial, the test to be applied is that the Court must be fully satisfied that the material produced by the accused would lead to a conclusion that their defence is based on sound, reasonable and indubitable facts. The material relied on by the accused should also be such that would persuade a reasonable person to dismiss the accusations levelled against them as false.”

96. Therefore, in view of above discussion, this Court finds a good ground for quashing the impugned summoning order as well as entire proceedings of the aforesaid case.

97. Accordingly, the entire proceedings of Complaint Case No.1738/2020, under Section 138 of Negotiable Instrument Act (Alok Singh

Niranjan vs. Ram Sharan Singh) as well as the summoning order dated 13.01.2021 passed by the Chief Judicial Magistrate, Jalaun, Police Station- Kotwali Orai, District- Jalaun, pending in the Court of Judicial Magistrate, Jalaun; are hereby **quashed**.

98. The present application under Section 482 Cr.P.C. is, accordingly, **allowed**. There shall be no order as to costs.

99. A copy of this order be certified to the lower court forthwith.

(2024) 12 ILRA 565
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.12.2024

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. 4TH Bail Application No 34950 of 2024

Manoj		...Appellant
	Versus	
State of U.P.		...Respondent

Counsel for the Appellants:
 Sri Ambrish Kumar Kashyap

Counsel for the Respondent:
 G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149 & 302 - Constitution of India, 1950 - Article 21 - F.I.R. lodged on 23.08.2016 - Applicant argued that he has been languishing in jail since 13.02.2017, but till date trial has not been concluded - Co-accused granted bail on ground of delay in conclusion of trial - No chance of fleeing away from judicial process or tampering with prosecution evidence. (Para 2, 4)

St. submitted that so far as merit of case was concerned, it was case of murder - The first shot was fired by co-accused at deceased and second shot was fired by applicant, whereby deceased succumbed to injuries - Eye-witness/ PW-2 has been examined and supported prosecution case. (Para 5)

Held, considering St.ment/examination-in-chief of PW-1, wherein he has attributed role of firing to applicant and co-accused and third bail application of co-accused and applicant was rejected - Now, fourth bail application has been filed mainly on ground of long incarceration of applicant, inordinate delay in concluding trial and plea of parity with bail order of co-accused. (Para 6)

Regarding status of trial of applicant, out of thirteen prosecution witnesses, only six have been testified before trial court in eight years, applicant was in jail since about seven years and ten months - Considering long detention of applicant, he needs to be set at liberty to establish his innocence, otherwise, continued detention will deprive him to frame his defence - Thus, applicant entitled to bail and trial court directed to conclude trial expeditiously. (Para 19, 24)

Bail application allowed. (E-13)

List of Cases cited:

1. Ashim @ Asim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Kumar Bhattacharya Vs National Investigation Agency, (2022) 1 SCC 695
2. U.O.I. Vs K.A. Najeeb, (2021) 3 SCC 731
3. Chintan Vidyasagar Upadhyay Vs St. of Mah., Petition for Special Leave to Appeal (Crl.) No. 2543 of 2021, decided on 17.09.2021
4. Paras Ram Vishnoi Vs The Director, Central Bureau of Investigation, 2021 SCC OnLine SC 3606

5. Indrani Pratim Mukerjee Vs Central Bureau of Investigation & anr., 2022 SCC OnLine SC 695

6. Mubarak Ali Vs St. of U.P., Petition for Special Leave to Appeal (Crl.) No. 8215 of 2024, decided on 05.09.2024, (Para 7)

7. Balwinder Singh Vs St. of Punjab & anr., Petition for Special Leave to Appeal (Crl.) No. 8532 of 2024, decided on 09.09.2024

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

1. Heard learned counsel for the applicant and Mr. Deepak Mishra, learned Additional Government Advocate representing the State.

2. The instant fourth bail application under Section 439 of Cr.P.C. has been filed on behalf of the applicant-Manoj with a prayer to release him on bail in Case Crime No. 244 of 2016, under Sections 147, 148, 149, 302 of I.P.C., Police Station-Nidhauri Kalan, District-Etah, during the pendency of trial.

3. First, second and third bail applications of the accused-applicant were rejected vide orders dated 05.04.2018, 18.07.2022 and 05.04.2023 in Criminal Misc. Bail Application Nos. 21550 of 2017, 19321 of 2021 and 35581 of 2022 respectively.

4. It is argued by learned counsel for the applicant that the applicant has been languishing in jail since 13.02.2017, but till date his trial has not been concluded. The Co-ordinate Bench of this Court vide order dated 13.09.2024 passed in Criminal Misc. Bail Application No. 21168 of 2024 has granted bail to co-accused Pancham Singh on the ground of delay in conclusion of trial, therefore, he may also be released on

bail. Lastly, it is submitted that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. In case he is released on bail, he will not misuse the liberty of bail and will cooperate with the early disposal of the case.

5. Per contra, learned Additional Government Advocate for the State opposed the prayer for bail of the applicant by contending that so far as merit of the case is concerned, it is a case of murder. The first shot was fired by co-accused Pancham Singh at the deceased and second shot was fired by applicant-Manoj, whereby deceased succumbed to injuries. Eye-witness Yogesh @ Mintu has been examined before the trial court as PW-2 and he supported the prosecution case.

6. Having heard learned counsel for the parties and examined the matter in its entirety, I find that considering the statement /examination-in-chief of PW-1, wherein he has attributed the role of firing to the applicant and co-accused Pancham Singh as well as the fact that third bail application of co-accused Pancham Singh was rejected by the Coordinate Bench, the third bail application of the applicant was also rejected. Now this fourth bail application, which has been filed mainly on the ground of long incarceration of the applicant and inordinate delay in concluding the trial as well as plea of parity with the bail order of co-accused Pancham Singh, who has now been granted bail by the Coordinate Bench as noted above.

7. This Court considering the aforesaid facts, vide order dated 27.09.2024 had called a report from the concerned Presiding Officer with regard to present status of trial of the applicant. In

compliance thereof trial court submitted its report dated 14.10.2024 mentioning following dates and events:-

i-F.I.R. was lodged on 23.08.2016.

ii-Charge sheet was submitted on 22.11.2016.

iii-Case was committed to the Court of Sessions on 28.11.2016.

iv-Charge against the accused-applicant was framed on 15.01.2018.

v-Examination-in-chief of PW-1 was recorded on 09.07.2018.

vi-Cross-examination of PW-1 was done on 26.11.2018, 18.02.2019 and 06.09.2019.

vii-Examination-in-chief of PW-2 was recorded on 01.11.2022.

viii-Cross-examination of PW-2 was done on 03.11.2022, 15.06.2023 and 16.06.2023.

ix-Examination-in-chief of PW-3 was recorded on 13.03.2024.

x-Examination-in-chief of PW-4 was recorded on 30.07.2024.

xi-Examination-in-chief of PW-5 was recorded on 30.07.2024.

xii-Examination-in-chief of PW-6 was recorded on 30.07.2024.

xiii-Cross-examination of PW-4 was done on 14.08.2024.

xiv-Cross-examination of PW-5 was done on 15.10.2024.

8. Vide order of this Court dated 27.09.2024, the Director General of Police, U.P., Lucknow was also directed to file his personal affidavit indicating therein as to why prosecution is not producing the prosecution witnesses before the trial court even in heinous matters and being Head of Police Department in the State of U.P.,

what steps have been taken by him to ensure production of prosecution witnesses on the dates fixed before the trial court. He was also directed that if in any matter, he has fixed the responsibility of the person concerned, the detail of the same shall also be brought on record.

9. In compliance of the aforesaid order dated 27.09.2024, the Director General of Police, U.P., Lucknow has filed his personal affidavit dated 16.10.2024 with the stand that on several dates, the Office of the Director General of Police, U.P., Lucknow had issued necessary directions regarding appearance of the Police Personnel before the trial court on the date fixed by means of Circulars dated 16.08.2015, 20.10.2015, 04.02.2020, 18.01.2021, 16.08.2023, 10.10.2023, 19.01.2024 and 13.04.2024 but reply with regard to second query of the Court as mentioned in the order dated 27.09.2024 was not found satisfactory because no detail about the action taken against any erring officer prior to passing of the order of this Court dated 27.11.2024 was furnished in the affidavit dated 16.10.2024, therefore, vide order dated 08.11.2024, a week's further time was allowed to file specific reply.

10. Thereafter, the Director General of Police, U.P., Lucknow has filed his second affidavit dated 22.11.2024 annexing district-wise chart relating to action taken against the erring police personnel, which indicates that between 27.05.2024 and 18.11.2024 actions have been initiated against 35 police personnel by instituting inquiry against them.

11. Now this Court proceeds to consider the effect of delay in conclusion of trial on the plea of bail.

12. In *Ashim alias Asim Kumar Haranath Bhattacharya alias Asim Harinath Bhattacharya alias Aseem Kumar Bhattacharya Vs. National Investigation Agency*, (2022) 1 SCC 695, Hon'ble Supreme held as under:

"This Court has consistently observed in its numerous judgments that the liberty guaranteed in Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial is imperative and the under trials cannot indefinitely be detained pending trial. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the Courts would ordinarily be obligated to enlarge him on bail."

"Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice."

13. In *Union of India Vs. K.A. Najeed*, (2021) 3 SCC 731, respondent-K.A. Najeed was granted bail by the High Court under UAPA. Being aggrieved by the order of High Court granting bail to respondent, the appellant-Union of India

filed appeal before the Hon'ble Supreme Court. Hon'ble Supreme Court while upholding the order of the High Court, after considering a catena of judgements on the point, held as under:

"Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such precondition under the UAPA. Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to

the well settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc."

14. In **Chintan Vidyasagar Upadhyay Vs. State of Maharashtra, Petition for Special Leave to Appeal (Crl) No. 2543 of 2021**, decided on 17.09.2021, the petitioner is facing trial for offences punishable under Sections 302, 396, 201, 109 and 120B read with 34 of the IPC. The application for bail filed by the petitioner was dismissed by the High Court on 21.12.2020. Aggrieved thereby, he filed Special Leave Petition. The Supreme Court after hearing the learned counsel for the parties and scrutinizing the record, while granting bail to the accused, held that the petitioner is in custody for nearly 6 years, the trial is proceedings and 28 witnesses have been examined and 12 witnesses are yet to be examined.

15. In **Paras Ram Vishnoi Vs. The Director, Central Bureau of Investigation, 2021 SCC OnLine SC 3606**, the Supreme Court held as under:

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

16. In ***Indrani Pratim Mukerjea Vs. Central Bureau of Investigation and another***, 2022 SCC OnLine SC 695, the Supreme Court held that "admittedly, the petitioner has been in custody for 6-1/2 years. We do not intend to comment on the merits of the case, which might be detrimental to the interest of either the prosecution or the defence. Taking into account the fact that the petitioner has been in custody for 6-1/2 years and even if 50% of the remaining witnesses are given up by the prosecution, the trial will not complete soon, we are of the considered view that the petitioner is entitled to be released on bail."

17. The Apex Court in the matter of ***Mubarak Ali Vs. State of Uttar Pradesh*** passed an order dated 05.09.2024 in Petition for Special Leave to Appeal (Crl.) No. 8215 of 2024 granting bail to accused who was in custody as an under-trial for about seven years in connection with unnatural death of his wife with the following observations and directions:-

"7. Before parting with the case, it is noticed that there are many instances of prolonged trial and on that basis the accused who are charged with even heinous crimes, are getting the opportunity to seek bail. Since several such cases have come to the notice of this Court, we deem it appropriate to request the Hon'ble Chief Justice of the Allahabad High Court to take appropriate measures in coordination with State Authorities and the concerned Presiding Officer of the concerned Courts for ensuring expeditious conclusion of Trial particularly in heinous crimes and crimes against women and children."

18. The Apex Court in the matter of ***Balwinder Singh Vs. State of Punjab and another*** passed an order dated 09.09.2024 in Petition for Special Leave to Appeal (Crl.) No. 8532 of 2024 granting bail to accused who was in custody as an under-trial for about four years and three months, whereas in the said case twenty-one prosecution witnesses were already testified and seventeen more prosecution witnesses were proposed to be examined with the following observations:-

"7. An accused has a right to a fair trial and while a hurried trial is frowned upon as it may not give sufficient time to prepare for the defence, an inordinate delay in conclusion of the trial would infringe the right of an accused guaranteed under Article 21 of the Constitution."

19. So far as status of trial of the applicant in the present case is concerned, I find that out of thirteen prosecution witnesses, only six prosecution witnesses have been testified before the trial court in eight years, whereas the accused-applicant is in jail since 13.02.2017 (about seven years and ten months). This Court is also of the view that the fair and speedy trial of an accused is a legal and fundamental right. Under the facts of the case considering the long detention of the accused-applicant, as noted above, this Court feels that accused needs to be set at liberty to establish his innocence, otherwise, his continued detention will deprive him to frame his defence. It is also not in dispute that co-accused Pancham Singh having similar role has been granted bail on the ground of long incarceration as noted above, hence, I am of the view that the applicant has made out a case for bail. Accordingly, the bail

application of the applicant is hereby *allowed*.

20. Let the applicant-**Manoj**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned:

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

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

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

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

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

22. It is made clear that the observations contained in the instant order are confined to the issue of bail only and shall not affect the merit of the trial.

23. The Senior Superintendent of Police, Etah is directed to ensure the production of remaining prosecution witnesses on the dates fixed before the trial

court, so that trial of the applicant may be concluded at the earliest.

24. On appearance of the prosecution witnesses, the trial court shall record their statements on the same date without granting any adjournment to either of the parties and also make an endeavour to conclude the trial of the applicant, expeditiously.

25. Before parting with the case, I would like to mention that the right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimize anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. In fact, lot of cases are coming before the courts for quashing of proceedings and for bail even in heinous offences on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge. No person shall be deprived of his life or his personal liberty except according to procedure established by law declares Article 21 of the Constitution.

26. In view of the above, the Director General of Police, U.P., Lucknow and Additional Director General (Prosecution), U.P., Lucknow are directed to ensure that in heinous matters, on receiving summons from the court, the prosecution witnesses are produced before the court concerned without any delay, so that the trial of the accused may be concluded expeditiously.

27. The trial court is also directed that whenever it issues summons to the

prosecution witnesses, it shall also ensure on the next date that the summons issued to the witnesses, must have duly been issued by the office and served upon the person/authority/witness concerned.

28. Copy of this order be sent to the Director General of Police, U.P., Lucknow, the Additional Director General (Prosecution), U.P., Lucknow, the Senior Superintendent of Police, Etah as well as to the concerned trial court for necessary information and compliance.

(2024) 12 ILRA 572
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal No. 1020 of 2023

Chandra Prakash Mishra & Ors.

...Appellants

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Appellants:

Manoj Kumar Singh

Counsel for the Respondents:

Arun Kumar, Ashish Kumar Singh

A. Civil Procedure Code, 1908 - Order VII Rule 11 - Court Fees Act, 1870 – Section 13 - Refund of fee paid on memorandum of appeal. Issue: *Whether, in a case where the decision of the trial court rejecting the plaint is reversed in appeal, the plaintiffs are required to again deposit court fees before the trial court after remand?* — Section 13 of the Court Fees Act, casts an obligation upon the appellate court to grant a certificate to the appellant authorizing him to receive back from the Collector the full amount of fees paid on the memorandum of appeal, and the

proviso restricts such right to the extent of the amount originally paid. (Para 13)

B. Civil Procedure Code, 1908 - Order VII Rule 11 - Court Fees Act, 1870 – Section 13 - Remand - Refund of fee paid on memorandum of appeal. In the instant case, plaintiff failed to deposit the ad valorem court fees. Plaint was rejected under Order VII Rule 11 C.P.C. Before the trial court, court fees of ₹700/- were paid. In the First Appeal, before the High Court, Appellants deposited the entire court fees as determined by the trial court, i.e., court fees of ₹2,27,000/- were deposited by the appellant. *Held:* Appellant not liable to again pay court fees after remand, and the court fees of ₹2,27,000/- deposited before the High Court were held to be sufficient in relation to the original suit. Appellant authorized to receive back from the Collector, Prayagraj, court fees of ₹2,27,000/- (Para 18)

Allowed. (E-5)

List of Cases cited:

1. *Chandra Bhushan Misra Vs Jayatri Devi*, AIR 1969 All 142 (FB)
2. *St. of U.P. Vs Chandra Bhushan Misra*, AIR 1980 SC 591
3. *Srivatsa Goswami Vs Anant Prasad Singh & anr.*, 2024 (162) ALR 834

(Delivered by Hon'ble Kshitij Shailendra, J.)

ON THE ISSUE OF REFUND OF COURT FEES IN A CASE OF REMAND

1. Heard Shri Rahul Sripat, learned Senior Counsel assisted by Shri Manoj Kumar Singh, for the appellants, Shri Ashish Kumar Singh, learned counsel for the contesting defendant-respondent, Shri Arun Kumar, learned counsel for respondent No.4 and Shri Vinod Kumar

Sahu, learned Additional Chief Standing Counsel for the respondent Nos. 1, 2, 3 and 5.

**APPEAL AGAINST
REJECTION OF PLAINT**

2. The instant appeal arises out of rejection of plaint under Order VII Rule 11 C.P.C. on the ground that despite earlier order of the trial court, the plaintiff has failed to deposit the ad valorem court fees.

**PREVIOUS PROCEEDINGS IN
THIS APPEAL**

3. On 18.11.2024, following order was passed:

"1. A mention was made from the respondents side in the morning stating that the appeal may be allowed. Therefore, the Court has taken up the matter at 03:55 P.M.

2. When the matter was taken up, learned counsel for the appellants submitted that for non-payment of court fees pursuant to determination of issues framed in that regard, plaint was rejected and in the instant first appeal, the appellants have deposited the entire court fees as determined by the trial court, however, once the appeal is allowed and the plaint is revived, the appellants shall have to again deposit the court fees and, therefore, the court fees deposited in this first appeal be treated as court fees in the suit.

3. Shri Ashish Kumar Singh, learned counsel for the respondents however, vehemently opposes this submission and

submits that against the order passed by the trial court deciding issues of valuation and court fees, the plaintiff filed First Appeal From Order under Section 6-A of the Court Fees Act, however, no order could be passed therein and, in the meantime, the plaint was rejected under Order 7 Rule 11 CPC and whatever court fees has been deposited before the first appellate court, that is the statutory requirement of law and, in no circumstances, the said court fees can be treated as court fees in the suit even if the appeal is allowed and the order and decree impugned therein are set aside

4. Both the learned counsel shall address the Court on this issue on the next date fixed.

5. List for final hearing on 17.12.2024 at 02:00 P.M. "

4. Learned counsel for the parties agree for final disposal of the appeal. The appeal is, accordingly, **admitted** for final hearing. In view of the limited controversy involved in this case, summoning the record of the trial court is not deemed necessary.

5. Following point for determination is framed under Order XLI Rule 31 C.P.C:

"Whether in a case where decision of the trial court rejecting the plaint is reversed in Appeal, plaintiffs are required to again deposit court fees before the trial court after remand?"

**SUBMISSIONS OF
APPELLANTS**

6. Shri Rahul Sripat, learned Senior Counsel submits that in view of the previous order of this Court and the objection raised by the other side, the point to be decided in this appeal revolves around Section 13 of the Court Fees Act, 1870 (hereinafter referred to as "Act, 1870"). The submission is that there being no requirement to deposit court fees twice as the adjudication on merits has to be made by the trial court, a certificate in terms of Section 13 of the Act, 1870 may be granted by this Court while disposing of the instant appeal. Reliance has been placed upon a Full Bench decision of this Court in *Chandra Bhushan Misra vs. Jayatri Devi*; AIR 1969 All 142 (FB) wherein the reference was answered in terms of Section 13 of the Act, 1870. The said decision has been upheld by the Supreme Court in *State of U.P. vs. Chandra Bhushan Misra*, AIR 1980 SC 591. It is further urged that since plaint has been rejected by the trial court on one of the grounds mentioned in the Code of Civil Procedure and since the matter has to be heard finally by the trial court on all issues, the decision in this appeal would be in the nature of an order of remand under Order XLI Rule 23 C.P.C. In support of this submission, reliance has been placed on recent decision of this Court in *Srivatsa Goswami vs. Anant Prasad Singh and Another*, 2024 (162) ALR 834.

SUBMISSIONS OF RESPONDENTS

7. Per contra, Shri Ashish Kumar Singh submits that the appellants cannot get advantage of decision of the Full Bench judgment in *Chandra Bhushan Misra (supra)* and, by referring to paragraph No. 51 of the report, it is contended that the Full Bench was of the view that a litigant should be relieved of burden to pay court

fees when an 'erroneous decision' of the lower court is set aside or reversed, however, in the present case, since the earlier order of the trial court deciding issues on valuation/payment of court fees was assailed before this Court in First Appeal from Order under Section 6-A of the Act, 1870 and no relief was granted to the appellant, the decision cannot said to be erroneous.

ANALYSIS OF RIVAL CONTENTIONS

8. In order to decide the issue involved, first of all reference of Section 13 of Act, 1870 should be made. It is quoted hereinunder:

"13. Refund of fee paid on memorandum of appeal.- If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in Section 351 of the same Code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal:

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorise the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-

matter in respect whereof the suit has been remanded."

9. A Full Bench of our Court, in *Chandra Bhushan Mishra (supra)* has held as under:

"51. There is another consideration upon which I find myself, for the purpose of applying Section 13 of the Court Fees Act, unable to limit the reference, to Order 41, Rule 23 to its original provisions. The object behind Section 13 appears to be that court fee should be levied only once in the progress of a suit from the lower court to the appellate court even though the case is remanded, for re-trial and the movement to the appellate court repeated. It appears to be intended that the litigant should be relieved of the burden of court fee in obtaining the removal of an erroneous decision of the lower court and a retrial of the case. That is also demonstrated by the terms of the proviso to Section 13 which limit the refund of the Court fee to that part of the subject matter in respect of which the suit is remanded. Now, if a refund of the court-fee is available when the case is remanded because the appellate court disagrees with the disposal of the suit by the lower court on the preliminary point, I am unable to discern any reason why the same right should not be recognised in an appellant if the appellate court finds it necessary to remand the case on any other ground. The remand of the case for retrial is. I think, the material event entitling the appellant to a refund of the

court fee. It is immaterial that the remand has been ordered for one reason or another.

53. For all these reasons, I am of opinion that an appellant is entitled to a refund of the court fee paid on the memorandum of appeal whenever the appeal is remanded under Order 41, Rule 23 as amended by this Court. In my judgment the statement of the law to this effect in 1964 All LJ 868 accords to the true position in law. The application of the appellant under Section 13 of the Court Fees Act should be allowed with costs."

10. The Supreme Court has affirmed the aforesaid decision in the *State of U.P.* (supra) by holding that reference was rightly answered by the Full Bench and, consequently, the appeal filed by the State of U.P. was dismissed.

11. Though it is true that at one place in paragraph No. 51 of the decision, the Full Bench has observed regarding removal of an 'erroneous decision' of the lower court, in the same paragraph it has been observed that 'nature of remand for one reason or the other is immaterial'. Even otherwise, the entire judgment and the ratio laid down has to be seen.

12. Here, judgment of Madhya Pradesh High Court in *Suresh Kumar Chowkse v. State of Madhya Pradesh and another, 1985 M.P.L.J. 758* also needs reference. The said case had arisen out of an order passed by the District Judge, Shivpuri in a civil appeal, by which, he had refused refund of Court fees as provided under Section 13 of the Madhya Pradesh Court Fees Act, 1870. The High Court, after considering the provisions of Section

13 which are *pari materia* with the one applicable in the State of U.P. as well as the provisions of Order XLI Rule 23 C.P.C. held as under:-

“This provision makes it abundantly clear that if a suit is remanded in appeal on any of the grounds mentioned in Section 351 of the Code (now Section 23 and Section 23-A) for a second decision by the lower Court, the appellate Court shall grant to the appellant a certificate authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal. When the appellate Court remanded the case for complete re-trial, it was the bounden duty of the appellate Court to grant the said certificate to the appellant authorising him to receive back from the Collector the full amount of Court-fee paid on the memorandum of appeal. This provision of the Court-fees Act is enacted with a view that when a re-trial is ordered by the appellate Court and the case is remanded to the trial Court for complete re-trial, then the Court-fees paid by the appellant should not be withheld as a measure of penalty, the reason being that now for the second time if the party becomes aggrieved by the judgment and decree of the trial Court, then he shall have to file an appeal again in the appellate Court and then he shall be required to pay the Court-fees again. Thus, if the Court-fee is not returned, he will have to pay Court-fee twice for getting one justice. This double jeopardy, which will be caused to the party, is not only against the

principles of equity and justice but is also against the principles of law. Ku. Shanti Shrivastava, learned counsel for the State, has placed for reliance in the case of Kishan Sarup, (AIR 1975 Punjab and Haryana 22). The judgment rather favours the appellant, than the party which has cited it. ”

13. Therefore, it is clear that Section 13 casts an obligation upon the appellate court to grant a certificate to the appellant authorizing him to receive back from the Collector the full amount of fees paid on the memorandum of appeal and the proviso restricts such right to the extent of the amount originally paid.

14. There is no dispute between the parties that although before the trial court, court fees of Rs. 700/- was paid, in the instant First Appeal, court fees of Rs. 2,27,000/- has been deposited by the appellant. In view of the above-referred decisions, this Court is of the view that the appellant is not liable to again pay court fees after remand and the court fees of Rs. 2,27,000/- deposited before this Court, after determination made by the competent officer of this Court, is held to be sufficient in relation to the Original Suit No. 1032 of 2006. The point for determination framed above is answered accordingly.

15. The appeal is **allowed**. The impugned judgment and order dated 23.03.2023 and the decree dated 05.04.2023 passed by the Judge Small Causes Court/Civil Judge (Senior Division), Allahabad in Original Suit No.1032 of 2006 is set aside. Matter is remanded to the trial court for decision on merits.

16. At this stage, Shri Ashish Kumar Singh has placed before this Court a copy of the order dated 02.03.2023 passed by this Court in Matter under Article 227 No.1786 of 2023 whereby the trial court was directed to decide the aforesaid suit in six months.

17. Accordingly, the trial court shall decide the suit proceedings most expeditiously. Evidence of the plaintiffs shall be concluded in three months, evidence of defendants shall be concluded in next three months and the suit shall be decided on merits in next two months.

18. This judgment, in itself, shall be treated as a certificate in terms of Section 13 of the Act, 1870 granted to the appellant authorizing him to receive back from the Collector, Prayagraj, court fees of Rs. 2,27,000/-. The Collector, being representative of the State in district and State being a party to this appeal, he is directed to ensure that the aforesaid amount of court fees is refunded to the appellant within 2 weeks after a copy of this order is placed before him. For this purpose, the Collector shall remain competent to delegate his power to any other officer under his supervision and control.

19. **Allowed** with aforesaid observations.

(2024) 12 ILRA 577

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.12.2024

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Public Interest Litigation (PIL) No. 1911 of 2024

Jai Bhagwan

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Awadhesh Kumar Mishra, Sri Sunil Kumar Singh, Sri Vipul Kumar (A.C.), Sri Rai Sahab Yadav (A.C.)

Counsel for the Respondents:

Sri Abhitab Kumar Tiwari, Sri Sunil Kumar Singh, C.S.C.

Civil Law- Public interest litigation — Government School — Use of school land and farm — Mismanagement of leased lands — Encroachments — Absence of statutory committee —Directions issued for enforcement of Government Order dated 31.07.2018 — Guidelines framed for transparent leasing and better educational outcomes — Composite school system in rural U.P. found deficient — Accountability, attendance, infrastructure and quality concerns — District authorities directed to implement corrective measures. (Para 8)

HELD:

In aforesaid circumstances, this public interest litigation is disposed of with following directions: (I) No School's Farm land will be leased out without a reasoned decision taken by above referred Committee of concerned School. (II) The Committee shall consider the condition of earlier lease, their consideration and whether earlier income generated was deposited in School's account or not. Committee shall also take note of antecedent of lessee. (III) District Basic Education Officer, Meerut will take note of shortcomings pointed out in report and will take necessary steps to address. (IV) District Basic Education Officer, Meerut will communicate all 53 Schools of District Meerut about this order. (V) District Magistrate, Meerut as well as District Basic Education Officer, Meerut will take note of report and its suggestions and take all efforts to implement it, as far as possible, if there is no legal impediment and if necessary be forwarded to Higher Authority for consideration. (Para 8)

Writ petition disposed of. (E-14)

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

1. This public interest litigation has been filed to keep a playground of a Government School of Village Kakkerpur, Post Bhuni, Sardhana, District Meerut, free from any encroachment as there was an apprehension that in the garb of lease to School's Farm land, playground of concerned School will be disturbed.

2. During hearing it was revealed that due procedure to lease out was not followed and income generated was not deposited in School's account, therefore, this Court extended the scope of present public interest litigation and appointed Sri Vipul Kumar and Sri Rai Sahab Yadav, Advocates as Amicus Curiae and asked them to visit the concerned School as well as other Schools and to submit a report.

3. Sri Vipul Kumar and Sri Rai Sahab Yadav, Advocates have submitted a report alongwith supplementary suggestions today, which are taken on record. Court also heard their submissions.

4. I have carefully perused the report. Sri Vipul Kumar and Sri Rai Sahab Yadav, Advocates have visited many Schools running under the jurisdiction of District Basic Education Officer, Meerut and they have pointed out certain irregularities and shortcomings. In one of the School facilities were utilized upto the best and even Adharshila Lab was working very efficiently.

5. In the report it has been disclosed that there are 53 Schools within the District Meerut, where there are School Farm. It is also pointed out in report that in terms of Government Order dated 31st July,

2018, in order to lease out such School's Farm land, a Committee has to be constituted having Gram Pradhan or Nagar Palika Adhyaksha as President and a person nominated by Sub-Divisional Magistrate, above the rank of Naib Tehsildar and Principal of concerned School as its Members. The report further states that such Committee is not constituted in every such Schools and without their express consent Schools' Farm land were leased out. So far as present School is concerned, a First Information Report was lodged against earlier Principal as well as present Principal has also committed an error as in order to submit his reply, he has appointed a person, who was supposed to be beneficiary of proposal of lease.

6. Some of the suggestions given by Sri Vipul Kumar and Sri Rai Sahab Yadav, Advocates in their report as well as supplementary suggestions are reproduced hereinafter:

"शिक्षा सुधार सम्बन्धी सुझाव"

- विद्यालयों में शिक्षा सम्बन्धी जाँच करने पर पाया गया कि बेसिक शिक्षा परिषद के विद्यालयों में छात्रों की संख्या लगातार कम होती जा रही है। शिक्षा को लेकर अध्यापक उदासीन दिखे, छात्रों में पढ़ाई के प्रति रुचि नहीं दिखी।

- कई विद्यालयों में 50 छात्र से कम की संख्या है। सरकार द्वारा शिक्षा पर विशेष अभियान चलाया जा रहा है। विद्यालय भवन बनवाये जा रहे हैं। फर्नीचर, मिड-डे-मील, स्कालरशिप, ड्रेस, बैग आदि प्रदान किये जा रहे हैं फिर भी छात्रों की संख्या कम होती जा रही है।

- अभिभावक द्वारा अंग्रेजी मीडियम स्कूल में अपने बच्चों को पढ़ाने पर जोर दिया जा रहा है। परिषदीय विद्यालयों में मात्र गरीबों के बच्चे आते हैं। प्राथमिक और उच्च प्राथमिक विद्यालयों में हिन्दी व अंग्रेजी मीडियम दोनों की सुविधा प्रदान किया जाना चाहिए।

• जब से विद्यालय में भोजन बनना शुरू हुआ शिक्षा का स्तर गिरता जा रहा है। विद्यालय सिर्फ शिक्षा के लिए होना चाहिए यदि सरकार गरीब व्यक्ति के बच्चों की मदद करना चाहती है तो बच्चों को स्कालरशिप या बच्चों के घर खाद्यान देकर मदद किया जा सकता है किन्तु विद्यालय में शिक्षा पर जोर दिया जाना चाहिए।

• सरकारी विद्यालयों में छात्रों का फर्जी पंजीकरण पाया गया। छात्र सरकारी व प्राइवेट दोनों विद्यालयों में पंजीकृत पाये गये। पढ़ने के लिए प्राइवेट विद्यालय में जाते हैं तथा सरकारी सुविधा लेने के लिए सरकारी विद्यालय में जाते हैं। अध्यापकों द्वारा भी छात्रों की फर्जी इंट्री करके विद्यालय में छात्रों की संख्या अधिक दिखाया जाता है तथा उनको मिलने वाली सुविधाओं का दुरुपयोग किया जाता है।

• प्राइवेट विद्यालय प्रतिवर्ष किताबें बदल देते हैं जिस कारण पुरानी किताबें प्रतिवर्ष कुड़े में चली जाती हैं जिससे शिक्षा महंगी होती चली जा रही है। आज से लगभग 20-25 वर्ष पहले एक किताब से लगभग दसों लोग पढ़ा करते थे। बड़े भाई-बहन की किताब छोटे भाई-बहन पढ़ा करते थे जिससे अभिभावक पर बच्चों की पढ़ाई पर कम खर्च होता था।

• सरकारी विद्यालयों में प्रतिवर्ष निःशुल्क किताबें बच्चों में बाँटी जाती है किन्तु पुरानी किताबें जमा नहीं करायी जाती जिससे सरकार पर अत्यधिक भार बढ़ता जा रहा है और शिक्षा महंगी होती जा रही है।

• निःशुल्क दी गई किताबें सत्र समाप्त होने पर जमा करा ली जानी चाहिए तथा उनकी बाइन्डिंग करा के नये सत्र के छात्रों को वितरित की जानी चाहिए, जो छात्र पुरानी किताबें नहीं जमा करते उनसे किताब का शुल्क जमा कराया जाय।

• वन नेशन वन एजुकेशन की अवधारणा होनी चाहिए। सरकारी और प्राइवेट विद्यालयों में एक ही किताब होनी चाहिए ताकि शिक्षा का एक आधार हो ऐसा न होने पर अलग अलग विद्यालयों में शिक्षा ग्रहण कर रहे छात्रों के बौद्धिक तथा तार्किक विकास में असमानता होती है जिस कारण प्रतियोगी परीक्षाओं में दो अलग अलग पैटर्न से पढ़े छात्रों को असुविधा होती है।

• आज के तकनीकी और आधुनिक युग में विद्यालयों में भी तकनीकी शिक्षा को महत्व दिया जाना चाहिए। हमें चीन व जापान से सीख लेनी चाहिए वहाँ

की शिक्षा बेरोजगार नहीं पैदा करती। आवासीय विद्यालय ज्यादा होने चाहिए जहाँ बच्चे विद्यालय में रहकर शिक्षा ग्रहण करें तथा अपने काम स्वयं करें और अनुशासन में रहना सीखें।

• जिस समय विद्यालय के पास भवन नहीं थे सुविधायें नहीं थे विद्यालय आम व महुआ के पेड़ के नीचे चला करते थे शिक्षक को वेतन बहुत कम मिलता था उस समय विद्यालय में शिक्षा अच्छी हुआ करती थी और बच्चों की संख्या बहुत अधिक रहा करती थी, शिक्षक भी बड़ी मेहनत से कार्य करते थे। आज इसका उल्टा है भवन है, सुविधायें हैं, शिक्षक हैं, शिक्षक को अच्छा वेतन मिलता है किन्तु विद्यालय में छात्र नहीं हैं, शिक्षक पढ़ाने नहीं आते। परिषदीय विद्यालयों में शिक्षा का स्तर बहुत गिर गया है।

विद्यालय फार्म प्रबन्धन सुझाव

• निरीक्षण के दौरान यह पाया गया कि जिन विद्यालयों के पास कृषि फार्म की भूमि पायी गई है उनके द्वारा इसका उपयोग नहीं किया जा रहा है।

• विद्यालय फार्म की जमीन पर अवैध कब्जे पाये गये, एक बार ठेके पर भूमि प्राप्त कर लेने पर लोग अवैध कब्जा कर लेते हैं।

• विद्यालय फार्म की भूमि को ठेके पर उठाने पर प्राप्त धनराशि गबन किया गया, कृषि ठेके की धनराशि को विद्यालय के विकास के लिए प्रयोग नहीं किया गया।

• विद्यालय की जो कृषि भूमि है उसे विद्यालय द्वारा बाउन्ड्रीवाल बनाकर या लोहे के एंगल और कटीले तार लगाकर उसमें लकड़ी वाले वृक्ष जैसे पापुलर, युकेलिप्टस लगाये जा सकते हैं जो 10 वर्ष में स्कूल के लिए अच्छी आय का स्रोत बन सकते हैं।

• विद्यालय की खाली पड़ी भूमि पर खेल ग्राउण्ड, मिनी स्टेडियम या विद्यालय अपने अन्य उपयोग में ले सकता है। खाली भूमि पर गाँव के लोग कब्जा करने लगते हैं अतः विद्यालय फार्म की भूमि को खाली नहीं छोड़ना चाहिए।

- विद्यालय फार्म को नियमित रूप से ठेके पर देकर उससे प्राप्त आय को विद्यालय के विकास के रूप में खर्च कर विद्यालय का विकास किया जा सकता है।

- विद्यालयों को कृषि भूमि इसलिए दी जाती थी क्योंकि बच्चों से कृषि करायी जाती थी। उनको छोटे-छोटे भू-भाग उपलब्ध करा के अलग-अलग प्रकार की फसलें उगाने के लिए कहा जाता था। जिससे विद्यार्थियों को कृषि से संबंधित जानकारी होती थी। आज विद्यालय ने यह सब कराना बन्द कर दिया है।

Some more suggestions
apart from consolidate report

Education is one of the key factors that significantly determines the development of any country. Thus, it must and ought to change according to the needs of the times and the changing scenario. It provides an opportunity to reflect seriously on humanity's social, economic, cultural, ethical and spiritual issues.

The National Education Policy, 2020 (for brevity referred as NEP, 2020 hereinafter) is the first Education Policy of the 21st century which aims to address the various growing developmental imperatives of our country. It is built on the foundational pillars of Access, Equity, Quality, Affordability and Accountability.

With emphasis on the early childhood care and education. The foundation stage is further divided into 2 parts i.e. 3 years of pre-school or Anganwadi, followed by classes 1 & 2 in a primary school. This will cover children of ages 3 to 8 years. The focus of studies will be in activity based learning. Preparatory stage is from class 3 to 5 which will cover children of the ages 8 to 11 years. It will gradually introduce subjects like speaking, reading, writing, physical education, language, art, science and mathematics. Middle stage is from class 6 to 8 which will cover children of the ages 11 to 13 years. It will introduce children to more abstract concept of mathematics, science, social sciences, arts and humanities. When we visited checked it composite schools upto 8th standard, we from touchstone of foundational pillars of NEP, 2020. These schools are established in villages for the purposes of easy accessibility and affordability which are accomplished with its establishment but these schools are lacking equity and quality education except few ones. So far as the question of accountability is

concerned, we found that teachers in most of schools haven't sense of responsibility towards students. Those schools, which are well maintained and students are well equipped with the subjects are outcome of their hard-work as well as of their teachers.

It is pertinent to mention here that schools, namely, P.M. Shri Uchcha Prathamik Vidyalay, Mohiuddinpur, Vikas Khand Meerut Gramin, Meerut and Uchcha Prathamik Vidyalay, Bahlolpur, Meerut have a well equipped Adharshila lab which provide the best way to learn about technology, science and space. Students were able to learn all about those topics in school using different working models and electronic devices. A dream concept is designed for students from which they will know about the possible career opportunities in which they can build their future with a concept of learning by doing at an early age when they are still developing their cognitive faculty. The idea behind Adharshila is to make sure that every child has access to scientific lab regardless of their location or socio-economic status. This way

every child may get an opportunity for learning something new even if they don't have access to these scientific instruments and computers at home.

Since we have checked, and realized the ground realities prevailing in those schools, we are in a position to give certain suggestions in order to improve the pathetic conditions of composite schools:-

(i) There must be Adharshila lab in each and every school and every endeavour be made for its establishment. In fact, this novel concept of this type of lab is in consonance with the Fundamental Duties enshrined under Article 51A(h) of the Constitution of India. For ready reference, it is reproduced as under-

"It shall be the duty of every citizen of India-(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;"

(ii) There should be frequent surprise checking of composite schools by their higher authorities of the department so that teachers of school shall discharge their duties with sense of accountability and could not shun their responsibility.

(iii) Last but not the least the government schemes meant for the betterment and development of children especially in the field of education and large money is spent on these may not go in waste due to laxity on the part of any of its stakeholders."

7. Sri Hrishabh Shukla and Ms. Diksha Shukla, Research Associates attached with me have also given following suggestions:

(I) Bio-metric attendance for Teachers should be made compulsory to ensure their attendance.

(II) Installation of digital equipments (CC Cameras, Voice Recorders) for surveillance of classes, supervised by an officer of Block level.

(III) There should be education awareness drive and campaign in every village conducted by Teachers of School.

(IV) Attendance of atleast 70% should be made mandatory for every student to appear in annual examination.

(V) District Basic Education Officer concerned should visit every school atleast twice in a year for the purpose of inspection and to remove shortcomings.

(VI) Teachers should be appointed on basis of subject and classes and not on basis of strength of students of School.

(VII) Duty of Teachers should be confined for teaching only and there should be separate staff for other kind of work.

(VIII) Benefits of Government schemes to students should be in proportion to their attendance and not merely on basis of admission so that attendance of students be increased.

(IX) Parent-Teachers meeting should be conducted atleast on monthly basis so that guardians are also aware about education system and also give their suggestions.

(X) Morning assembly in school should be conducted in presence of all Teachers and the Teacher, not present, should be marked as absent because of presence of Teachers will maintain discipline in students as well as boost the confidence of parents.

(XI) There should be proper staff to ensure cleanliness in School and Village Pradhan should be held accountable on failure of cleanliness.

8. In aforesaid circumstances, this public interest litigation is disposed of with following directions:

(I) No School's Farm land will be leased out without a reasoned decision taken by above referred Committee of concerned School.

(II) The Committee shall consider the condition of earlier lease, their consideration and whether earlier income generated was deposited in School's account or not. Committee shall also take note of antecedent of lessee.

(III) District Basic Education Officer, Meerut will take note of shortcomings pointed out in report and will take necessary steps to address.

(IV) District Basic Education Officer, Meerut will communicate all 53 Schools of District Meerut about this order.

(V) District Magistrate, Meerut as well as District Basic Education Officer, Meerut will take note of report and its suggestions and take all efforts to implement it, as far as possible, if there is no legal impediment and if necessary be forwarded to Higher Authority for consideration.

9. A copy of this order alongwith report and supplementary suggestions be sent to District Magistrate, Meerut and District Basic Education Officer, Meerut and for that Office of Advocate General will take appropriate steps.

10. The Court extends it's gratitude towards Sri Vipul Kumar and Sri Rai Sahab Yadav, Advocates as well as Sri

Hrishabh Shukla and Ms. Diksha Shukla, Research Associates, for their valuable assistance.

(2024) 12 ILRA 583
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

Writ -A No. 4810 of 2021

Pradeep Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
 Siddhartha Khare, Sr. Advocate

Counsel for the Respondents:
 C.S.C.

Official Secrets Act,1923 - Judicial Service (Direct Recruitment)

Examination- petitioner applied and disclosed that he was charged and tried at session trials of criminal cases-It was also disclosed that petitioner was acquitted at those trials-petitioner participated in the selection process. He was declared successful. He secured merit position twenty-seven. No material exists to reach a conclusion that the petitioner may have worked for any foreign intelligence agency-the petitioner was "honorably acquitted" at two criminal trials faced by him -those orders have attained finality.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Avtar Singh Vs U.O.I. & ors. (2016) 8 SCC 471
2. Joginder Singh Vs Union Territory of Chandigarh & ors., (2015) 2 SCC 377

3. Commissioner of Police, New Delhi & anr.
Vs Mehar Singh, (2013) 7 SCC 685

4. Deputy Inspector General of Police & anr.
Vs S. Samuthiram, (2013) 1 SCC 598

5. Government Appeal No. 2416 of 2014

6. Writ-A No 23371 of 2018

7. Manish Saini Vs Government of NCT of
Delhi & anr., 2024 SCC Online Del 7599

8. Mahesh Kumar Vs U.O.I. & ors., 2023 SCC
Online Del 2113

9. Mohammad Imran. Vs St. of Mah. & ors.,
(2019) 17 SCC 696

10. Management of R.B.I., New Delhi Vs
Bhopal Singh Panchal, (1994) 1 SCC 541

11. Union Territory, Chandigarh
Administration & ors. Vs Pradeep Kumar &
Anr. (2018) 1 SCC 797

(Delivered by Hon'ble Saumitra Dayal
Singh, J. & Hon'ble Donadi Ramesh, J)

1. Heard Sri Ashok Khare, learned
Senior Counsel assisted by Sri Umang
Srivastava, learned counsel for the
petitioner; Ms. Kritika Singh, learned
Additional Chief Standing Counsel for the
State-respondents and Sri Ashish Mishra,
learned counsel for the High Court.

2. Present writ petition has been
filed for the following relief :-

*“(a) Issue a writ, order or
direction in the nature of certiorari
quashing the order of the State
Government dated 26.09.2019
(Annexure No.11) and the order of
High Court on administrative side
dated 09.07.2020 (Annexure No.8);*

*(b) Issue a writ, order or
direction of a suitable nature*

*commanding the respondents to
forthwith grant appointment to the
petitioner as Additional District
Judge in U.P. Higher Judicial
Service in pursuance of his
selection in U.P. Higher Judicial
Service (Direct Recruitment)
Examination-2016, within a period
to be specified by this Hon'ble
Court, with all consequential
benefits with effect from the date
from which other selected
candidates have been appointed”.*

3. The undisputed facts of the case
are, the petitioner applied for selection to
the U.P. Higher Judicial Service under the
U.P. Higher Judicial Service (Direct
Recruitment) Examination, 2016. In that
application, the petitioner disclosed the
facts pertaining to Session Trial No.69 of
2004, State versus Pradeep Kumar @
Akash Verma, under Sections 3, 6, 9 of
Official Secrets Act & Section 120-B IPC
and Session Trial No.236 of 2004, State
versus Pradeep Kumar @ Akash Verma,
under Section 124-A IPC, arising out of
Case Crime No.268 of 2002, Police Station
Kotwali, District Kanpur Nagar. It was thus
disclosed that the present petitioner was
charged and tried at those session trials. It
was also disclosed, vide judgement and
order dated 06.03.2014, passed by the
Additional Sessions Judge, Court No.24,
Kanpur Nagar, the petitioner was acquitted,
at those trials.

4. The petitioner participated in the
selection process. He was declared
successful. He secured merit position
twenty-seven. On 18.08.2017, the High
Court forwarded to the State Government
the list of selected candidates and
recommended their appointments.
Appointment letter was not issued to the

petitioner. At that stage, the petitioner approached this Court by means of **Writ-A No.23371 of 2018, Pradeep Kumar versus State of U.P. & others**. It was disposed of with the following directions: -

“In view of the aforesaid facts and circumstances, we dispose of this writ petition with the direction to the respondent No.1 to place the matter of appointment of the petitioner in the Higher Judicial Service of the State of U.P. pursuant to the recommendation of the High Court dated 18.8.2017 before the Hon'ble Governor of the State immediately within two weeks and have his opinion within next one month, after necessary consultation with any other authority, as may be deemed proper, and thereafter to proceed, if necessary, with the appointment.

In the end, we saddle the respondent No.1 with an exemplary cost of Rs.10 Lakh for the indifferent attitude shown by it in the matter of appointment of the Judicial Officer and for remaining inactive on the recommendation of the High Court for a period of two years. The said cost is directed to be deposited in the Registry of the Court within a period of one month to be utilized for the benefit of the litigants by the High Court”.

5. That order was not challenged. Thereafter, the matter was considered by the State Government. Vide Office Memorandum dated 26.09.2019, the State Government has declined to offer appointment to the petitioner. That Office Memorandum has been communicated to the petitioner, by the High Court, vide its

further communication dated 09.07.2020. Hence this writ petition.

6. Submission of learned Senior Counsel for the petitioner is, other than the fact occurrence of two criminal cases lodged against the petitioner, leading to two sessions trials (noted above) faced by the petitioner, there is no adverse circumstance existing or considered by the State Government in declining to issue the appointment letter to the petitioner. As to the criminal trials faced by the petitioner, it has been strenuously urged that the entire prosecution story was concocted. It has been found to be false by learned trial court, in its judgement and order dated 06.03.2014. Referring to paragraph nos. 27, 28, 29, 30 and 31 of that judgement and order passed by the learned trial court, it has been submitted, the prosecution could not prove : (i) that the documents i.e. copies of alleged maps produced at the trials, were confidential or secret documents; (ii) that those documents had been recovered from the petitioner; (iii) the documents produced at the trials were the same as were allegedly recovered from the petitioner; (iv) that the petitioner called or spoke to any foreign national or passed on any information, telephonically; (v) that the petitioner spoke to or was in contact with any foreign national; (vi) that there existed any element of conspiracy; (vii) that ingredients of offence alleged under Section 124-A IPC, existed. Reliance has been placed on the decision of the Supreme Court in **Avtar Singh Vs. Union of India & Ors. (2016) 8 SCC 471 and Joginder Singh Vs. Union Territory of Chandigarh and Others, (2015) 2 SCC 377**.

7. On the other hand, learned Additional Chief Standing Counsel would contend that the allegations levelled against

the petitioner are most serious. The petitioner was a spy and worked for an enemy nation. He was apprehended on a joint operation of the Special Task Force (STF) of the State Government and Military Intelligence. He was charged under the Official Secrets Act. Though, the criminal trials failed, the State Government had enough material to reach a conclusion that the petitioner's character could not be certified. He was wholly undeserving of the appointment.

8. Learned Additional Chief Standing Counsel has also placed on record a copy of the report submitted by the Military authority to the District Magistrate, Kanpur Nagar, U.P. (dated 25.7.2019). The same has been retained on record. It reads as below:

*"District Magistrate
Kanpur Nagar (UP)*

**COMMENTS ON DISTRICT
MAGISTRATE KANPUR NAGAR
LETTER NO 1770-B/ST-DM-2019
DATED 25 JUL 2019**

1. Reference to your office letter No 1770-B/ST-DM-2019 dt 25 Jul 2019.

2. Comments on your office letter quoted above are given in succeeding paras.

3. Brief of the Case.

(a) Based on the records held with concerned Army authorities, there were inputs received from sister intelligence agencies, Pradeep Kumar @ Akash Verma was on the radar of Military Intelligence (MI) in 2002 for involvement in Pakistan espionage activities. He was a graduate in Law and was unemployed at that time. His father was also found to be suspended from the service of an additional Judge for charges of bribery in 1990. Pradeep Kumar was apprehended in a joint operation by STF and Military Intelligence on 13 Jun

2002. At the time of arrest, he was residing in Kanpur (UP).

(b) Information avail at the time apprehension:-

(i) Name : Pradeep
Kumar s/o Mr. Jagdish Prasad.

(ii) Age : 27 Years.

(iii) Profession : Unemployed.

(iv) Marital Status : Unmarried.

(v) Residence Address: House No 43/122, Rajendra Mohal Chowk Police Station Kotwali, Kanpur Nagar

(vi) Education : Graduation from DAV College, LLB, Diploma in Computer Plg from AITC and Internet Training.

(vii) Religion : Hindu.

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4. As per inputs on record, Pradeep Kumar in search of easy money options had come in contact of an individual namely Faizan Illahi, s/o Imam of Badi Masjid at Meston Road. Faizan was running a Photostat shop at that time. Faizan asked Pradeep to provide him some information on telephone in exchange of money. Thereafter, Pradeep started receiving PIO calls on his landline No 0512-366701 and became part of the PIO network. Reportedly, Pradeep Kumar passed sensitive information like names of units and officers of Kanpur cantonment for Rs 18,000/-. He proceeded on to open a cyber café and share more information with the handlers. He was identified and neutralized in the initial stages itself and thereafter handed over to the local police Kanpur Nagar. The recovered documents from the individual including data of Kanpur Cantonment and a service map were found to be of classified nature.

5. The case was closed by the Army authorities in 2002.

6 Further details regarding the apprehension and the charge sheet filed

may be sought from STF, UP or district police.

7. For information and necessary action please.

(XXX)

Colonel, Administrative Commandant”

9. She has also relied on the contents of the paragraph 14 of the counter affidavit filed by the State Government. It reads as below:

“14. That the contents of paragraph nos.29 and 30 of the Writ Petition are not admitted hence denied. In reply, it is submitted that letter dated 27.07.2019 of the Military Intelligence has been received along with the report of the District Magistrate, Kanpur dated 28.07.2019, in which it has been mentioned that the allegations of spying against India had been leveled upon the petitioner, which in itself is serious allegation and the then Army Officer had proved the allegation as P.W. 5 against the petitioner in the criminal case against him. District Magistrate, Kanpur did not find the petitioner as deserving (suitable) for the post in his above report dated 28.07.2019. Apart from it, the petitioner has concealed material facts in the online application form filed by him for Uttar Pradesh Higher Judicial Services Examination – 2016 for police verification. In view of the above mentioned facts and circumstance candidature of the petitioner has been cancelled vide office order dated 26.09.2019 of Niyukti Anubhag-4.”

10. Therefore, reasonable doubt exists as to the character of the petitioner. Reliance has also been placed on the fact that the petitioner’s father - a judicial officer, was dismissed from service on charges of corruption.

11. We have heard learned counsel for the parties and perused the record. In ***Avtar Singh (supra)***, a slightly different issue was examined by the Supreme Court – whether, upon suppression of information or upon not submitting or submitting false information, in the verification form, pertaining to past criminal conviction or criminal prosecution or arrest or pendency of a criminal case, a right to appointment earned pursuant to selection/examination etc., may be defeated. In that it was concluded as below:

“38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government

orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to

consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to

be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him.

39. We answer the reference accordingly. Let the matters be placed before an appropriate Bench for consideration on merits."

Those being contingencies other than acquittal, we may examine the matter a little further.

12. In **Deputy Inspector General of Police & Anr. vs S. Samuthiram, (2013) 1 SCC 598**, the Supreme Court considered the meaning and effect of the phrases "honourable acquittal", "acquitted of blame" and "fully exonerated". It found those phrases are not different concepts under any statutory law rather, they are phrases coined by judicial pronouncements. Thus, an order of "honourable acquittal" is one where an accused though charged and put to trial, faces that trial on the full strength of the prosecution evidence. Thereafter, the trial court offers full consideration to that evidence and finds (as a fact) that the prosecution had "miserably failed to prove the charges levelled against the accused". In that regard, it first observed as below:

"24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal [(1994) 1 SCC 541 : 1994 SCC (L&S) 594 : (1994) 26 ATC 619] . In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted".

(emphasis supplied)

13. Then, applying that test, in **Commissioner of Police, New Delhi & Anr. vs Mehar Singh, (2013) 7 SCC 685**, two contingencies came up for consideration - whether civil consequences arising from an alleged transaction may be avoided, where the charged person may either be acquitted for reason of compromise reached between the parties or upon the prosecution witness turning

hostile. It was held, exoneration from civil consequences may not arise in either of the above noted two contingencies. It was held as below:

“34. The respondents are trying to draw mileage from the fact that in their application and/or attestation form they have disclosed their involvement in a criminal case. We do not see how this fact improves their case. Disclosure of these facts in the application/attestation form is an essential requirement. An aspirant is expected to state these facts honestly. Honesty and integrity are inbuilt requirements of the police force. The respondents should not, therefore, expect to score any brownie points because of this disclosure. Besides, this has no relevance to the point in issue. It bears repetition to state that while deciding whether a person against whom a criminal case was registered and who was later on acquitted or discharged should be appointed to a post in the police force, what is relevant is the nature of the offence, the extent of his involvement, whether the acquittal was a clean acquittal or an acquittal by giving benefit of doubt because the witnesses turned hostile or because of some serious flaw in the prosecution, and the propensity of such person to indulge in similar activities in future. This decision, in our opinion, can only be taken by the Screening Committee created for that purpose by the Delhi Police. If the Screening Committee's decision is not mala fide or actuated by

extraneous considerations, then, it cannot be questioned”.
(emphasis supplied)

14. As to the difference between an acquittal and a honourable acquittal and its effect, in **Union Territory, Chandigarh Administration & Ors. Vs Pradeep Kumar & Anr. (2018) 1 SCC 797**, the Supreme Court again considered the law laid down by it in **S. Samuthiram (supra) and Management of Reserve Bank of India, New Delhi Vs Bhopal Singh Panchal, (1994) 1 SCC 541**. It observed as below:

“10. The acquittal in a criminal case is not conclusive of the suitability of the candidates in the post concerned. If a person is acquitted or discharged, it cannot always be inferred that he was falsely involved or he had no criminal antecedents. Unless it is an honourable acquittal, the candidate cannot claim the benefit of the case.....”
(emphasis supplied)

15. In **Joginder Singh (supra)**, the appointment against selection earned at a public examination was denied for reason of criminal trial faced. There also, an order of honourable acquittal had been earned by the selected candidate/petitioner. In that, the Supreme Court reasoned as below:

“24.....Thus, as rightly pointed out by the trial court that as the prosecution has failed to prove the charges against the appellant by adducing cogent evidence, therefore, the police authorities cannot be allowed to sit in judgment over the findings

recorded by the Sessions Court in its judgment, wherein the appellant has been honourably acquitted. Denying him the appointment to the post of a Constable is like a vicarious punishment, which is not permissible in law, therefore, the impugned judgment and order [UT, Chandigarh v. Central Administrative Tribunal, (2008) 2 PLR 565] passed by the High Court is vitiated in law and liable to be set aside.”

(emphasis supplied)

16. In **Mohammad Imran. Vs. State of Maharashtra & Ors., (2019) 17 SCC 696**, that petitioner was also selected for appointment in judicial service. Meanwhile, he had been charged with commission of offence under Sections 363, 366 and 34 IPC. He was honourably acquitted of that charge, by the criminal court. Yet, his character was not verified for reason of his having faced that criminal trial. Negating the objection raised by the State-respondents, the Supreme Court reasoned as below:

“9.....The report received reveals that except for the criminal case under reference in which he has been acquitted, the appellant has a clean record and there is no adverse material against him to deny him the fruits of his academic labour in a competitive selection for the post of a judicial officer. In our opinion, no reasonable person on the basis of the materials placed before us can come to the conclusion that the antecedents and character of the appellant are such that he is unfit to be appointed as a judicial officer.”

(emphasis supplied)

17. The Delhi High Court in **Mahesh Kumar Vs. Union of India and Others, 2023 SCC Online Del 2113**, observed as below:

“19. In trial for criminal offences, the accused is presumed to be innocent unless proved guilty and it is the duty of the prosecution for establishing the actus reus of the crime as well as the mens rea. When the accused is acquitted after full consideration of prosecution evidence and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted as held in *Inspector General of Police v. S. Samuthiram [Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598 : (2013) 1 SCC (Cri) 566 : (2013) 1 SCC (L&S) 229]*.

20. There can be no second opinion that each case is to be scrutinised on its own facts through the designated officers and in case of the police force, the scrutiny needs to be more closer since the police officials are under a duty to tackle lawlessness. However, at the same time, generalisations cannot be made to deny the offer of appointment merely on the basis of registration of FIR without considering the reasoning in the judgment and the relevant facts and circumstances. Apart from the registration of the aforesaid FIR, there is nothing on record to reflect that the antecedents or the conduct of the petitioner disqualified him in any manner for the appointment to

the post of SI (EXE), Delhi Police. It may be difficult to presume that the petitioner would be a threat to the discipline of the police force merely on account of aforesaid FIR and also considering the fact that petitioner had already joined on selection as SI (EXE) in CISF in an exam conducted by SSC. It does not appear to be logical that the petitioner who was found fit for appointment to the post of SI in CISF may be held to be unsuitable for appointment in Delhi Police on the basis of exam conducted by the same recruiting agency i.e. SSC."

18. Again, in **Manish Saini Vs. Government of NCT of Delhi and Another, 2024 SCC Online Del 7599**, the Delhi High Court had the occasion to consider similar lingering suspicion in the context of honourable acquittal earned by the selected person. It observed as below:

"38. The decision of the Screening Committee, as contained in the order dated 24 September 2019, is completely at odds with the judgment of the learned ASJ, and is inherently presumptuous. It defeats comprehension as to how the Screening Committee could allege that the petitioner was "involved in serious nature of offence like attempt to robbery" when the learned ASJ has held otherwise. The alleged possession, by the petitioner, of spring actuated knives, which appears to be what has most disturbed the Screening Committee, has also been disbelieved by the learned ASJ. The use of the words "as such" indicates that it was the alleged

possession of knives by the accused, including the petitioner, which has most influenced the Screening Committee to hold him unfit for appointment.

39. We are constrained to hold that the Screening Committee has effectively sat in appeal over the judgment of the learned ASJ, which it was not competent to do. It is nobody's case that the petitioner's antecedents were otherwise murky. The only blot on his escutcheon, if one may call it that, was the criminal trial in which he found himself involved. The Screening Committee had, therefore, before it only the judgment of the learned ASJ on the basis of which it had to determine the suitability of the petitioner for appointment as SI. It was, therefore, required to scrupulously appreciate the judgment of the learned ASJ, and we are of the considered opinion that it has failed to do so. The observations of the Screening Committee are totally at variance with those of the learned ASJ and, therefore, we cannot accord, to the decision of the Screening Committee, the respect which it otherwise commands.

40. According to us, therefore, the decision of the Screening Committee suffers from non-application of mind and is, therefore, perverse, as understood in law, as it fails to appreciate the material before it in the proper perspective."

19. In the present case, same issue was first raised at the initial stage. The

petitioner approached this Court by means of earlier **Writ-A No 23371 of 2018 (Pradeep Kumar Vs. State of U.P. and 3 Others)**. The Court took note of Rule 13 of the governing Rules, the order of honourable acquittal passed in favour of the petitioner and thereafter issued the direction, as extracted above.

20. At present, other than the self-same material that was considered at the trial faced by the petitioner, no other or further material has come into existence and no other or further material has been considered by the State authorities, to not certify the character of the petitioner. Mere repetition of words or reiteration of the suspicion or belief, and/or continued reliance on the self-same material that gave rise to the criminal trial, is irrelevant. In absence of any foundational or basic relevant fact being proven or established before the learned trial Court, on strength of such material, mere reliance on the seriousness of the charge levelled, causes no consequential legal effect.

21. Next, it cannot be denied that the petitioner faced a heavy charge of espionage, and the matter required careful consideration by the State authorities, at the same time, it remained material and relevant that the petitioner was “honourably acquitted” at the criminal trial, with no element of truth found in the prosecution story on most fundamental/vital aspects of the allegation that had a direct bearing on the petitioner’s moral character. Other than the fact of his arrest proven, the prosecution could neither establish that the documents/copies of alleged maps were confidential nor that any secret document had been recovered from the petitioner nor that the documents produced at the trial were the same as had been recovered from

the petitioner nor that the petitioner had called or spoken or met any foreign spy/agent or person nor it was proven that the petitioner acted inimical to the interest of the country nor that he was part of any conspiracy and nor that he had committed any offence under Section 124-A IPC.

22. In the present case, none of the witnesses produced by the prosecution turned hostile. On the contrary, they sought to prove the prosecution case, as presented to the Court. The trial court made full appraisal of the said evidence and thereafter reached its conclusions as below:

“27. पत्रावली पर इस सम्बन्ध में कोई साक्ष्य उपलब्ध नहीं है, जिससे यह साबित हो सके कि कथित प्रदर्शित दस्तावेज प्रदर्श क-6 एवं क-7 किस मूल अभिलेख / नक्शे की छाया प्रतियां हैं। साक्षी पी०डब्लू०-5 मेजर ए०एम० सिंह ने अपनी प्रतिपरीक्षा के पृष्ठ-5 पर यह कहा है कि 'सेना के मूल नक्शे सेना के कार्यालय में रहते हैं और प्रस्तुत नक्शे पर सेना से सम्बन्धित शब्द अंकित नहीं है और नक्शे पर कानपुर छावनी का तथ्य भी अंकित नहीं है।' आगे इस साक्षी ने यह भी कहा है "कि सेना के नक्शे बगैर अधिकारी की अनुमति के बाहर नहीं जा सकते हैं और न ही छाया प्रतियां बनायी जा सकती हैं।" उक्त दस्तावेजों के परिशीलन से यह प्रतीत होता है कि उक्त दस्तावेजों में कानपुर कैन्टोनमेन्ट की बाजार एरिया, बंगला एरिया, सिविल और मिलिट्री की जनसंख्या, सड़कों की संख्या, अस्पताल, मंदिर, मस्जिद, गुरुद्वारा, चर्च, सिनेमा हाउस, मार्केट इत्यादि तथ्यों का उल्लेख है और नक्शे की जो फोटो प्रति दाखिल है, उसमें कोई विशिष्ट चिन्ह दूरी के सम्बन्ध में अंकित नहीं है और यह नक्शा सामान्य तौर से प्रत्येक जगह पर नक्शे के रूप में पाया जा सकता है।

उक्त नक्शा एवं दस्तावेज किस प्रकार गोपनीय थे, के बिन्दु पर विद्वान सहायक जिला शासकीय अधिवक्ता द्वारा यह कहा गया है कि उक्त नक्शा एवं दस्तावेज को पी०डब्लू०-5 मेजर ए०एम० सिंह ने अपनी रिपोर्ट प्रदर्श क-5 में बताया है। इसके

प्रतिवाद में विद्वान अधिवक्ता बचावपक्ष द्वारा यह कहा गया है कि प्रश्रगत मामले में नक्शा एवं दस्तावेज किसी भी प्रकार से गोपनीय नहीं है, क्योंकि कानपुर कैन्टोनमेन्ट के विषय में कोई भी जानकारी इण्टरनेट पर उपलब्ध है तथा उक्त प्रकार का कोई भी नक्शा सामान्य रूप से बाजारों एवं गूगल मैप से प्राप्त किया जा सकता है और उसको प्रत्येक व्यक्ति कहीं से भी प्राप्त कर सकता है। चूंकि अभियोजन का सम्पूर्ण कथानक कि उक्त दस्तावेज अर्थात् प्रदर्श क-6 एवं क-7 गोपनीय दस्तावेज हैं, मूल रूप से पी०डब्लू०-5 मेजर ए०एम० सिंह के साक्ष्य पर निर्भर है। अतः इस सम्बन्ध में मेरे द्वारा पी०डब्लू०-5 मेजर ए० एम० सिंह के साक्ष्य का परिशीलन किया गया। इस साक्षी ने प्रदर्श क-5 में दस्तावेजों को सैन्य दस्तावेज नहीं बताया है। अपने साध्य में उनके द्वारा यह भी कहा गया है कि उक्त दस्तावेज सैन्य विभाग के दस्तावेज हैं, जबकि वे कानपुर के सबसे वरिष्ठ इन्टेलीजेन्स आफिसर के रूप में तैनात थे, जो पांच जिलों से सम्बंधित मामले के इन्टेलीजेन्स आफिसर थे और उन्हें ही निर्णय देना पड़ता था। वे यह भी स्वीकार करते हैं कि सेना के मूल नक्शे सेना के कार्यालय में रहते हैं तथा नक्शे में कानपुर छावनी भी अंकित नहीं है। ऐसे नक्शे सेना के सभी कार्यालयों में रहते हैं। सेना के नक्शे बिना अधिकारी की अनुमति के बाहर नहीं निकाले जा सकते हैं और न ही उनकी छाया प्रतियां करायी जा सकती हैं। वे यह भी कहते हैं कि कानपुर स्थित सेना के किसी कार्यालय के सैन्य अधिकारी अथवा कर्मचारी के विरुद्ध इस सम्बन्ध में कोई कार्यवाही नहीं की गयी है, जिनके द्वारा कोई नक्शा चोरी से निकालकर फोटो प्रति करा दी गयी हों उपरोक्त के अतिरिक्त उनके द्वारा यह भी स्वीकार किया गया कि केवल संस्थान के नाम लिखने से कागज गोपनीय दस्तावेज के श्रेणी में नहीं आता है, लेकिन जो सूचनायें प्रदर्श क-6 में अंकित हैं, उसके आधार पर यह गोपनीय दस्तावेज की श्रेणी में आता है। प्रदर्श क-6 के परिशीलन से स्पष्ट होता है कि उक्त कागज में कानपुर कैन्टोनमेन्ट के बाजार एरिया, बंगला एरिया, मंदिर, मस्जिद इत्यादि का उल्लेख है। यह एक सामान्य दस्तावेज है, जो किसी भी तैयारी करने वाले प्रतियोगी के पास भी प्राप्त हो सकता है और विभिन्न साक्षात्कारों में भी यह प्रश्न पूछा जाता है और उक्त जानकारीयां इण्टरनेट पर आसानी से उपलब्ध है। प्रदर्श क-6 में कानपुर में तैनात सैनिकों की संख्या, तोपों का विवरण

एवं युद्धक विमानों आदि की संख्या का कोई उल्लेख नहीं है। अतः ऐसी स्थिति में मेरा यह मत है कि कथित दस्तावेज गोपनीय दस्तावेज की श्रेणी में आता है, के सम्बन्ध में अभियोजन की तरफ से कोई पुष्टिकारक साक्ष्य प्रस्तुत नहीं किया गया है और इन दस्तावेजों को गोपनीय दस्तावेजों की श्रेणी में नहीं माना जा सकता है। इससे अभियोजन कथानक का मूल प्रतिकूल रूप से प्रभावित होता है और जहां मामले में परिवाद दाखिल न किया गया हो, यह समस्त कार्यवाही को धूल-धूसरित कर देता है और अभियोजन कथानक में गंभीर दोष उत्पन्न होता है।

28. अब मेरे द्वारा अभियुक्त के विद्वान अधिवक्ता के इस तर्क पर विचार किया गया कि कथित पुलिन्दे वस्तु प्रदर्श-4 पर अभियुक्त के हस्ताक्षर नहीं है। इस सम्बन्ध में मेरे द्वारा साक्षी पी०डब्लू०-1 उपनिरीक्षक लल्लूराम त्यागी के साक्ष्य का परिशीलन किया गया।

वस्तु प्रदर्श-4 पुलिन्दे पर अभियुक्त के कोई हस्ताक्षर पुलिस दल द्वारा नहीं कराये गये और न ही इस बात का कोई उल्लेख प्रदर्श क-1 फर्द बरामदगी एवं गिरफ्तारी में है। साक्षी पी०डब्लू०-1 वादी ने अपनी मुख्य परीक्षा में भी पुलिन्दे पर अभियुक्त के हस्ताक्षर होने के विषय में कोई कथन नहीं कहे हैं। इस साक्षी ने अपनी प्रतिपरीक्षा के पृष्ठ-18 पर यह स्वीकार किया है कि "जिस कपड़े में सील किया था, उस पर मुल्जिम के हस्ताक्षर नहीं कराये थे। अन्य साक्षियों के भी हस्ताक्षर सीलबन्द पुलिन्दे पर नहीं बनवाये थे।" ऐसी स्थिति में माननीय इलाहाबाद उच्च न्यायालय द्वारा अवधारित विधि व्यवस्था बेनी प्रसाद बनाम उ०प्र० राज्य 2003 (46) ए०सी०सी० पृष्ठ संख्या-701 में उल्लिखित विधि व्यवस्था के अनुसार यदि अभियुक्त के हस्ताक्षर वस्तु प्रदर्श के सीलयुक्त पैकेट पर नहीं है तो उक्त बरामदगी संदेहास्पद मानी जायेगी। अतः ऐसी स्थिति में कथित बरामदगी के सम्बन्ध में निश्चयात्मक विनश्चय नहीं किया जा सकता है कि अभियुक्त के पास से कथित रूप से उक्त बरामदगी हुयी थी।

29. अभियुक्त के पास से कथित रूप से टेलीफोन का एक बिल भी बरामद होने का कथन अभियोजन की ओर से किया गया है। उक्त पी०सी०ओ० की पर्ची किस पी०सी०ओ० की है और जिस नम्बर पर कथित रूप से बात करना बतायी जा रही है, के सम्बन्ध में विवेचक द्वारा कोई जानकारी नहीं दी

गयी है। उक्त पर्ची में उल्लिखित तथ्य सत्य है अथवा नहीं अथवा बी०एस०एन०एल० के टेलीफोन से उन नम्बरों पर कथित रूप से कोई बात हुयी अथवा नहीं के सम्बन्ध में कोई सम्पोषणात्मक साक्ष्य पत्रावली पर संकलित नहीं किया गया है। कथित रूप से उक्त टेलीफोन एक अन्तराष्ट्रीय काल है, जिससे पाकिस्तान में बात होना अभियोजन की तरफ से कहा गया है। बी०एस०एन०एस० के नम्बर से जिन-जिन नम्बरों पर बात हुयी थी, उसका काल डिटेल् बड़ी आसानी से प्राप्त किया जा सकता था, जिसे विवेचक द्वारा प्राप्त नहीं किया गया है। इससे विवेचक द्वारा की गयी विवेचना की निष्पक्षता प्रभावित होती है और अभियोजन कथानक की विश्वसनीयता पुनः प्रभावित होती है।

30. जहां तक अभियुक्त के विरुद्ध विरचित आरोप अन्तर्गत धारा-120बी का प्रश्न है, तो आपराधिक षडयन्त्र के अपराध के लिये अभियोजन को यह साबित करना पड़ेगा कि उक्त षडयन्त्र में पक्षकारों की सहमति किसी अवैध कार्य या वैध कार्य अवैध साधनों से करने की थी। प्रश्नगत मामले में कथित रूप से षडयन्त्र में दूसरे व्यक्ति के रूप में शामिल होने का कथन पाकिस्तान के आई०एस०आई० एजेंट को बताया गया है, परन्तु पत्रावली पर ऐसा कोई क उपलब्ध नहीं है, जिससे यह साबित हो सके कि अभियुक्त का कोई सम्बन्ध पाकिस्तान से किसी भी प्रकार से था। इस सम्बन्ध में विवेचक द्वारा न तो टेलीफोन के सम्बन्ध में जानकारी प्राप्त की गयी और न ही अन्य किसी व्यक्ति को कथित रूप से वह नक्शे दिये जा रहे थे, के सम्बन्ध में कोई साक्ष्य संकलित किया गया। अतः ऐसी स्थिति में अभियोजन अभियुक्त के विरुद्ध धारा-120बी भा०द०सं० के आरोप को युक्तियुक्त संदेह से परे साबित करने में विफल रहा है।

31. जहां तक अभियुक्त के विरुद्ध विरचित आरोप अन्तर्गत धारा-124 भा०द०सं० का प्रश्न है, तो इस धारा के अधीन अभियोजन द्वारा अभियुक्त को दोषसिद्ध करने के लिये यह साबित करना पड़ेगा कि अभियुक्त द्वारा सरकार के प्रति घृणा या अवमान पैदा की गयी अथवा उसका प्रयत्न किया गया तथा उसका यह कार्य शब्दों द्वारा, जो शब्दों द्वारा अथवा लिखा हो सकता है, संकेतों द्वारा अथवा दृश्यरूपण किया गया। प्रश्नगत मामले में अभियोजन की ओर से प्रस्तुत साक्षियों के साक्ष्य से सरकार के प्रति घृणा यह अवमान पैदा करने अथवा अप्रीति प्रदीप्त करने या प्रदीप्त करने का प्रयत्न करने के सम्बन्ध में कोई

साक्ष्य पत्रावली पर उपलब्ध नहीं है। अतः ऐसी स्थिति में अभियुक्त के विरुद्ध विरचित आरोप अन्तर्गत धारा-124ए भा०द०सं० का अपराध भी साबित नहीं है।"

23. The judgment and order of the learned Court below has been confirmed in **Government Appeal No. 2416 of 2014 (State of U.P. Vs. Pradeep Kumar alias Akash Verma)**, decided on 7.2.2018. In that this Court dismissed that appeal, on the following reasoning:

"Considering the above legal proposition, I do not find illegality, infirmity or perversity in the impugned judgement and order. The view taken by the trial Court is just and does not suffer from any misreading of any material evidence on record."

The above order has attained finality. No further appeal is disclosed to have been filed there against.

24. What survives with the respondent state authorities is a lingering belief or suspicion that the petitioner had spied for a foreign country. That lingering suspicion has not arisen or survived on any fresh or other cogent material or objective fact, not considered at the criminal trial. Even the document produced during course of the hearing, contains an inference on the self-same information and material that were considered by the trial court, and it is not based on any other information or material. It uses high sounding words and expressions to describe a purely subjective belief entertained, not based on any objective material.

25. If the inference drawn were to arise and prevail as true, on its simple recital, as if by way of a magician's spell,

without applying the test of objectivity, that suspicion may be actionable. Yet, that cannot be, and it is not the law. The fact allegation that the petitioner had worked for a foreign intelligence agency was not proven (to any extent), at the criminal trial.

26. We recognize that the standard of proof in a criminal case is proof beyond all reasonable doubt whereas the proof in a civil proceeding or in a proceeding involving civil rights is one of preponderance of probabilities. At the same time, it also cannot be said, though the petitioner has been “honourably acquitted” at the criminal trial, the ‘stigma’ arising from that allegation of criminal offence (made against the petitioner), would itself cause or result in adverse civil consequences.

27. Then, even if it may have remained open to the said respondents to examine the impact of the transaction alleged against the petitioner, in the context of the civil right of the petitioner to seek appointment as a judicial officer, such examination would necessarily involve consideration of objective material, in a prudent manner. Neither suspicion, nor simple belief - not founded on objective material, nor whims and fancies may propel or govern that objective exercise, to be performed by the state respondents. Here, no objective material survived or existed to allow for a possibility to reach a conclusion other than that reached by the criminal court. It therefore remained impermissible for the State respondents to infer guilt or culpability of the petitioner, in the alleged transaction.

28. No material exists with the State respondents to reach a conclusion that the petitioner may have worked for any

foreign intelligence agency. The fact that he may have been on the “radar” of the Indian intelligence agencies, itself means nothing. To be suspected of an offence is not an offence or a scar on a citizen’s character. Unless objective material was shown to exist with the authorities for that suspicion to continue to exist, no adverse civil consequence may ever arise against a citizen, based on such a lingering suspicion, that too in the face of result of an order of “honourable acquittal” at the criminal trial.

29. Unless a citizen is reasonably suspected to be involved in an illegal or other activity that may invite adverse civil consequences, the fact that an intelligence agency or police authority may opine - purely subjectively and thus suspect that such a citizen had indulged in any illegal nature of activity or to have performed such act, without any supportive objective material, may remain a wholly inactionable belief, therefore extraneous to the issue of character certification of the concerned citizen.

30. Second, the fact that the petitioner was unemployed and was in search of gainful employment, is also wholly extraneous to the issue, to the point of being absurd. If unemployment, poverty and like unfortunate circumstances could by themselves be a valid ground to suspect a citizen of infringement of the law, a substantial population would be suspected for one or the other offence. In fact, the circumstance of being poor or unemployed or marginalised, itself would become a tool for suspicion and oppression, specifically to deny public employment. Mere registration of a criminal case and perhaps submission of a charge-sheet would be enough to tear to tatters, the precious and

fundamental rights guaranteed under Part-III of the Constitution. In the present status of our society, where many criminal prosecutions arise in doubtful circumstances, frequently for collateral reasons, that would be a dangerous proposition.

31. Third, the fact that the petitioner's father may have been suspended/dismissed from service on charges of bribery etc., is equally extraneous to the issue. A person may not be penalised, and his character may not be judged, for the act of another, be it his father or son. It is indeed regrettable that the respondent authorities have also chosen to rely on the allegations of corruption levelled against the father of the present petitioner. That consideration if allowed to stand will admit untenable bias in the process in the objective exercise of character certification that was to be conducted by the State authorities.

32. The fact that the petitioner was apprehended by the STF and the Military Intelligence, is the only fact proven. It is not rebutted. The fact of arrest in the context of criminal investigation is a relevant writing on the slate of character certification of the accused citizen. Yet, an order of "clean acquittal" or "honourable acquittal" earned by a citizen (earlier charged or arrested), wipes clean that slate as may not allow any person, agency or the State to read the impression of any previous writing on that slate (recording any fact pertaining to such criminal charge suffered by that citizen or of arrest suffered etc.), relevant to his character. Upon the order of "honourable acquittal" earned by the citizen, his innocence is etched hard and deep on that slate, in personam, i.e. in the particular facts of that case and in rem, i.e.

to the whole world for the purpose of certification of his character, qua the allegation faced by him, in that case.

33. To say, a citizen would continue to be suspected of an offence alleged and therefore be deprived of fruits of hard labour and "honourable acquittal" earned by him, would be, to not only vicariously penalise an innocent citizen after his innocence has been established in a Court of law, but it would successfully militate against the rule of law itself, guaranteed by the Constitution. A criminal trial begins with a presumption of innocence of the person charged. Once, the charged person is "honourably acquitted", after full appraisal of all prosecution evidence, that presumption is confirmed and sealed, by judicial pronouncement made. None may look beyond it.

34. While individuals, who may have levelled the charge against such a person, may continue to harbour a belief or suspicion (to themselves), that that person though "honourably acquitted", was guilty, yet even they may act on such personal belief only against risk of preventive and other action (against them), by that person. On the other hand, the State and its' institutions, may not continue to entertain such a suspicion or belief any further, as may deprive and deny to the innocent citizen his fundamental right to equality including his right to continuance and progression in life as a citizen, equal in all sense with any other innocent citizens, who may not have been charged with any criminal offence.

35. For the reasons noted above, we find, the respondents have wrongly continued to entertain a suspicion about the character of the petitioner. They also do not

have in their possession any credible or actionable material. Only the fact that the petitioner was charged with a serious offence has prevented the State authorities to act with objectivity. We find no reason exists with the respondents to continue to entertain a belief or suspicion that the petitioner is a person who lacks good moral character to hold judicial office. The unfortunate circumstance of the petitioner having faced two criminal trials, cannot be cited as that reason.

36. The petitioner was “honourably acquitted” at two criminal trials faced by him and no element of truth was found in the prosecution story, in either case. Those orders have attained finality. On all vital aspects of allegation of violation of Official Secrets Act, we find that the lingering sense of suspicion with the State authorities, is to be equated with figment of imagination and nothing more.

37. In view of the above, the writ petition must succeed. It is allowed. The communication dated 26.09.2019 (Annexure No.11) is quashed. Mandamus is issued to respondent no. 1 to ensure Character Verification of the petitioner within a period of two weeks. Consequentially, upon completion of all formalities, appointment letter may be issued to the petitioner not later than 15th January 2025. The petitioner may be appointed against existing vacancies, as on date. This modified relief we have granted because though selected against vacancy of 2017, neither those vacancies survive in the light of the provision of U.P. HJS Rules and also, the petitioner does not have any work experience in the HJS cadre for the last seven years. Grant of larger relief may be detrimental both to the progression of the

petitioner in service and also to the working of the cadre and its morale.

38. The writ petition is **allowed as above**. No order as to costs.

(2024) 12 ILRA 598
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -A No. 5200 of 2008

Arvind Kumar Raji ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 I.P. Singh, M.P. Raju

Counsel for the Respondents:
 C.S.C.

A. Service Law – Post of Driver – Cancellation of appointment – Petitioner belongs to 'Patharcut' (Kanjur) caste, which comes under the Scheduled Caste category – However, Schedules Tribes caste certificate was used to obtain appointment – Subsequently, the authority proceeded to cancel the ST caste certificate granted to the petitioner, which has not been challenged – No opportunity of hearing was given before cancellation of appointment – Effect – Held, it cannot be said that order of cancellation of petitioner's appointment is illegal or arbitrary, as reservation in service is to be granted strictly to the persons who belong to that particular category and certainly any attempt by any individual to fabricate any document falsely showing himself to belong to a particular caste or community, deserves to be dealt strictly in accordance with law. (Para 8 and 11)

Writ petition dismissed. (E-1)**List of Cases cited:**

Kumari Madhuri Patil & ors. Vs Additional Commissioner, Tribal Development & ors.; (1994) 6 SCC 241

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

1. Heard Sri I.P. Singh, learned counsel for the petitioner as well as learned Standing Counsel for the respondents.

2. By means of present writ petition the petitioner has challenged legality and validity of order dated 23.08.2008, passed by the Special Radio Officer (Administration), Police Head Quarter, Lucknow whereby the appointment of petitioner on the post of Assistant Driver dated 15.11.2007 has been cancelled.

3. It has been submitted by learned counsel for the petitioner that petitioner was appointed on the basis of advertisement in pursuance to which petitioner applied for appointment on the post of Driver. He has undergone physical test and submitted all the document including his caste certificate indicating that petitioner belongs to Scheduled Tribe category by certificate dated 15.02.2023 was submitted by him. Subsequently, the petitioner has appeared in the written test followed by interview where he stood successful and was appointed on the post of Assistant Driver by means of order dated 17.11.2007. The petitioner continued to discharge his duties as Assistant Driver in pursuance to the interim order till impugned order dated 23.08.2008 was passed cancelling his appointment on the ground that it is in the meanwhile that his caste certificate dated 17.11.2007 was

revisited by the Tehsildar, Mehmoodabad, Sitapur and was cancelled by order dated 24.03.2008. When the appointing authority of the petitioner came to know that appointment has been obtained by petitioner on the basis of caste certificate which has already been cancelled, he proceeded to pass the impugned order of cancellation.

4. The sole ground raised by the petitioner while assailing the impugned order is that petitioner was never afforded opportunity of hearing prior to cancelling his appointment order. On filing of present writ petition, an interim order was passed on 29.08.2008, staying the operation of the order of cancellation of appointment dated 23.08.2008 and on the strength of interim order the petitioner continued to work and discharge his duties till 26.12.2023 as the writ petition was dismissed for want of prosecution on 30.10.2023. Subsequently, on an application given by the petitioner the writ petition was restored on 08.04.2024 and now same has been listed for hearing.

5. Considering the submissions made by learned counsel for the petitioner that no opportunity of hearing was given to him and therefore by cancelling his order of appointment, prejudice has been caused to him by not affording opportunity of hearing. Had opportunity of hearing been provided to the petitioner, he would have placed before the authority material that order of cancellation of caste certificate itself is illegal and arbitrary and same has been passed on incorrect appreciation of facts.

6. Perusal of order dated 24.03.2008 passed by the Tehsildar, Mehmoodabad, Sitapur which has been

annexed by the State alongwith counter affidavit, indicates that same is based on the directions of this Court passed in Writ Petition No. 8788 (M/B) of 2007 which was preferred by the petitioner. Paragraph 4 of the present writ petition wherein prayer made by the petitioner in Writ Petition No.8788 (M/B) of 2007 has been mentioned, is quoted herein below :-

"4. That it is submitted that a writ petition no. 8788 (M/B) of 2007 was filed by the petitioner with the following prayer :-

(i) Issue a writ, order or direction in the nature of Mamdamus thereby commanding the opposite parties to issue the caste certificate, being Scheduled Tribe of Raji caste to the petitioner with immediate effect in the interest of justice.

(ii) Issue any other order or direction which this Court may deem just fit and proper in the circumstances of the case.

(iii) Allow the writ petition with cost."

7. Considering the directions passed by this Court in Writ Petition No. 8788 (M/B) of 2007, on 25.01.2007, the authority has proceeded to consider the aspect of grant of caste certificate to the petitioner. While considering the issue, a detailed inquiry was held and entire relationship of the petitioner was duly inquired. Evidence of his father and other relatives was also recorded by the competent authority as well as declaration made by the petitioner with regard to his relations was also considered.

8. Without dwelling into the controversy on merits, it was noticed by the

authority that there was severe discrepancies in the statement made by the petitioner before the competent authority vis-a-vis what was disclosed by petitioner's father and other relatives with regard to caste of petitioner. After examining entire relationships of the petitioner with other persons and considering the caste of all the persons it was concluded that infact petitioner belong to "Patharcut" (Kanjari) caste which comes under the Scheduled Caste category and therefore the authority proceeded to cancel the Scheduled Tribe caste certificate granted to the petitioner on 15.02.2003.

9. Accordingly, from the perusal of order dated 24.03.2008, it is evident that due opportunity of hearing was given to the petitioner before cancelling his caste certificate. The competent authority i.e. Tehsildar after fully complying the directions of the writ Court dated 25.01.2008, which was passed on the writ petition filed at the behest of the petitioner and accordingly cancelled the caste certificate of petitioner.

10. There is no material on record, which could indicate that order dated 24.03.2008 was ever challenged by the petitioner before any other forum or before any other authority as provided for in the judgment of Hon'ble Supreme Court in the case of **Kumari Madhuri Patil & Others Vs. Additional Commissioner, Tribal Development and Others, (1994) 6 SCC 241.**

11. It has been further disclosed in the writ petition that order dated 24.03.2008 was assailed by the petitioner in Writ Petition No. 7047 of 2008 which writ petition has been dismissed as withdrawn. Subsequently, there is no material

indicating that either petitioner has challenged the said order before any higher forum or that the said order has been canceled or modified. Considering the fact that petitioner was granted appointment on the ground that he belonged to Scheduled Tribe category and subsequently the said certificate has been cancelled and hence it cannot be said that order of cancellation of petitioner's appointment is illegal or arbitrary, as reservation in service is to be granted strictly to the persons who belong to that particular category and certainly any attempt by any individual to fabricate any document falsely showing himself to belong to a particular caste or community, deserves to be dealt strictly in accordance with law.

12. This Court is of the considered view that no prejudice in any manner by order dated 23.08.2008 has been caused to the petitioner inasmuch as full opportunity of hearing was afforded by the competent authority to the petitioner to defend his caste certificate issued to him previously. Considering that even challenge made to the said order has not been successful and order of cancellation is still in vogue, it cannot be said that the impugned order of cancellation of appointment suffers from any infirmity.

13. The only contention of the petitioner is that due opportunity of hearing was not given, which has caused prejudice to him. This argument, on due consideration, fails on the face of it. The perusal of the order of cancellation of caste certificate dated 24.03.2008 clearly indicates that full opportunity was given to the petitioner to defend his case, in compliance of which, Tehsildar held an inquiry and subsequently cancelled his caste certificate, which further became the

basis of passing of impugned order of cancellation of appointment dated 23.08.2008.

14. The petitioner has not challenged the order dated 24.03.2008, which stands as the basis and reason for cancellation of his appointment vide order dated 23.08.2008. The onus to prove that prejudice has been caused falls upon the petitioner who failed to do so. As neither prejudice has been caused nor miscarriage of justice has been proved, hence no interference is warranted by this Court in this regard.

15. The writ petition being devoid of merits, is **dismissed**.

16. However, it is provided that in case any order is passed by the competent authority setting aside the order of cancellation of caste certificate dated 24.03.2008, the petitioner shall have liberty to bring the said order on record and prefer appropriate application for review of the instant order, if so advised.

(2024) 12 ILRA 601
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2024

BEFORE

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

Writ -A No. 16300 of 2024

Pramod Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Mr. Dinesh Kumar

Counsel for the Respondents:

Ms. Monika Arya, Addl. C.S.C., Mr. Harsh Vardhan Gupta

disbursement of post-retiral benefits to the petitioner.

A. Service Law – Retirement – Post-retiral benefits – Interest – Entitlement – The petitioner was retired without a decision being taken in the disciplinary proceedings initiated against him – Permissibility – Claim for interest was rejected on the ground of lack of provision for it – Validity challenged – Held, there was culpable delay in paying the petitioner's post-retiral benefits on the respondent's part. If an employee is suspended pending inquiry, with a short time to go until his superannuation, it is the bounden duty of the employer to conclude the disciplinary proceedings well ahead of the employee's retirement – No employee should be allowed to retire, with disciplinary proceedings pending against him, unless these are commenced virtually on the eve of his retirement, for very compelling reasons, or the charges are so serious and facts so complicated that the process of inquiry would certainly extend beyond the employee's superannuation – High Court issued writ of mandamus to pay simple interest at the rate of 6% per annum on the belated payment of group insurance, gratuity and arrears of pension by imposing costs of Rs. 10,000/-. (Para 13, 15 and 23)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of Kerala & ors. Vs M. Padmanabhan Nair; (1985) 1 SCC 429
2. Smt. Nazma Khatoon Vs St. of U.P. & ors.; 2016:AHC:102266-DB

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

This writ petition is directed against an order passed by the Executive Officer, Nagar Palika Parishad, Seohara, District Bijnor dated July the 3rd, 2024, declining to pay interest on the belated

2. The petitioner was a Revenue Moharir in the employ of the Nagar Palika Parishad, Seohara, Bijnor¹. His date of birth is 01.06.1959. On 15.02.1977, he was appointed a *Naib Moharir* with the Nagar Palika. He was appointed for a period of two months on a temporary basis vide order dated 15.02.1977 passed by the Chairman of the Nagar Palika, under Section 70 of the Uttar Pradesh Municipalities Act, 19162. After the petitioner completed the period of two months with effect from 15.04.1977, his employment was not extended. On 16th of April, 1977, upon an application made by the petitioner, he was appointed again to the post of a Naib Moharir for two months on a temporary basis. This time he was permitted to work until the month of December, 1977.

3. Eschewing unnecessary detail, all that deserves to be noticed is that the petitioner was regularized in service by an order of the Executive Officer of the Nagar Palika dated 09.05.1982, with effect from 01.06.1982. The petitioner discharged his duties regularly thereafter. On 09.01.2018, the Sub-Divisional Magistrate, Tehsil Dhampur, Bijnor, directed the Executive Officer to conduct an inquiry against the petitioner into a complaint dated 02.01.2018, addressed by one Sushil Kumar Verma to the Chief Minister on the *jansunwai* portal. The complaint was that the petitioner was appointed before attaining the age of 18 years. These complaints are said to be repeated and were disposed of. Still another inquiry was made by the *Naib Tehsildar*, Seohara, Dhampur, where an inquiry report dated 19.03.2018 was made, finding that the first ad hoc

appointment of the petitioner on the post of *Naib Moharir* was made on 15.02.1977, when he was aged 17 years 8 months and 14 days. The Sub-Divisional Magistrate, Dhampur, on 28.03.2018, made a recommendation that appropriate action be taken by the competent authority on the basis of the Naib Tehsildar's inquiry report dated 19.03.2018. Relying upon the Sub-Divisional Magistrate's report, the Executive Officer passed an order of suspension dated 23.08.2018.

4. Two months afterwards i.e. on 05.11.2018, a charge-sheet was served upon the petitioner, carrying five charges. The petitioner filed his reply to the charge-sheet on 01.12.2018, together with documents in support of his defence. The Junior Engineer, Nagar Palika Parishad, Seohara was appointed the Inquiry Officer. He served a notice upon the petitioner dated 10.01.2019, requiring him to appear on 18.01.2019 at 02:00 p.m. The petitioner appeared in compliance with the notice. The Inquiry Officer, according to the petitioner, perhaps, submitted his report on the basis of proceedings taken on 18.01.2019. On 06.03.2019, the Executive Officer intimated the petitioner that he would retire on 31.05.2019, upon completing 60 years of age. The petitioner says that on 25.04.2019, he submitted an application to the Executive Officer to take a decision in the disciplinary matter, because the Inquiry Officer would have submitted his report and the petitioner was going to retire on 31.05.2019. No heed was paid to the said letter and the disciplinary matter was kept pending. The petitioner retired on 31.05.2019, without a decision being taken in the disciplinary proceedings initiated against him. On 01.07.2019, the petitioner submitted an application to respondent No. 4 to release his pension and

the other post-retiral benefits. No action was taken. A period of eleven months passed by since his suspension on 23.08.2018 and more than six months from the date that he appeared before the Inquiry Officer. Still, no final orders were made in the disciplinary matter.

5. The petitioner was compelled to move this Court through a writ petition, being Writ - A No. 12274 of 2019, against the continuing disciplinary proceedings and complaining of the fact that the suspension order was not brought to an end promptly. He sought an expeditious decision in the disciplinary proceeding. This Court, in the writ petition aforesaid, on 20.08.2019, passed the following order, disposing of the petition :

In view of the said admitted facts, suspension order dated 23.8.2018 cannot be allowed to continue in absence of any conclusion of the departmental enquiry on the part of the respondent.

The suspension order dated 23.8.2018 passed by respondent no.5 is set aside to the above extent.

As the petitioner has attained the age of superannuation, he would be treated as reinstated employee subject to the final decision to be taken by the disciplinary authority on the basis of the enquiry report dated 22.2.2019. The release of retiral dues of the petitioner would be subject matter of the final decision of the disciplinary authority which shall be taken, preferably, within a period of one month from the date

of submission of certified copy of this order.

The writ petition is disposed of.

6. The order dated 20.08.2019 was served in the Office of the Executive Officer on 02.09.2019. Despite service of that order, no final decision, on the basis of the inquiry report, was taken or any of the petitioner's post-retiral dues paid to him. Instead, the petitioner was served with a notice dated 15.11.2019, saying that he had not given complete charge till that day, and on 20.11.2019, the petitioner replied to the letter of 15.11.2019, suitably.

7. Since the disciplinary proceedings were not concluded in compliance with the orders of this Court dated 20.08.2019, passed in Writ - A No. 12274 of 2019, the petitioner was compelled to move Contempt Application (Civil) No. 8269 of 2019 before this Court. This Court issued notice to the contemnors, granting one more opportunity to them to comply with the order within a month. The following order was passed by this Court in the contempt application aforesaid, on 12.12.2019 :

Heard the learned counsel for the applicant.

It is alleged that the order of the writ court has been violated.

From a perusal of the record, a prima facie case for contempt is made out.

Issue notice to opposite party nos. 1 and 2.

The counter affidavit may be filed within the aforesaid period or else charges may be framed after summoning the noticee.

However, one more opportunity is granted to the opposite party nos. 1 and 2 to comply with the order within a month. In case by the next date fixed the directions of the Writ Court are not complied with and an affidavit to that effect is not filed, the opposite party nos. 1 and 2 shall remain present before this Court on the date fixed.

The office may send a copy of this order along with the notice.

List on the date mentioned in the notice.

8. A compliance affidavit was filed on behalf of the contemnor-opposite party, the then Executive Officer, Arudendra Prasad Pandey on 04.02.2020, saying that the petitioner was reinstated and so far as retiral dues were concerned, in case, the petitioner completes the requisite formalities, the Executive Officer would proceed to pass final orders within a reasonable time to pay his post-retiral benefits. It was also said that the admitted dues had already been paid to the petitioner. The petitioner acknowledges that he was paid two cheques dated 23.10.2019, one worth ₹2,09,664, and another, worth ₹45,601. Thereupon, this Court disposed of the contempt application in terms of the following orders passed on 04.02.2020 :

Shri Manu Saxena, Advocate has entered appearance on behalf of opposite party nos.1 and 2 and files affidavit of compliance indicating therein that the applicant has been reinstated in the Department. So far as the retiral and other benefits are concerned, in case the applicant completes the formalities as is required for,

definitely the Authority would proceed to pass a final order according the same within reasonable time. So far as the admitted amount is concerned, the same has already been extended in favour of applicant.

In the facts and circumstances of the case, the Court is of the considered opinion that sufficient compliance has been ensured in the matter. To extend final reprieve, it would be appropriate that the applicant shall approach the Department concerned within 10 days from today. In case, the applicant turns up within the said period and submit all relevant papers, definitely the opposite party would proceed to extend all the benefits within two weeks thereafter.

With these observations, the contempt application is *disposed of*.

9. On 10.02.2020, in compliance with the orders made by this Court in the contempt application, the petitioner went to the Office of the Nagar Palika in order to complete requisite formalities. He moved an application to the Executive Officer to release the arrears of his salary, dues on account of earned leave encashment, gratuity and group insurance, together with interest. It is asserted that nothing was done. On 11.08.2020, the petitioner made an application on the Chief Minister's jansunwai portal, bearing number 40013420011998. This complaint was disposed of vide letter dated 26.08.2020, saying that the payment of earned leave encashment has already been made. Regarding the payment of pension and gratuity, the papers were being processed,

but due to overload of work in the office, it was delayed. About the arrears, it was said that it was not possible due to a stay on all payments imposed by the Government of Uttar Pradesh during the lockdown in consequence of the CoViD-19 pandemic. There was a repeat of events, when the petitioner complained again on the jansunwai portal of the Chief Minister on 18.09.2020. The petitioner also made an application to the Director, Local Bodies through registered post, with a prayer to comply with the orders passed in the contempt application and a request to take strict action against the Nagar Palika authorities. The petitioner alleges that the dues of his leave encashment approximate to a sum of ₹4,17,440, but he has been paid under that head on 11.02.2020 a sum of ₹2,54,265. The gratuity and insurance, bonus for the period 2017-18 had not been paid at all. He, therefore, moved Contempt Application (Civil) No. 5076 of 2020 before this Court. This Court issued notice to the opposite party. During the hearing of this contempt application, an affidavit of compliance was filed on 21.10.2021, seeking further time. On 06.09.2022, partial compliance was reported and it was said that the balance would be paid very soon. It was on 16.04.2024 that the respondents said that the entire dues payable to the petitioner have been made good. The petitioner pressed for award of interest on the belated payment, but the learned Judge hearing the contempt matter did not take cognizance, as there was no direction by this Court on the writ side to pay interest. The contempt notice was, accordingly, discharged. The petitioner then made an application to the Executive Officer and the Chairman of the Nagar Palika to pay him interest on the belated payment of arrears of salary, bonus, leave encashment, gratuity, group insurance and other retiral

benefits, with all details. No heed was paid, despite a reminder dated 10.06.2024. Ultimately, by the order impugned dated 03.07.2024, the petitioner's claim for interest was rejected, with a remark that there was no provision for payment of interest on post-retiral benefits to a retired employee.

10. Aggrieved by the order dated 03.07.2024 passed by the Executive Officer, Nagar Palika Parishad, Seohara, Bijnor, the instant writ petition under Article 226 of the Constitution has been instituted.

11. A short counter affidavit was filed on 24.10.2024, to which, the petitioner has filed a rejoinder. Apart from that, in compliance with the orders dated 08.11.2024, three personal affidavits each were filed by the Commissioner, Moradabad Division, Moradabad, the District Magistrate, Bijnor and the Deputy Director, Local Fund Accounts Department, U.P., Moradabad Region, Moradabad.

12. Heard Mr. Dinesh Kumar, learned Counsel for the petitioner, Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondents Nos. 1, 2 & 3, and Mr. Harsh Vardhan Gupta, learned Counsel appearing on behalf of respondents Nos. 4 & 5.

13. Upon hearing learned Counsel for parties and a perusal of the records, this Court is of opinion that there was culpable delay in paying the petitioner's post-retiral benefits on the respondents' part. If an employee is suspended pending inquiry, with a short time to go until his superannuation, it is the bounden duty of the employer to conclude the disciplinary proceedings well ahead of the employee's

retirement. In this case, when the petitioner retired on 31.05.2019, his suspension from service, ordered on 23.08.2018, was still continuing. Obviously, the suspension stood automatically dissolved, upon the petitioner's retirement and severance of employer-employee relationship, a position reinforced by the directions of this Court in Writ - A No. 12274 of 2019. Notwithstanding the fact that the respondents say that the petitioner was not fully exonerated of the charges, a decision was made to pay all his post-retiral dues. This obviously means that the inquiry report, which is one said to be completed on 21.09.2019, but, surprisingly, never placed before this Court, did not hold the petitioner guilty of any such serious charge, where, his entitlement to receive his post-retiral benefits would be in jeopardy. The decision, as aforesaid, according to the respondents, was taken in compliance with this Court's order dated 20.08.2019 passed in the writ petition last mentioned, some three months after the petitioner's retirement. Now, if by August, 2019, it was known to the respondents that they had to pay the petitioner's post-retiral benefits, there is no valid explanation except a lackadaisical and nonchalant approach of the respondents about their obligation to pay these benefits, which led to delay in complete disbursement of the petitioner's dues. The last of the petitioner's dues, according to the Divisional Commissioner, were paid off on 07.09.2022 and, according to the Executive Officer of the Nagar Palika, on 04.09.2022. Between 21.09.2019, when the inquiry against the petitioner was completed, and a decision taken to release his post-retiral dues and the last of payment, that was made on 07.09.2022, there is no explanation worth the name to justify the delay.

14. The stand of the Commissioner of the Division as well as the Deputy Director, Local Fund Accounts Department, U.P., Moradabad Region, Moradabad has been very insensitive. In paragraphs Nos. 7 to 12 of the Commissioner's affidavit, it is averred :

7. That due to the absence of any conclusive orders on the suspension proceedings, the petitioner subsequently filed Writ Petition No. 12274/2019 before this Hon'ble Court, wherein Hon'ble Court, by order dated 20.8.2019, directed that a final decision be rendered within a month in the matter. Consequently, the Nagar Palika Parishad, Syohara, passed an order on 21.9.2019, concluding the departmental proceedings against the petitioner. Thereafter, the petitioner was expected to fulfill the requisite formalities for the release of pensionary benefits vide notice dated 10.10.2020.

8. That following the completion of requisite formalities, the petitioner's pension file was forwarded to the Deputy Director, Local Fund Audit Department, Moradabad, on 4.3.2020 and in between the payment of earned leave encashment was made to the petitioner on 23.10.2019, and the amount of Group Insurance was subsequently disbursed to him on 03.08.2021.

9. That due to the nationwide lockdown imposed on 25.3.2020 owing to the Covid-19 pandemic, no action could be furthered, and, upon resumption of work after lockdown, a letter was sent to the Deputy Director, Local

Fund, on 16.7.2021. The Deputy Director raised objections on 31.7.2021, resulting in the return of the file to the Nagar Palika. After addressing these objections on 13.10.2021, the file was resubmitted to the Deputy Director, who accorded his approval on 21.10.2021. Subsequently, the file was forwarded to the Commissioner's Office through the District Magistrate on 25.10.2021.

10. That the duty to approve the pension file lies upon the Additional Commissioner (Administration), who, by communication dated 8.8.2022, returned the file to the District Magistrate, Bijnor, with specific objections, which included the following:

a. Absence of date of birth evidence (either educational or medical certificate) in the service book.

b. Overwriting on dates of initial appointment (15.2.1977) and confirmation (15.2.1981) in pen, which contradicted the dates provided in the executive officer's letter dated 25.10.2021 which states dates of initial appointment (16.04.1986) and confirmation (15.03.1990).

c. Lack of clear recommendations for payment of pension and gratuity.

d. Absence of a record indicating reinstatement or other action post suspension.

e. Non compliance with the High Court order dated 20.8.2019 in Writ Petition No. 12274/2019, as there was no record in the service book

indicating the conclusion of proceedings against the petitioner.

against Nagar Palika Parishad towards petitioner.

11. That following the rectification of these objections, the Nagar Palika Parishad resubmitted the file on 02.04.2022. However, the following objections remained unaddressed:

a. Requirement to record the reinstatement and other actions in the service book with attestation by the competent authority, which was absent. No mention in the departmental inquiry order regarding exoneration or penalty, as required.

b. Absence of a conclusive report on file to affirm whether pension could be granted in view of the contempt petition pending as Contempt Petition No. 5076/2020.

c. Lack of rationale for the recommendation or non recommendation of pension and gratuity.

12. That due to the above reasons, on 18.4.2022, the Additional Commissioner (Administration) returned the file to the District Magistrate, Bijnor, for rectification, which was thereafter resolved and resubmitted to the Commissioner's Office on 13.7.2022. The pension, family pension, and gratuity were finally sanctioned on 4.8.2022, and payments were made to the petitioner on 7.9.2022. Post 7.9.2022, no dues remain pending

15. The Commissioner has some visitorial powers in the affairs of the Nagar Palika, though not the Collector. Neither the Executive Officer of the Nagar Palika nor the Commissioner bothered to think, as the stance of the Commissioner in paragraph No. 7 of the personal affidavit would show, that an employee, some months away from his retirement, if proceeded with in the disciplinary jurisdiction, ought have been dealt with swiftly and conclusions reached about his guilt or otherwise - or the extent of it and its consequences. There is nothing said either by the Nagar Palika or the Commissioner of the Division as to why the inquiry, that was initiated against the petitioner with a suspension order dated 23.08.2018, was not concluded and disposed of before the petitioner's retirement on 31.05.2019. It took the Executive Officer of the Nagar Palika and the Commissioner as well, the nudge of a writ of this Court to galvanize them into action, conclude the inquiry after the petitioner's retirement and based on findings, reach a decision on 21.09.2019, when the inquiry report was submitted that after all, the petitioner's post-retiral benefits had to be paid in full. Why this was not done before the petitioner's retirement, as already said, is thought both by the Executive Officer and the Commissioner of the Division something so trivial as not to beg an answer. No employee should be allowed to retire, with disciplinary proceedings pending against him, unless these are commenced virtually on the eve of his retirement, for very compelling reasons, or the charges are so serious and facts so complicated that the process of inquiry would certainly extend

beyond the employee's superannuation. Here, neither was the case. The first justification offered, therefore, that the initial delay occurred due to the petitioner's indictment in a disciplinary case, places the blame squarely on the shoulders of the Executive Officer of the Nagar Palika Parishad and the Commissioner of the Division.

16. The remarks of the Commissioner, saying that after conclusion of the departmental proceedings on 21.09.2019, the petitioner was expected, through a notice dated 10.10.2020, to fulfill the requisite formalities for release of pensionary benefits, betrays the same approach. The further remarks make the picture worse. Perhaps, leave encashment, that was said to have been paid on 23.10.2019, is the lone entitlement under the head of retiral benefits, that was met with some promptitude. The group insurance, it is said by the Commissioner in paragraph No. 8 of the personal affidavit, was "subsequently disbursed to him on 03.08.2021". The Commissioner has not realized that between 21.09.2019, when the inquiry report was submitted and a decision taken, that the petitioner would be paid his post-retiral benefits, and 03.08.2021, when the petitioner's group insurance was paid, a period of two years has elapsed. Two years is a long period of time in man's short life. Neither the Executive Officer of the Nagar Palika nor the Commissioner of the Division spared a thought to it, because, obviously, they were not suffering the predicament. It was the petitioner.

17. In paragraph No. 10 of the Commissioner's affidavit, and elsewhere, there is a repeat reference that the file relating to the post-retiral benefits was routed to the Nagar Palika from the

Commissioner's office through the District Magistrate. The District Magistrate, Bijnor, in his personal affidavit, has attempted to show that he never put in any objection in the matter. We believe him for his word, though we think that he too has managed to coerce the Executive Officer of the Nagar Palika into saying that there was a typographical error in mentioning that objections were put in by the District Magistrate, when, what was meant, was the Commissioner. The Commissioner has acknowledged that each time the file relating to the petitioner's retiral benefits moved from the Nagar Palika, it was routed through the District Magistrate's office. We fail to see why that is so. If the District Magistrate had no say in the matter of the Nagar Palika, why should the Commissioner, who is some statutory authority in the Nagar Palika affairs, should have routed all papers through the District Magistrate, as if it were by the compelling habit. One more office - one more station, it is not hard to imagine, leads to added delay; particularly, when the office of conduit has the trappings of sovereign authority. These seem small or unnecessary detail, but, are unpredictable hurdles, which, if circumvented, would accelerate matters. There is no reason why the papers in this case should have been routed each time by the Commissioner and the Executive Officer of the Nagar Palika through the District Magistrate, Bijnor.

18. A perusal of paragraph No. 10 of the Commissioner's personal affidavit shows that five objections were put in by the Additional Commissioner (Administration) entrusted with the assignment. A look at the objections leaves one to wonder - at least about three of these - if they are matters which should have been dealt with at least a year ahead of the

petitioner's scheduled retirement. The last two objections in paragraph No. 10 are less of objections and more of obstructions. Likewise, when rectified and resubmitted, a fresh list of objections, numbering three, were put in, two of which are absolutely besides the point - the one about pendency of contempt proceedings, requiring a conclusive report on file to affirm whether pension could be granted pending, contempt proceedings. This, for an objection, is nothing short of perversity. The tenor of the objections in paragraphs Nos. 10 and 11, as already remarked, show not the desire to facilitate payment of post-retiral benefits, but a mind that is utterly nonchalant to the plight of a retiree. Admittedly, the last of the dues, that were paid, was on 07.09.2022. It had been decided that the petitioner would be paid his dues by the Nagar Palika way back on 21.09.2019, when the inquiry report was submitted. By the time the last and the most substantial of retiral dues were paid, it was already 07.09.2022, to wit, a period of three years. There is absolutely no justification for all this delay. What was paid on 07.09.2022, after the Commissioner's approval, was pension and gratuity. The group insurance was paid on 03.08.2021 and the leave encashment was paid on 23.10.2019. Except for dues on account of leave encashment, all dues that have been paid later, have been paid with a culpable delay, inviting award of interest.

19. Long ago, in **State of Kerala and others v. M. Padmanabhan Nair**³, it was observed by their Lordships of the Supreme Court :

3. The instant case is a glaring instance of such culpable delay in the settlement of pension and gratuity claims due to the

respondent who retired on May 19, 1973. His pension and gratuity were ultimately paid to him on August 14, 1975 i.e. more than two years and 3 months after his retirement and hence after serving lawyer's notice he filed a suit mainly to recover interest by way of liquidated damages for delayed payment. The appellants put the blame on the respondent for delayed payment on the ground that he had not produced the requisite L.P.C. (last pay certificate) from the Treasury Office under Rule 186 of the Treasury Code. But on a plain reading of Rule 186, the High Court held — and in our view rightly — that a duty was cast on the Treasury Officer to grant to every retiring Government servant the last pay certificate which in this case had been delayed by the concerned officer for which neither any justification nor-explanation had been given. The claim for interest was, therefore, rightly, decreed in respondent's favour.

4. Unfortunately such claim for interest that was allowed in respondent's favour by the District Court and confirmed by the High Court was at the rate of 6 per cent per annum though interest at 12 per cent had been claimed by the respondent in his suit. However, since the respondent acquiesced in his claim being decreed at 6 per cent by not preferring any cross-objections in the High Court it would not be proper for us to enhance the rate to 12 per cent per annum which we were otherwise inclined to grant.

5. We are also of the view that the State Government is being rightly saddled with a liability for the culpable neglect in the discharge of his duty by the District Treasury Officer who delayed the issuance of the L.P.C. but since the concerned officer had not been impleaded as a party defendant to the suit the Court is unable to hold him liable for the decretal amount. It will, however, be for the State Government to consider whether the erring official should or should not be directed to compensate the Government the loss sustained by it by his culpable lapses. Such action if taken would help generate in the officials of the State Government a sense of duty towards the Government under whom they serve as also a sense of accountability to members of the public.

20. Furthermore, in the Bench decision of this Court in **Smt. Nazma Khatoon v. State of U.P. and others**⁴, it has been held :

Even otherwise, we are of the opinion that interest is a necessary corollary to the retention of money by another person. It is neither compensatory nor penal in nature and in that regard matter has been adjudicated upon by the Division Bench of this Court in the case of *Smt. Ranjana Kakar Vs. State of U.P. and others* reported in 2008(10)ADJ 63(DB).

Following the law so laid down by the Division Bench of this Court, we are of the opinion that the appellant is entitled to get

interest at the rate of 8 percent on the money of gratuity payment whereof has been delayed by the respondents. Interest so payable shall be calculated from the date the money was due by the date of actual payment.

21. One is left to wonder that the principles, laid down more than four decades ago by the Supreme Court and reiterated by their Lordships as also by this Court on a number of occasions, have failed to influence the respondents' bureaucratic mind, which revels with abiding faith in the wisdom of Government Orders and other non-statutory instruments. Sadly, to the practitioners of this approach, the constitutional era has not dawned. It is for violators such as these that penalty in the form of interest, and, may be something more, is necessary. In the present, the former would suffice.

22. Before parting with the matter, it must be remarked that the Divisional Commissioner, though not formally impleaded as a party respondent to this writ petition, has been sufficiently heard and represented by the learned Additional Chief Standing Counsel, with due notice to him and he has filed his personal affidavit in answer to the petitioner's claim dated 19.11.2024.

23. In the result, this petition **succeeds** and stands **allowed with costs**, which we quantify at **₹10,000**, payable by the Executive Officer, Nagar Palika Parishad, Seohara, Bijnor. The impugned order dated 03.07.2024 passed by the Executive Officer, Nagar Palika Parishad, Seohara, Bijnor is hereby **quashed**. A *mandamus* is issued to the Director, Local Bodies, Government of U.P., Lucknow, the

24. The Registrar (Compliance) is directed to communicate this order to the Director, Local Bodies, Government of U.P., Lucknow, the Deputy Director, Local Fund Account Department, Moradabad Region, Moradabad and the Executive Officer, Nagar Palika Parishad, Seohara, Bijnor through the learned Chief Judicial Magistrates of Lucknow, Moradabad and Bijnor, respectively.

(2024) 12 ILRA 612
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2024

BEFORE

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

Writ -A No. 16406 of 2024

Satish Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sudeep Dwivedi, Sr. Advocate

Counsel for the Respondents:
C.S.C., Saurabh Tiwari

**Civil Law – Constitution of India, 1950
- Article 226, - Uttar Pradesh
Intermediate Education Act, 1921 –
Regulations 101, 101(1), 103, 104,
105, 106 & 107- writ petition – seeking**

mandamus commanding the DIOS to grant approval to his appointment as clerk in the institution under dying-in-Rules – Institution is run and management by the Nagar Plika Parishad – Petitioner's father died in harness who was a peon with the institution – being son of deceased employee applied for appointment - being eligible for the post of a clerk, considered for compassionate appointment in accordance with Regulation 103-107 of Chapter III of Regulation framed under Act, of 1921 – manager of institution issued an appointment letter appointing him as a clerk – petitioner joined the duty – institution made request to DIOS for approval for including the name of petitioner on Human Resource Portal for the purpose of payment of Salaries – DIOS referred the matter to Joint Director of Education – JDE direct to DIOS to proceed in accordance with Regulation 105 – court finds that, there is a complete provision for purpose made in regulation framed under chapter III of the Act, but the authorities have not acted in accordance with Regulation – held, (i) Petitioner has a right to be considered for compassionate appointment, (ii) Manager of the institution has no right to issue the letter of appointment, (iii) The District Level Committee constituted under regulation 105 have to undertakes the necessary exertions – Hence, a mandamus is issued to the Manager of the institution to report with all particulars within seven days to the DIOS and DIOS will then proceed in accordance with Regulation 104 and 105 to place the petitioner's case for consideration before the Committee, envisaged under Regulation 105 and the committee will take a decision for appointment within a month in accordance with regulations in force, and thereafter DIOS shall proceed further to appoint the petitioner within a month of receipt of such instruction from committee – direction issued to the authorities for compliance punctiliously and without fail – writ petition – Allowed. (Para – 19, 22, 23, 24, 25, 26)

Writ petition Allowed. (E-11)

List of Cases cited:

Anand Kumar Tripathi Vs St. of U.P. & ors.
(2012 vol. 1 ADJ 286),

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

1. The petitioner, Satish Chandra, has applied for the issue of a writ, order or direction in the nature of mandamus, commanding the District Inspector of Schools, Kasganj (for short, 'the DIOS') to grant approval to his appointment as a Clerk with the Sant Tulsidas Municipal Inter College, Soron, Kasganj (for short, 'the Institution') made by the Management on 06.03.2024 under the Dying-in-Rules.

2. The Institution is run and managed by the Nagar Palika Parishad, Soron, Kasganj and the Chairman of the Nagar Palika is the ex officio Manager thereof. The Institution is governed by the provisions of the Uttar Pradesh Intermediate Education Act, 1921 (for short, 'the Act of 1921') and the Regulations framed thereunder as also Government Orders issued from time to time. Payments of salaries to teachers and other employees working with the Institution are made under the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (for short, 'the Act of 1971'). The petitioner's father, the late Lala Ram, was a peon with the Institution and died in harness on 08.11.2023. The petitioner, being the deceased employee's son, applied for appointment against a suitable post. There are three posts of clerks sanctioned for the Institution, out of which two are occupied with incumbents working thereagainst. There is a vacancy of one due to Ravi Kumar Parashar's services being terminated by the Management on 08.12.2008. The said order is under

challenge before this Court at the instance of Parashar in Writ-A No.7688 of 2009. There is no interim order granted in the said petition. Parashar is scheduled to superannuate in the year 2026 and the post is vacant since the year 2009.

3. The petitioner, being eligible for the post of a clerk, was considered for compassionate appointment in accordance with Regulations 103-107 of Chapter III of the Regulations framed under the Act of 1921. The petitioner made his application on 27.01.2024, upon which consideration followed. After due selection, the petitioner was appointed by the Manager of the Institution by a letter of appointment dated 06.03.2024, appointing him as a Clerk. The petitioner joined his duties on 11.03.2024. On the 30th of March, 2024, the Principal of the Institution addressed a letter to the DIOS, requesting him to include the petitioner's name on the Human Resource Portal for the purpose of payment of his salary. On 12.04.2024, the Chairman of the Nagar Palika Parishad, Soron, Kasganj/ the Manager of the Institution addressed a letter to the DIOS, seeking approval for the petitioner's appointment and further requested him to record the petitioner's name on the Human Resource Portal for the purpose of payment of salary. On the 3rd of May, 2024, the DIOS addressed a letter to the Joint Director of Education, Aligarh and requested him to provide guidance in the matter of approval of appointment to the Clerk's post with the Institution, the petitioner having been appointed on compassionate grounds by the Management and given charge.

4. The Manager of the Institution later, addressed a letter dated 10.06.2024 to the Joint Director of Education, Aligarh, apprising him of the position regarding the

petitioner's appointment on compassionate grounds as also the position of vacancy in the cadre of clerks, the applicability of the Act of 1921 to the Institution as well as the Regulations framed thereunder. The Joint Director of Education, Aligarh Region, Aligarh wrote back to the DIOS, vide his memo dated 10.07.2024. It says that the DIOS had sought guidance about the petitioner's appointment on compassionate grounds as a Clerk with the Institution on a supernumerary post. It is remarked that the Institution is governed in the matter of payment of salary by the Act of 1971. Therefore, the DIOS was asked to consider the petitioner's case in accordance with Chapter III, Regulation 105 of the Regulations framed under the Act of 1921. The DIOS by his letter dated 18.07.2024, addressed to the Manager and the Principal of the Institution, directed them to take necessary action in accordance with his letter under reference. A detailed allusion to this letter of the DIOS would be made in the course of this judgment.

5. Nevertheless, it must be pointed out that for whatever flaws in the petitioner's appointment, that were indicated by the DIOS vide his letter dated 22.08.2024, he returned the papers relating to the petitioner's appointment to the Management to take action in accordance with the guidance offered by the Joint Director of Education, Aligarh Region, Aligarh vide his letter dated 10.07.2024. Regarding this as inaction in the matter of grant of approval to his appointment, the petitioner has instituted the present writ petition.

6. When the petition came up for admission on 18.11.2024, a very detailed order was passed by this Court, requiring the DIOS to file a personal affidavit. The

order dated 18.11.2024 passed by this Court reads:

"1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Sudeep Dwivedi, learned counsel for the petitioner, learned Standing Counsel for the respondents no. 1 to 3 and Sri Saurabh Tiwari, learned counsel for the respondents no.4 & 5.

2. The petitioner has preferred present writ petition inter-alia with the following prayers :-

"(i) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.3 to give approval and feed data of the petitioner on Human Resources Portal and to pay the salary to the petitioner month to month forthwith and also pay the dues allowances from date of joining dated 11.03.2024 to from the date of actual payment within stipulated period as may be specified by this Hon'ble Court.

(ii) Issue a writ, order or direction in the nature of mandamus commanding to the respondent no.3 to decide the representation dated 29.08.2024 within stipulated period which may be specified by this Hon'ble Court."

3. The facts in brief as contained in the writ petition are that father of the petitioner namely late Sri Lalaram was working on Class-IV post in Sant Tulsidas Myu. Inter College, Soro, Kasganj and while working on the aforesaid post unfortunately he died on 08.11.2023. The petitioner being fully eligible and qualified for the post of clerk made an application for his appointment on compassionate ground, the respondent no.5 namely Sant Tulsidas Myu. Inter College Soro, Kasganj through its Manager, Chairman Nagar Palika Parishad, Soro, Kasganj after considering the entire material of the case issued an appointment of letter to the petitioner appointing him on the post of clerk vide letter of appointment dated 06.03.2024, thereafter on 30.03.2024 Principal of the institution wrote a letter to the District Inspector of Schools, Kasganj/respondent no.3 with a request to include the name of the petitioner on Human Resources Portal for the purpose of payment of salary. Thereafter on 03.05.2024 District Inspector of Schools, Kasganj written a letter to Joint Director of Education, Aligarh requesting to provide guidelines for appointment on the post of clerk to the petitioner, who appointed and join on 11.03.2024 on the said post and doing work regularly from the date of joining. On 01.06.2024, the Chairman, Nagar Palika Parishad, Soro, Kasganj/Officio Manager of the institution has also written and send a letter to the Joint Director of Education, Aligarh and he also stated clear position to the post of clerk in the institution. Thereafter, on 18.07.2024 a letter was written by the respondent no.3-District Inspector of Schools, Kasganj to the Manager/Principal of the institution directing to take action pursuant to the letter dated 18.07.2024.

4. It is argued by learned Senior Counsel that direction given in the letter dated 23.08.2024 written by the respondent no.3 to the Manager of the institution in question is per-se illegal and without any basis. It is further argued that two grounds were taken in the aforesaid, which reads as follows :-

"उपर्युक्त के अतिरिक्त आप अवगत हों कि नगर पालिका परिषद से सम्बद्ध शिक्षण संस्थान हेतु पत्र व्यवहार एवं अन्य कार्यवाही संस्था प्रबंधक के रूप में किया जाना नियमानुसार है न कि अध्यक्ष नगर पालिका परिषद के पदनाम से। सहायक लिपिक पद पर विभागीय नियमों के अनुसार टंकण की गति के परीक्षण हेतु परीक्षा लिए जाने का न तो कोई साक्ष्य है और न किसी प्रकार का कोई उल्लेख है।

अतः मार्ग निर्देश दिनांक: 19.07.2024 के अनुसार तत्काल आवश्यक कार्यवाही करें।"

5. In so far as first ground is concerned, the Court is of the opinion that this is only hyper technical grounds. The State Authority can not restrain a person to work on compassionate ground. In so far as second ground is concerned, it is argued that there is no such provision in the Act/Rules to pass tying test before any appointment on compassionate ground on the post of clerk.

6. In this view of the matter, it is argued that both grounds taken in the matter is without any basis hence direction be given to the respondent no.3 to give approval and feed date of the petitioner on Human Resources Portal.

7. Learned Standing Counsel placed before this Court instructions dated 17.11.2024 under

signature of respondent no.3. It is again stated in the aforesaid instructions that without examining the typing speed of the petitioner, the appointment letter was issued to the petitioner hence writ petition is liable to be dismissed.

8. Heard learned counsel for the parties and perused the records.

9. From perusal of the records it is clear that one of the basic objection has been taken by the respondent no.3 that petitioner was appointed on compassionate ground by the Management of the institution without examining typing speed of the petitioner.

10. It is further argued by Sri Ashok Khare, learned Senior Counsel that there is no such condition either in the Act or in the Rules or in the Government Order issued by the State Government from time to time that before appointment on post of clerk on compassionate ground typing test is a condition precedent.

11. In this view of the matter, respondent no.3 is directed to file personal affidavit within ten days regarding the same. In absence of same, respondent no.3 is directed to appear in person on the next date fixed in the matter.

12. Put up as fresh on 28.11.2024.”

7. In response, a personal affidavit has been filed by the DIOS on 28.11.2024, which was directed by this Court to be read as a counter affidavit, as the learned Standing Counsel waived his right to file a

detailed return. Learned Counsel for the petitioner waived his right to file a rejoinder.

8. Issue of notice to the fifth respondent was dispensed with since they are ad idem with the petitioner's cause. The petition being ready, it was admitted to hearing, which proceeded forthwith and orders reserved.

9. Heard Mr. Sudeep Dwivedi, learned Counsel for the petitioner, Mr. Saurabh, learned Standing Counsel and Mr. Saurabh Tiwari, Advocate appearing on behalf of respondent No.4.

10. The learned Counsel for the parties centered their submissions on the issue whether it was imperative for the Management, while selecting the petitioner for compassionate appointment and issuing him an appointment letter, to have subjected him to a typing test in order to ascertain his typing speed. This submission on both sides is premised on the provisions of Regulation 103 of Chapter III of the Regulations framed under the Act of 1921, as amended vide notification dated 06.12.2022 issued by the State Government in exercise of their powers under Section 16-G of the Act of 1921, more particularly, the first proviso to Regulation 103(1). The aforesaid Regulation, to which allusion would be made in the course of this judgment, makes it mandatory, in case of posts which require knowledge of operation of a computer or possession of typing skill and where the candidate for compassionate appointment does not possess the necessary proficiency in computer operation or typing, to make the appointment contingent upon the candidate earning the necessary CCC Certificate from the DOEACC Society or an equivalent qualification,

recognized by the Government, and achieve, along with earning the certificate, a typing speed of 25 words per minute in Hindi and 30 words per minute in English. It is also mandated by the proviso that if a candidate fails to earn the certificate or achieve the requisite speed within a year, his annual increment shall be withheld and he would have another year to earn the requisite CCC Certificate etc. and achieve the necessary typing speed. It is also provided that if after the further time period of one year granted, the qualification or the speed are not earned or achieved, his service would be terminated.

11. Now, both sides have been emphatic about the point whether at the time of recruitment, or so as to speak, selection and initial appointment, the proviso to Regulation 101 (1) obliges the Management of the Institution to undertake, or the candidate appointed on compassionate grounds to undergo a test to establish whether he/ she possesses the requisite typing speed. There is no issue about the petitioner earning the CCC Certificate because he asserts that he already has it and the fact is not disputed either before this Court or in the letter/ order of the DIOS dated 22.08.2024, returning the papers to the Management, relating to the petitioner's appointment.

12. The DIOS by his letter dated 22.08.2024, addressed to the Manager of the Institution, returned the papers relating to the petitioner's selection and appointment, where the material remarks read:

“प्रश्नगत प्रकरण नीतिविषयक होने के कारण वैधानिक मार्गदर्शन हेतु मण्डलीय संयुक्त शिक्षा निदेशक अलीगढ़ को इस कार्यालय के पत्रांक- मा0 / 573-76/2024-25 दिनांक - 30.05.2024

के अनुसार संदर्भित किया गया। मण्डलीय संयुक्त शिक्षा निदेशक अलीगढ़ के पत्रांक-2028-30 / 2024-25 दिनांक: 10.07.2024 के अनुसार मार्गदर्शन दिया गया कि माध्यमिक शिक्षा अधिनियम 1921 के अध्याय-3 की धारा 105 में वर्णित प्राविधानों के अनुसार नियमानुसार आवश्यक कार्यवाही करें। मार्गदर्शन की प्रति आपको भी पृष्ठांकित की गयी। उक्त के सम्बन्ध में इस कार्यालय के पत्र सं0-2267-69/2024-25 दिनांक: 18.07.2024 के द्वारा भी आपको अवगत कराया गया।

आप द्वारा उक्त मार्गदर्शन के क्रम में कोई कार्यवाही नहीं की गयी है तथा उ०प्र० सरकार शिक्षा (7) अनुभाग सं०-मा० / 3082 / 15-7-8 (4)/75 दिनांक: 12.07.1982 को जारी अधिसूचना का भी संज्ञान नहीं लिया गया है, संज्ञान लेकर कार्यवाही करें।

उपर्युक्त के अतिरिक्त आप अवगत हों कि नगर पालिका परिषद से सम्बद्ध शिक्षण संस्थान हेतु पत्र व्यवहार एवं अन्य कार्यवाही संस्था प्रबंधक के रूप में किया जाना नियमानुसार है न कि अध्यक्ष नगर पालिका परिषद के पदनाम से। सहायक लिपिक पद पर विभागीय नियमों के अनुसार टंकण की गति के परीक्षण हेतु परीक्षा लिए जाने का न तो कोई साक्ष्य है और न किसी प्रकार का कोई उल्लेख है।

अतः मार्ग निर्देश दिनांक: 10.07.2024 के अनुसार तत्काल आवश्यक कार्यवाही करें। पत्रावली मूलरूप में संलग्न कर प्रत्यावर्तित है।”

(emphasis by Court)

13. Before this Court, learned Counsel for both sides have made their submissions on the premise that the Management are competent not only to appoint, but select a candidate like the petitioner under the Regulations relating to compassionate, which the DIOS has to scrutinize and approve for the purpose of payment of salary under the Act of 1971. These submissions have proceeded on lines that the Management while examining the candidature of a candidate for compassionate appointment have to ensure

that he fulfills the necessary qualifications for appointment to a clerical post. This includes the possession of a CCC Certificate and command of the prescribed typing speed in Hindi and English. The objection that has been the subject of issue raised by parties before this Court is that the proviso to Regulation 103 envisaging a time period of one year for a candidate appointed to a clerical post, requiring the knowledge of typing to acquire the prescribed speed, the remarks of the DIOS or the stand before the Court that the Management at the time of selection ought have taken a typing test and determined the petitioner's typing speed is besides the point. This is what the petitioner would submit on the issue.

14. Mr. Saurabh, the learned Standing Counsel, on the other hand, asserts that it is to be ascertained in the first instance by the Management while the selecting a candidate for compassionate appointment under Regulations 103 to 107 of Chapter III of the Regulations framed under the Act of 1921, if he/ she possesses the requisite typing speed. The period of one year, according to Mr. Saurabh, is then the first opportunity to acquire the requisite speed. There is then, according to the learned Standing Counsel, a further opportunity of one year to acquire the prescribed typing speed if at the end of one year, the candidate fails to attain it. At that stage too, a typing test would be necessary. The submission in substance, therefore, is that at the threshold, at the time of selection, it has to be ascertained by the Management if the candidate possesses the requisite typing speed. If he does, there is no requirement of asking him to undergo a further test at the end of one year.

15. In our opinion, this point, though much debatable, is not required to be gone into in this case, and, therefore, left open for consideration in a suitable cause in the future.

16. Here, allusion must be made to the provisions of Regulations 104, 105, 106 and 107 of Chapter III of the Regulations framed under the Act of 1921, as amended vide notification dated 6th December, 2022. These read:

“104. किसी मान्यता प्राप्त, सहायता प्राप्त संस्था का प्रबन्धतन्त्र मृत्यु होने के दिनांक से सात दिन के भीतर निरीक्षक को मृत कर्मचारी के कुटुम्ब के सदस्यों की एक रिपोर्ट प्रस्तुत करेगा जिसमें मृत कर्मचारी का नाम, धृत पद, वेतनमान, नियुक्ति का दिनांक मृत्यु का दिनांक नियोजक संस्था का नाम उसके कुटुम्ब के सदस्यों के नाम, उनकी शैक्षिक प्रशिक्षण अर्हताएं यदि कोई हों, और आयु का विवरण भी दिया जायेगा। निरीक्षक अपने द्वारा रखे जाने वाले रजिस्टर में मृतक की विशिष्टियाँ दर्ज करेगा।

105. विनियम 103 में निर्दिष्ट मृत कर्मचारी के कुटुम्ब का कोई सदस्य सम्बन्धित निरीक्षक को यथास्थिति, प्रशिक्षित स्नातक श्रेणी में अध्यापक या शिक्षणेत्तर संवर्ग के किसी पद पर नियुक्ति के लिए आवेदन करेगा। आवेदन पत्र पर समिति द्वारा विचार किया जायेगा और यदि समिति उसकी नियुक्ति की संस्तुति करे तो निरीक्षक मान्यता प्राप्त, सहायता प्राप्त उस संस्था के, जिसमें आवेदक को नियुक्त किया जाना है, प्रबन्ध तन्त्र को आवेदन-पत्र विनियम 106 और 107 के अनुसार नियुक्ति आदेश जारी करने के लिये भेजेगा।

समिति में निम्नलिखित होंगे-

1. निरीक्षक अध्यक्ष
 2. जिला विद्यालय निरीक्षक के कार्यालय में लेखाधिकारी सदस्य
 3. जिला बेसिक शिक्षा अधिकारी सदस्य
106. मृत कर्मचारी के कुटुम्ब के सदस्य की नियुक्ति उसकी शैक्षिक अर्हताओं के अनुसार प्रशिक्षित स्नातक श्रेणी में या किसी शिक्षणेत्तर पद पर

यथासम्भव उसी संस्था में की जायेगी जहाँ मृत कर्मचारी अपनी मृत्यु के समय सेवारत था। यदि ऐसी संस्था में प्रशिक्षित स्नातक श्रेणी में किसी अध्यापक या शिक्षणेत्तर संवर्ग में कोई पद रिक्त न हो तो उसकी नियुक्ति जिले की किसी अन्य मान्यता प्राप्त, सहायता प्राप्त संस्था में जहाँ ऐसी रिक्ति हो की जायेगी-

प्रतिबन्ध यह है कि यदि जिले की किसी मान्यता प्राप्त, सहायता प्राप्त संस्था में कोई रिक्ति तत्समय विद्यमान न हो तो उस संस्था में जहाँ मप्तक अपनी मृत्यु के समय सेवारत था, नियुक्ति प्रशिक्षित स्नातक श्रेणी के अध्यापक के या चतुर्थ श्रेणी के शिक्षणेत्तर पद के प्रति किसी अधिसंख्य पद के प्रति तुरन्त की जायेगी। ऐसे अधिसंख्य पद को इस प्रयोजन के लिये सृजित किया गया समझा जायेगा और उसे तब तक जारी रखा जायेगा जब तक कोई रिक्ति उस संस्था में या जिले की किसी अन्य मान्यता प्राप्त, सहायता प्राप्त संस्था में उपलब्ध न हो जाये और ऐसी स्थिति में अधिसंख्य पद के पदधारी द्वारा की गई सेवा की गणना वेतन निर्धारण और सेवा निवृत्ति लाभों के लिये की जायेगी।

107. उस मान्यता प्राप्त, सहायता प्राप्त संस्था के प्रबन्धतन्त्र द्वारा, जिसको विनियम 105 के अधीन निरीक्षक द्वारा आवेदन-पत्र भेजा गया या आवेदन पत्र को प्राप्ति के दिनांक से एक माह की अवधि के भीतर निरीक्षक को सूचना देते हुए नियुक्त पत्र जारी किया जायेगा।"

17. The deceased employee, Lala Ram passed away on 08.11.2023, leaving behind him a dependent family, including the petitioner, his son. There is little doubt in view of the date of the employee's demise that the Regulations 103-107 of Chapter III aforesaid would apply, as amended by the notification dated 06.12.2022. These have been quoted hereinbefore. A perusal of the entire scheme for selection and appointment under the Regulations aforesaid is encapsuled in Regulations 104-107. The Regulations aforesaid envisage a complete scheme for compassionate appointment and the power to select a candidate on

compassionate ground does not at all vest with the Management of the Institution, where the deceased employee was serving.

18. Regulation 104 casts an obligation upon the management or the principal or the headmaster of a recognized and aided institution, where the deceased employee was serving, to intimate within seven days of his death in harness by a report to the District Inspector of Schools the factum of his death. Apart from it, the report aforesaid shall convey information, which would mention the deceased's name, the post held by him, his pay scale, the date of his appointment, the date of his death, the name of the employer-institution, the name of the deceased's family members, their educational qualifications and ages. The District Inspector of Schools is obliged to maintain a register, wherein particulars relating to the deceased employee sent to him through report by the management/principal of the institution, as the case may be, shall be recorded.

19. Regulation 105 provides that one family member of the deceased would then apply for appointment as an assistant teacher or a Class-III employee. The aforesaid application shall be placed before a Committee, comprising three members, to wit, the District Inspector of Schools, who would be its Chairman, the Finance and Accounts Officer (Secondary Education) and the senior most Principal of the Government Inter College/ Government Girls Inter College, both of whom would be members. The Committee as aforesaid would consider the application for compassionate appointment and make recommendation for appointment of the applicant to the institution, where he is entitled to be appointed in accordance with the provisions of Regulation 106. The

management or the principal or the headmaster, as the case may be, would then issue a letter of appointment in favour of the applicant for compassionate appointment.

20. Regulation 106 provides that as far as possible the family member of the deceased would be appointed in the same institution, where the deceased was employed. If there is no position of an assistant teacher or a Class-III employee available with the said institution, the family member may be appointed in any other institution in the district, wherever a vacancy exists. In the further event of there being no vacancy in the district in any institution, the District Level Committee, above described, would refer the matter to the Regional Level Committee and that Committee would recommend appointment of the candidate in any institution in the Region, wherever a suitable vacancy exists. It is also provided that if there is no vacancy in the entire Region, or if the applicant for compassionate appointment desires an appointment in some other Region, the matter would be referred to the Directorate of Education (Secondary), where it would be considered by a Committee, again comprising three members. This Committee would be headed by the Additional Director of Education (Secondary) as its Chairman and would have two other members, whose particulars are mentioned by reference to their office in the second proviso to Regulation 106. After consideration of the matter by the Committee at the Directorate Level, they would send the matter to the District Level Committee, wherever a suitable vacancy is there. This decision would be taken after securing information about the position of vacancies across the State.

21. Regulation 107 mandates that when a recognized and aided institution receives an application for appointment from the District Inspector of Schools in favour of a candidate for compassionate appointment, that institution would be obliged to issue an appointment letter in favour of the candidate within a month of receipt of the communication from the District Inspector of Schools.

22. The entire scheme of Regulations 104-107 of Chapter III of the Regulations framed under the Act of 1921 does not at all authorize the management of the institution, where the employee, who died in harness, was working, to recommend any compassionate appointment, much less make it and afterwards seek approval of the District Inspector of Schools, as done in the present case. The procedure envisaged under Regulations 104-107 has to be followed for such an appointment to be made, where the management and the principal of the institution have no role, except to comply with the instructions of the District Inspector of Schools, in turn issued, on the basis of the recommendations of the concerned Committee. In this connection, reference may be made to **Anand Kumar Tripathi v. State of U.P. and others, 2012 (1) ADJ 286**, where this Court held:

“9. A perusal of Regulation 103 discloses that the appointment on compassionate ground is to be made on a post suitable to the qualification of the candidate. The Regulation 104 provides for the role of the management. According to Regulation 104, the Management within seven days from the date of the death of the employee, has to submit a report to the District

Inspector of Schools giving such details of the deceased - employee and his family members as are noted in the regulation. Upon receipt of this report, the District Inspector of Schools has to enter the details in a register. Regulation 105 provides for an application by the member of the family of the deceased-employee thereby seeking appointment. This application has to be made before the District Inspector of Schools. Thereafter, the application with all the relevant papers is to be placed before a District Level Committee, which consists of the District Inspector of Schools, the Accountant in the office of the District Inspector of Schools and the District Basic Education Officer of the concerned district. Upon recommendation of this Committee, the District Inspector of Schools has to forward the application for appointment to the Management concerned for issuing necessary appointment order in accordance with Regulations 106 and 107. Regulation 106 provides that the dependent of the deceased-employee would be given appointment in the same Institution where the deceased-employee was working and in case there is no vacant post in the said institution then the appointment is to be provided in any other recognized/ aided institution of the District. The Proviso to Regulation 106 states that where there is no vacant post in the entire District then a supernumerary post in Class IV shall be created for the candidate. Regulation 107 provides for the

time limit within which the exercise of issuing the appointment order is to be carried out.

10. Having considered the aforesaid provisions that deal with the compassionate appointments in recognized / govt. aided Intermediate Colleges, I am of the considered opinion that the Management of a college has no say with regard to the post on which a dependent of a deceased-employee is to be appointed. The role of the Management is only to forward the necessary information, as is required by Regulation 104 of Chapter III of the Regulation framed under the U.P. Intermediate Education Act, 1921. The District Level Selection Committee constituted under Regulation 105 is the body that decides the post on which a candidate is to be appointed after taking into account his or her qualification/and the vacancy available for appointment.”

23. This then being the position of the law, if the petitioner had applied to the Management for consideration of his case vide application dated 27.01.2024, that occasion should not have arisen. The Management of the Institution should have reported the matter with all necessary particulars to the DIOS under Regulation 104 and the DIOS ought have processed the claim after entering it in the prescribed register. The Chairman of the Nagar Palika Parishad, who is the Manager of the Institution, certainly had no right to issue the letter of appointment dated 06.03.2024 to the petitioner and then send papers to the DIOS for his approval. The letter of appointment issued to the petitioner is

contrary to the scheme of the provisions of Regulations 104-107 of Chapter III of the Regulations framed under the Act of 1921. It does not confer upon the petitioner any right. It is void. Being void, any kind of approval to it, even if given, would not imbue it with life. There was no occasion for the DIOS to have sought directions from the Joint Director of Education. He ought have entered the petitioner's particulars in the register, processed the claim and placed it before the Committee, envisaged under Regulation 105 for their consideration. This would be followed by necessary direction for appointment to whichever institution these had to be issued.

24. Now, since that was not done and guidance from the Joint Director was sought, the Joint Director of Education was not wrong in asking the DIOS to proceed in accordance with Regulation 105. In fact, he was absolutely right. At that stage too, the DIOS should have proceeded under Regulation 105 and after collecting necessary particulars relating to the petitioner, caused it to be laid before the Committee under Regulation 104, of which he is himself the Chairman. Sadly, he did not do that. When he received the letter of appointment for approval etc. from the Institution along with papers, he found faults with it on the ground that the petitioner had not been subjected to the necessary typing test for ascertainment of his speed, and on that ground refused approval and sent the matter to the Management vide his order dated 22.08.2024. The sole direction in that order, that is sound, is that the DIOS has required, towards the tail-end of the order, the Manager of the Institution to act in accordance with the instructions of the Joint Director of Education carried in his

memo dated 10.07.2024. This would oblige the Manager to report on the necessary particulars about the deceased to the DIOS. As soon as the Manager would do that, the obligation of the DIOS under Regulations 104 and 105 would commence. For judging the suitability of the petitioner for appointment to a Class-III post, it would be the Committee constituted under Regulation 105, who would have to undertake the necessary exertions. If it involves a typing test, it is for them to ensure it. However, this is with the remark that passing the typing test at the time of initial recruitment, even if the requisite typing speed is not there, is not a precondition. There is complete provision for the purpose made in Regulation 101 (1) of the Regulations of Chapter III framed under the Act of 1921. The District Level Committee would do well to bear that in mind, so far as the petitioner's case goes. The petitioner has a right to be considered for compassionate appointment, but cannot be granted relief in the terms that he has prayed. The relief would have to be suitably moulded to give effect to the petitioner's rights, otherwise well-founded.

25. In the circumstances, a mandamus is issued to the Manager of the Institution/ Chairman, Nagar Palika Parishad, Soron, Kasganj to report with all particulars within seven days of receipt of this order, death of the petitioner's father to the DIOS. The DIOS will then proceed in accordance with Regulations 104 and 105 to place the petitioner's case for consideration before the Committee, envisaged under Regulation 105. The Committee will take a decision relating to the petitioner's appointment as a Class-III employee with whichever institution they find it feasible in accordance with the Regulations in force. The Committee's

decision shall be taken within a month of receipt of the particulars from the Manager of the Institution. Immediately upon the recommendations of the Committee being made, the necessary instructions shall be issued by the DIOS to the Manager/ Principal/ Headmaster of whichever institution it is decided to appoint the petitioner. The institution concerned, to whomsoever the instructions/ directions are issued by the DIOS, shall proceed to appoint the petitioner within a month of receipt of such instructions. It shall be the duty of the DIOS to ensure that this mandamus of ours is carried out punctiliously and without fail.

26. This writ petition is **allowed** in terms of the aforesaid orders.

27. There shall be no order as to costs.

28. Let this order be communicated to the Manager, Sant Tulsidas Municipal Inter College, Soron, Kasganj, the Chairman, Nagar Palika Parishad, Soron, Kasganj through the learned Civil Judge (Sr. Div.), Kasganj by the Registrar (Compliance). The order would also be communicated to the Joint Director of Education, Aligarh Region, Aligarh through the learned Civil Judge (Sr. Div.), Aligarh by the Registrar (Compliance).

(2024) 12 ILRA 623
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

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

Writ -A No. 18422 of 2023

Connected with
 Writ-A No. 2255 of 2024

Nagendra Narayan Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Pankaj Tiwari, Rajan Upadhyay, Sr. Advocate

Counsel for the Respondents:
 C.S.C.

A. Service Law – Disciplinary proceeding – Punishment – Award of censure – Punishment order suffers from absence of reasons – Effect – Cryptic and laconic order – Validity challenged – Held, the imperative of furnishing reasons in an order, that is quasi judicial in nature, or even administrative, if it determines rights of parties and has civil consequences, cannot be underestimated, much less discounted – Tested on the anvil of well settled principles about what may be considered a valid order of punishment passed by a Disciplinary Authority, the impugned order cannot be sustained because it is utterly cryptic and laconic – Awarding censure to the petitioner cannot be sustained. (Para 24, 25, 27 & 43)

B. Service Law – Disciplinary proceeding – Punishment – Adverse entry and censure – For the same omission, both adverse entry and censure was awarded – Permissibility – Non-consideration of material evidence – Effect – Held, it is true that adverse entry and censure for the same act or omission can be awarded, but it is equally true that an adverse entry written in the ACR is not relevant material at all to return a finding based on the same omission in disciplinary proceedings. The findings of the Inquiry Officer are, therefore, based on ignorance of material evidence and taking into consideration of irrelevant material, besides being cryptic. The same cannot be sustained. (Para 36)

C. Expression 'Malice in Law' – Meaning – 'Legal malice' or 'malice in law' means 'something done without lawful excuse'.

In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others' – S. R. Venkataraman's case and Goverdhanlal Pitti's case relied upon. (Para 40 and 41)

D. Expression 'Perverse finding' – Meaning – 'Perverse finding' would mean a finding which is not only against the weight of evidence but is altogether against the evidence itself – Neelam Gupta's case relied upon. (Para 42)

E. Service Law – Promotion – Entitlement – The petitioner was deprived from promotion due to punishment order – Punishment order quashed – Effect – Held, the petitioner would be entitled to a consideration for promotion by the Selection Committee to be promptly convened and subject to the outcome of their recommendations, the petitioner entitled to seniority, if promoted to the next higher cadre with effect from the date that juniors to him have been promoted. (Para 44)

Writ petition allowed. (E-1)

List of Cases cited:

1. Mahabir Prasad Santosh Kumar Vs St. of U.P. & ors.; (1970) 1 SCC 764
2. S.R. Venkataraman Vs U.O.I. & anr.; (1979) 2 SCC 491
3. St. of A.P. & ors. Vs Goverdhanlal Pitti; (2003) 4 SCC 739
4. Neelam Gupta & ors. Vs Rajendra Kumar Gupta & anr.; 2024 SCC OnLine SC 2824

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

1. This judgment will decide the present writ petition and connected Writ-A No.2255 of 2024. Since affidavits have

been exchanged in Writ-A No.18422 of 2023, the said petition will be treated as the leading petition and facts noticed from the pleadings there.

2. The petitioner substantially seeks to challenge an order dated 04.09.2023 passed by the State Government, punishing him with the award of a censure after disciplinary proceedings. He also challenges the result of the Departmental Promotion Committee held on 05.09.2023, by which respondent No.3, an Officer junior to him, has been promoted to the post of a Chief Development Officer/ Joint Development Commissioner/ Joint Commissioner. The petitioner further prays that a mandamus be issued by this Court, ordering the State Government, represented by the Principal Secretary, Rural Development and the Commissioner, Rural Development, to consider the petitioner's name for promotion before the third respondent and others junior to him.

3. In the connected writ petition, the petitioner challenges an order passed by the State Government dated 04.10.2023, rejecting a representation made by the petitioner against the order dated 04.09.2023, impugned in the leading petition. This petition has, therefore, been heard on the basis of affidavits exchanged in the leading petition.

4. The petitioner is an officer in the Provincial Civil Service of the State. He belongs to the 1994 Batch. He joined service as a Block Development Officer on 11.12.1997. The petitioner says that he is the topper of the 1994 Batch. At the time this petition was presented, the petitioner was working as the Deputy Commissioner, National Livelihood Mission, Pratapgarh. The petitioner stands at Sr. No.1 of the

1994 Batch in the seniority list of the Provincial Development Service Cadre. A seniority list was issued in the year 2012, where the petitioner's name figures at Sr. No.289. He says that he has an exceptionally good service record and never awarded any adverse entry, except the one in the month of February, 2002, which the petitioner has represented against to the State Government. The representation was said to be pending until time when the leading petition was instituted, but this representation now stands decided and, in any case, does not survive the order dated 04.10.2023, impugned in the connected petition.

5. While the petitioner was stationed at Pratapgarh, he was placed under suspension pending inquiry vide order dated 29.11.2022. The suspension order says that the petitioner, while posted as the Deputy Commissioner (Self-Employment), Pratapgarh, inspected the community toilet at Village Kewaradih on 17.06.2022. On the basis of his inspection report, in place of Smt. Sita Devi, some other volunteer from the Self-Assistance Group was selected to look after the community toilet. In consequence, Writ-C No.4333 of 2022, Stri Mahila Swayam Sahayata Samooh through its President v. State of U.P. and others, was instituted before the Lucknow Bench of this Court. It is then remarked that the petitioner had not submitted his report regarding the community toilet based on records, on account of which the State Government was placed in an uncomfortable position before this Court. For the said happening, the petitioner was found prima facie guilty. It is remarked in the suspension order that for the petitioner not discharging his duties with responsibility, the Government's image was tarnished. The order goes on to

say that on this allegation, disciplinary proceedings are contemplated, pending which the petitioner has been placed under suspension. There was nothing else said in the suspension order, except the allegations indicated.

6. The petitioner says that he had carried out his inspection on 17.05.2022, acting on complaints received in his office and made his report after inspection based on an objective assessment of the situation that prevailed on the spot. His report is one dated 17.05.2022. The petitioner has made a reference to three orders, that were made in Writ-C No.4333 of 2022 by the Lucknow Bench of this Court. These are orders dated 13.07.2023, 27.07.2022 and 01.08.2022. It is pointed out that vide order dated 13.07.2022, this Court directed the Additional Chief Secretary to file his personal affidavit, but since he did not put in his affidavit, he was directed to appear in person vide order dated 27.07.2022. Upon his appearance before this Court by the Additional Chief Secretary orders were made regarding maintenance of toilet in rural areas, particularly highlighting the security of women, where toilets for men and women had to be constructed at some distance, as the orders would show.

7. The petitioner challenged the suspension order before the Lucknow Bench of this Court by means of Writ-A No.8333 of 2022, wherein the Court, vide order dated 22.12.2022, stayed the petitioner's suspension. In compliance, the petitioner was reinstated in service vide order dated 12.01.2023, but not paid his salary. When Writ-A No.8333 of 2022 came up before the Court, it appears that the Court disposed of the writ petition, declining to interfere with the suspension order, but with a direction to the Inquiry

Officer to complete the inquiry within a period of three months from the date the petitioner received a copy of the charge-sheet along with relevant documents relied upon in support of the charge. This direction was issued because the petitioner asserts that he was not given a copy of the charge-sheet in all this while. The petitioner says that he appeared before the Mission Director, U.P. Rural Livelihood Mission, Gomti Nagar, Lucknow on 26.06.2023 and requested him to furnish a copy of the charge-sheet as ordered by this Court. The Mission Director expressed his inability as a copy of the charge-sheet was not available with his office. In this regard, the Mission Director addressed a letter dated 28.04.2023 to the Additional Chief Secretary, Rural Development, Government of U.P., requesting that a copy of the charge-sheet be made available to him, so that the order of this Court to furnish a copy of the charge-sheet to the petitioner, could be complied with.

8. It is the petitioner's case that despite the aforesaid letter addressed by the Mission Director, the Additional Chief Secretary did not cause a copy of the charge-sheet to be furnished to the petitioner, compelling him to approach the Mission Director once again. The Joint Managing Director addressed a letter dated 18.05.2023 to the Additional Chief Secretary, requesting him to provide a copy of the charge-sheet for the purpose of providing it to the petitioner. A copy of the charge-sheet was ultimately served upon the petitioner on 15.05.2023. He asserts that a reply to it was submitted within a month i.e. on 14.06.2023. It is then said that in compliance with the directions of this Court carried in the order dated 24.04.2023 passed in Writ-A No.8333 of 2022, the respondents were bound to

conclude the inquiry within a period of three months from 15.05.2023 i.e. by 15.08.2023, but they did not do so. The petitioner was nevertheless served with a copy of the inquiry report on 08.08.2023, where the Inquiry Officer found the petitioner not guilty on the other charges, except Charge Nos.3 and 5. The petitioner submitted his objections to the inquiry report on 11.08.2023.

9. It is said by the petitioner that as regard Charge No.3, the misconduct, subject matter of the charge, had already been dealt with by the respondents and the petitioner awarded an adverse entry, against which he had preferred a representation, which was not disposed of. So far as Charge No.5 was concerned, it related to payment of travel allowance to employees of the department from June, 2020 to July, 2021. It is said by the petitioner that he was posted at the particular station, to which the charge relates, on 16.08.2021. He could, therefore, never be held responsible for payment of travel allowance to employees prior to his joining station. It is the petitioner's case that he had approached the Chief Development Officer and the Mission Director, who suggested seeking a clarification in the matter from the Mission Director. The petitioner wrote successive letters dated 08.08.2022, 06.09.2022 and 26.11.2022, requesting the Mission Director to issue a clarification as to the manner in which payment of travel allowance was to be made, inasmuch as the officer posted at the station between June, 2020 to July, 2021 had already retired or transferred to a different station. No clarification in this regard, according to the petitioner, was received from the Mission Director. In consequence, travel allowance payable to employees for the period June, 2020 to July, 2021 could not be released.

10. It is emphasized in this regard that there is a circular issued by the Chief Development Officer dated 28.05.2022, which requires certification under signatures of the officer posted at the station when the travel by employee/employees was undertaken, for payment of the allowance claimed. It is this requirement, which prevented the petitioner from releasing the travel allowance claimed for the period in question without the signatures of the officer posted at the relevant time or a clarification in this regard being issued by the Mission Director.

11. It is particularly emphasized that on one hand the disciplinary proceeding were not brought to an end, and on the other, the Commissioner, Rural Development issued a letter dated 19.07.2023, informing all officers of the cadre that a Departmental Promotion Committee to consider promotion of officers on vacant posts during the recruitment year 2022-23 shall be held and records of officers considered eligible for promotion had been summoned. It is pleaded that officers at Sr. Nos.1-12 of the list annexed to the letter dated 19.07.2023 issued by the Commissioner, Rural Development are officers of the 1993 Batch and those placed at Sr. Nos.13-26 belong to the 1994 Batch (the petitioner's batch). The petitioner, being the topper of his Batch, his name finds place at Item No.13 of the said list. The petitioner emphasizes that his eligibility is reflected from the list appended to the letter dated 19.07.2023, but says that the respondents are trying to harm the petitioner by not concluding the disciplinary proceedings, inasmuch the petitioner is the senior most officer of his Batch and there being no adverse entry in his service record, the petitioner was

entitled to be considered for promotion to the next higher post, certainly before his juniors.

12. The petitioner made a detailed representation to the Additional Chief Secretary on 11.08.2023, requesting that the inquiry proceedings be dropped looking to the frivolous nature of the charges against him. No order was made on the said representation by the Additional Chief Secretary. It is said that the order dated 29.11.2022, by which proceedings were initiated against the petitioner and the charges that figure in the charge-sheet show the flimsy nature thereof and further indicate that these were brought with a view to harass the petitioner.

13. The petitioner, apprehending a non-consideration of his case for promotion, instituted Writ-A No.15117 of 2023, which was taken up on 12.09.2023. Since, there was a strike by members of the Bar on that day, no one appeared on the petitioner's behalf. This Court, however, disposed of the writ petition aforesaid vide order dated 12.09.2023, directing the competent Authority to decide the petitioner's representation dated 11.08.2023 (addressed to the Additional Chief Secretary), in accordance with law within a period of three weeks from the date of receipt of a certified copy of the order made by this Court. The petitioner was directed to serve a copy of the representation dated 11.08.2023 again, along with a certified copy of the order passed by this Court. In compliance with the order dated 12.09.2023 passed by this Court, the petitioner moved a detailed representation to the Principal Secretary, Rural Development, Lucknow (the competent Authority), bringing to his notice the order of this Court. In

compliance with the orders of this Court dated 12.09.2023 passed in Writ-A No.15117 of 2023, the State Government passed orders dated 04.09.2023, punishing the petitioner with the award of a censure and disposing of the disciplinary proceedings.

14. Aggrieved by the order dated 04.09.2023, the petitioner has instituted the present writ petition. The connected writ petition has been instituted against the order dated 04.10.2023 passed by the State Government, rejecting the petitioner's representation dated 08.09.2023 preferred against the order dated 04.09.2023 to the State Government.

15. Notice of motion in the leading petition was issued on 02.11.2023. A counter affidavit on behalf of respondent Nos.1 and 2 was filed on 30.01.2024, to which the petitioner has filed a rejoinder on 09.05.2024. This petition was admitted to hearing on 02.07.2024, which proceeded forthwith. The matter was heard further on 05.07.2024 and finally on 23.07.2024, when judgment was reserved.

16. Heard Mr. Ramesh Upadhyay, learned Senior Advocate assisted by Mr. Rajan Upadhyay and Mr. Pankaj Tiwari, learned Counsel in support of this petition and the learned Standing Counsel on behalf of the State.

17. It is submitted by Mr. Ramesh Upadhyay, learned Senior Advocate that the petitioner, while holding the position of the Deputy Commissioner, National Livelihood Mission, Pratapgarh, had conducted an on-spot inquiry on 17.06.2022 regarding the maintenance of public toilets. The Principal Secretary, Rural Development had issued a circular dated 15.07.2020, saying that

maintenance of public toilets should be done through a self-help group, for which requisite orders may be made by the Gram Panchayat. While conducting the inquiry as aforesaid, the Block Development Officer of the concerned Block informed the petitioner that there was no record regarding maintenance of community toilets available in his office. The petitioner, therefore, recommended that maintenance of public toilets be done through resolution of the Gaon Sabha passed in an open meeting, as directed by the Principal Secretary. In the meantime, Writ-C No.4333 of 2022, questioning the allotment of public toilets, was filed before the Lucknow Bench of this Court and the Division Bench vide their Lordships' order dated 13.07.2022 directed the Additional Chief Secretary to file his personal affidavit, scheduling the case for 27.07.2022. As the Additional Chief Secretary did not file his personal affidavit by the date fixed, the Division Bench summoned him. This piqued the Additional Chief Secretary into ensuring the petitioner's suspension from service vide order dated 27.11.2022, which specifically mentions that as a result of the petitioner's report, the State Government faced an awkward position before the Court, for which the petitioner was prima facie to blame.

18. The Inquiry Officer found Charge No.3 proved and Charge No.5 partially proved against the petitioner. The petitioner filed his detailed objections to the inquiry report. In his objections, the petitioner said that he had mentioned reasons for the delay in the feeding of data in the computer and that was primarily on account of the strike by contract employees. It was also mentioned that the average feeding of data in the entire State

was 50% and it was 63% in District Pratapgarh. It was also said by the petitioner in his objection that he had been given an adverse entry already and a second punishment for the same allegation cannot be awarded. This was regarding Charge No.3. In relation to Charge No.5, it was said that the matters relating to travel allowance, antedated the petitioner's posting at Pratapgarh. Despite repeated requests by him to the Chief Development Officer, regarding the matter of payment of travel allowance to employees of the Department, which related to a period of time before he joined, the Chief Development Officer asked the petitioner to seek a clarification from the Mission Director. The petitioner did seek clarifications through several letters, but none was forthcoming either from the Chief Development Officer or the Mission Director. This resulted in delay in the payment of travel allowance to some of the employees, which relates to a period of time before the petitioner joined his post at Pratapgarh. It is in the last submitted by Mr. Ramesh Upadhyay that the only reason given in the impugned order is that the delinquent officer's reply was not satisfactory. This reasoning, according to Mr. Upadhyay, is absolutely cryptic and in breach of Rule 10(2) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for short, 'the Rules of 1999'), which provides that where a penalty is imposed, reason thereof shall be given. It is, particularly, urged by Mr. Upadhyay that the Departmental Promotion Committee was scheduled to meet on 05.09.2023 and the impugned order was passed mala fide with a view to harm the petitioner, so that he would become ineligible for consideration. It is also pointed out by the learned Senior Advocate that the promotion order dated 24.05.2024,

filed as Annexure No.2 to the supplementary affidavit dated 23.07.2024, shows that persons junior to the petitioner have been promoted in the higher scale and on the higher post, leaving out the petitioner.

19. The learned Standing Counsel, on the other hand, submits that the order of punishment has been passed after going through the entire procedure of inquiry required to be made in a major penalty matter, even though what has been awarded to the petitioner is a minor penalty. This could be done by just issuing the petitioner with a show cause notice and nothing more. He submits that the jurisdiction of this Court does not extend to scrutinizing the correctness of the decision made by the Disciplinary Authority, but the fairness of procedure. There is nothing unfair about the procedure adopted in holding the disciplinary inquiry or in passing the order impugned based on the inquiry report, which too has been done after furnishing the petitioner a copy of the inquiry report. The petitioner's reply to the inquiry report too has been considered.

20. We have carefully considered the submissions advanced on behalf of the parties by learned Counsel and perused the record.

21. The charges, on the foot of which this inquiry has proceeded, carries seven charges. The copy of the charge-sheet filed along with the petition, for some reason, is a truncated document, where all charges, otherwise reflected from the record, are not there. That, however, does not make much difference because in the inquiry report dated 27.07.2022, all the seven charges have been set out verbatim. Out of the seven charges, Charges Nos.1, 2,

4 and 6 were held not proved, whereas Charge No.3 proved and Charge No.5 partially proved. No finding was recorded on Charge No.7 on ground that the matter was being examined by the Additional Chief Secretary and also the subject of a writ petition before the Lucknow Bench of this Court. The impugned order of punishment dated 04.09.2023, that has been passed, is, therefore, founded on whatever culpability, has been determined for the petitioner on the basis of conclusions recorded by the Inquiry Officer, vis-a-vis Charges Nos.3 and 5. Charge No.3 reads:

"आरोप संख्या-3"

शासन के निर्देशानुसार आई०सी०डी०एस० के अन्तर्गत स्वयं सहायता समूहों द्वारा आई०सी०डी०एस० केन्द्रों पर ड्राई राशन पहुँचाने / वितरण का कार्य किया जा रहा है। जनपद प्रतापगढ़ में माह अक्टूबर, 2020 तक कुल 1155 स्वयं सहायता समूहों के सापेक्ष मात्र 02 स्वयं सहायता समूहों के बैंक डिटेल्स दिनांक 11 फरवरी, 2022 तक पोर्टल पर फीड करते हुए वेरिफाई किया गया है। आप द्वारा आई०सी०डी०एस० योजनान्तर्गत ड्राई राशन वितरण जैसे महत्वपूर्ण योजना का क्रियान्वयन ससमय सम्पादित नहीं कराया गया। आपके शिथिल रवैये के प्रति शासन के पत्र संख्या आर-20 / 38-1-2022-3508 / 2022 दिनांक 11.02.2022 द्वारा प्रतिकूल प्रविष्टि निर्गत की गयी जिसके लिए आप दोषी है। माह अगस्त 2021 में स्वयं सहायता समूह से जुड़ी महिलाओं द्वारा ड्राई राशन वितरित किया गया था, उनके पारिश्रमिक की धनराशि के भुगतान हेतु पोर्टल पर वितरण की रिपोर्ट की फीडिंग 63 प्रतिशत पायी गयी। योजना के क्रियान्वयन में आपके द्वारा अपेक्षित रुचि नहीं ली जा रही है, जिसके लिए प्रथम दृष्टया आप दोषी हैं।"

22. Likewise, Charge No.5 runs as follows:

"आरोप संख्या-5"

राष्ट्रीय ग्रामीण आजीविका मिशन के अन्तर्गत डी०एम०एम०/ बी०एम०एम० सहित कुल 74

कर्मचारियों की यात्रा-भत्ता भुगतान सम्बन्धी पत्रावली कार्यालय में दिनांक 09.05.2022 को प्रस्तुत की गयी। प्रस्तुत पत्रावली में उक्त तिथि को पाया गया कि अधिकांश यात्रा-भत्ता सम्बन्धी मांग पत्र खण्ड विकास अधिकारी द्वारा सत्यापित नहीं है/ सहायक विकास अधिकारी के हस्ताक्षर है / सचिव द्वारा सहायक विकास अधिकारी के रूप में हस्ताक्षर किया गया है/ मांगपत्र मूल रूप में न होकर छायाप्रतियां है जो वित्तीय मामलों में स्वीकार्य नहीं है, जबकि लेखाकार द्वारा राष्ट्रीय ग्रामीण आजीविका मिशन के अन्तर्गत एफ०एल०टी०ए० मद के भुगतान सम्बन्धी बिन्दुओं पर स्थिति स्पष्ट किये जाने का उल्लेख किया गया है। इसके उपरान्त दिनांक 28.05.2022 को 41 कर्मचारियों के टी०ए० हेतु पत्रावली प्रस्तुत की गयी। परीक्षण करने पर पत्रावली उल्लिखित बिन्दुओं के सापेक्ष नहीं पायी गयी। यथा:- खण्ड विकास अधिकारी मान्धाता एवं कुण्डा का हस्ताक्षर फॉर करके किया गया है। सभी टी०ए० मांगपत्र की छायाप्रतियां संलग्न की गयी है। कोई भी मांग पत्र लेखाकार एवं उपायुक्त स्वतः रोजगार द्वारा सत्यापित नहीं किया गया है। राष्ट्रीय ग्रामीण आजीविका मिशन के अन्तर्गत विकास खण्ड स्तर पर कार्यरत मिशन प्रबन्धकों ने अपने प्रार्थनापत्र दिनांक 05.08.2022 द्वारा अवगत कराया गया है कि उनका यात्रा भत्ता माह जून, 2020 से तथा पूर्व में चलायी गयी ड्राईवों के संचालन में होने वाले व्यय का समायोजन लम्बित है। तत्क्रम में मुख्य विकास अधिकारी, प्रतापगढ़ के पत्र संख्या 302 दिनांक 28.05.2022 के माध्यम से 'कारण बताओ नोटिस' निर्गत किया गया एवं पत्र संख्या 744 दिनांक 06.09.2022 के माध्यम 'चेतावनी' निर्गत की गयी जिसका आपके द्वारा उत्तर नहीं दिया गया, इस प्रकार पर्यवेक्षणीय / पदीय दायित्वों का निर्वहन नहीं किये जाने के लिए प्रथम दृष्टया आप दोषी है।"

23. While it is true that in any quasi judicial proceedings or administrative proceedings, charges are not required to be framed with the formality expected and forthcoming in a Court of law, but the charge should nevertheless be definitive in its terms and convey the essentials of the act or omission, on the basis of which

misconduct is alleged. It should be fairly ascertainable by the delinquent as to what is the allegation against him with sufficient particulars indicated to enable him to effectively answer it. In this context while some sense may be made of Charge No.3, this is not the case with Charge No.5. Charge No.5, as would be evident, carries a jumble of allegations and hardly reads like a charge. It reads more like a part from an essay. Vague and mixed up allegations of the kind, that Charge No.5 is, would certainly prejudice any delinquent as it would have done the petitioner in effectively defending himself. Nevertheless, the petitioner has answered the charges and an inquiry report submitted.

24. There is one singular flaw, so far as the impugned order goes, and that is, its cryptic nature and the absence of reasons. At the end of a long-winded description of the two Charges, Nos.3 and 5, of which the petitioner has been held guilty, his defence, the opinion of the Inquiry Officer and the objections of the petitioner, all that is said by the Disciplinary Authority, is an abrupt conclusion sans reasons, that reads:

"जांच आख्या एवं अन्य सुसंगत अभिलेखों में वर्णित तथ्यों के आलोक में परीक्षणोपरान्त अपचारी अधिकारी द्वारा उपलब्ध कराये गये उपरोक्त उत्तर को संतोषजनक नहीं पाया गया। अतः सम्यक् विचारोपरान्त डॉ० एन०एन० मिश्रा, उपायुक्त (स्वतः रोजगार), जनपद-प्रतापगढ़ को 'परिनिन्दा' का दण्ड देते हुए उनके विरुद्ध संस्थित अनुशासनिक कार्यवाही को समाप्त किये जाने के आदेश एतद्वारा श्री राज्यपाल प्रदान करती हैं। उक्त दण्ड मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या-4333/2022 स्त्री महिला स्वयं सहायता समूह बनाम उ०प्र० राज्य व अन्य में पारित होने वाले अंतिम निर्णय के अधीन होगा।"

25. There is absolutely nothing to show as to what reasons have prevailed with the Disciplinary Authority on the basis of evidence on record to reach the conclusions that he did. It is, therefore, difficult to judge the validity of the order impugned, testing it on principles by which its validity may be assessed. The imperative of furnishing reasons in an order, that is quasi judicial in nature, or even administrative, if it determines rights of parties and has civil consequences, cannot be underestimated, much less discounted.

26. In **Mahabir Prasad Santosh Kumar v. State of U.P. and others, (1970) 1 SCC 764**, the necessity to give reasons for an authority acting in a quasi judicial capacity or even an executive authority, whose decision would affect rights of parties was emphasized by the Supreme Court in the following words:

"6. From the materials on the record it cannot be determined as to who considered the appeal addressed to the State Government, and what was considered by the authority exercising power on behalf of the State Government. The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the rights of the aggrieved party without giving reasons is a negation of the rule of law. This Court had occasion to protest against this practice in several decisions: see *Madhya Pradesh Industries Ltd. v. Union of India* [(1966) 1 SCR 466] (per Subba Rao, J.); *Bhagat Raja v. Union of India* [(1967) 3 SCR 302]; *State of M.P. v. Seth Narsinghadas*

Jankidas Mehta [CA No. 621 of 1966, decided on April 29, 1969] ; State of Gujarat v. Patel Raghav Natha [CA No. 723 of 1966, decided on April 21, 1969] ; and Prag Das Umar Vaishya v. Union of India [CA No. 657 of 1965, decided on August 17, 1967] . The power of the District Magistrate was quasi-judicial: exercise of the power of the State Government was subject to the supervisory power of the High Court under Article 227 of the Constitution and of the appellate power of this Court under Article 136 of the Constitution. The High Court and this Court would be placed under a great disadvantage if no reasons are given, and the appeal is dismissed without recording and communicating any reasons.

7. Opportunity to a party interested in the dispute to present his case on questions of law as well as fact, ascertainment of facts from materials before the Tribunal after disclosing the materials to the party against whom it is intended to use them, and adjudication by a reasoned judgment upon a finding of the facts in controversy and application of the law to the facts found, are attributes of even a quasi-judicial determination. It must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him: it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution.

Satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the Appellate Authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.”

27. Tested on the anvil of well settled principles about what may be considered a valid order of punishment passed by a Disciplinary Authority, the impugned order cannot be sustained because it is utterly cryptic and laconic. We hold accordingly.

28. So far as the findings of the Inquiry Officer on Charges Nos.3 and 5 are concerned, it would be appropriate to consider each of them separately to find out if there is any perversity or manifest illegality about them. In holding the petitioner guilty on Charge No.3, the Inquiry Officer has recorded the following finding:

"शासन के निर्देशानुसार आई०सी०डी०एस० के अन्तर्गत स्वयं सहायता समूहों द्वारा आई०सी०डी०एस० केन्द्रों पर ड्राई राशन

पहुँचाने / वितरण का कार्य किया जा रहा है। जनपद प्रतापगढ़ में माह अक्टूबर, 2020 तक कुल 1155 स्वयं सहायता समूहों के सापेक्ष मात्र 02 स्वयं सहायता समूहों के बैंक डिटेल्स दिनांक 11 फरवरी, 2022 तक पोर्टल पर फीड करते हुए वेरिफाई किया गया है। अपचारी अधिकारी द्वारा आई०सी०डी०एस० योजनान्तर्गत ड्राई राशन वितरण जैसे महत्वपूर्ण योजना का क्रियान्वयन ससमय सम्पादित नहीं कराया गया। इसी प्रकार स्वयं सहायता समूह से जुड़ी महिलाओं द्वारा वितरित किये गये ड्राई राशन के सापेक्ष पारिश्रमिक धनराशि के भुगतान हेतु बैंक खाते का डिटेल्स पोर्टल पर अपलोड / वेरीफाई कर, उच्च स्तर से निर्दिष्ट किये जाने के बाद भी अपचारी अधिकारी द्वारा अपेक्षित रूचि नहीं ली गयी, जिससे योजना के क्रियान्वयन में विलम्ब होना प्रतीत होता है जिसके लिए अपर मुख्य सचिव, ग्राम्य विकास अनुभाग-1, उ०प्र० शासन के आदेश संख्या आर - 20 / 38-1-2022-3508 / 2022 दिनांक 11.02.2022 द्वारा अपचारी अधिकारी को प्रतिकूल प्रविष्टि निर्गत की गई है।

अपचारी अधिकारी द्वारा अपने उत्तर / स्पष्टीकरण में यह उल्लेख किया गया है कि माह अक्टूबर 2020 के सापेक्ष 11 फरवरी, 2022 तक 1155 स्वयं सहायता समूहों की मैपिंग के सापेक्ष 958 समूहों की मैपिंग की गई थी तथा मात्र 02 स्वयं सहायता समूहों के बैंक डिटेल्स पोर्टल पर फीड करते हुए वेरीफाई किया गया है तथा शेष 197 समूहों की मैपिंग एवं 1153 समूहों के बैंक डिटेल्स पोर्टल पर फीड करने के सम्बन्ध में तकनीकी समस्या का कारण बताते हुए प्रतिरक्षा साक्ष्य - 18 एवं 18 / 1 संलग्न किया है।

अपचारी अधिकारी द्वारा ड्राई राशन वितरण योजना का कार्य कर रहे स्वयं सहायता समूहों की पोर्टल पर निर्धारित अवधि में मैपिंग एवं उनके बैंक खाते पोर्टल पर अपलोड करते हुए वेरीफाई करने में पर्याप्त रूचि नहीं लिया जाना प्रतीत होता है, जिसके कारण से ऐसी स्थिति उत्पन्न हुई। अपचारी अधिकारी द्वारा अपने बचाव में ड्राई राशन वितरित करने व स्वयं सहायता समूहों के बैंक खातों का डिटेल्स पोर्टल पर अपलोड / वेरीफाई करते हुए अद्यतन स्थिति से भी अवगत कराने हेतु कोई साक्ष्य भी नहीं प्रस्तुत किया गया है।

इस प्रकरण पर अपर मुख्य सचिव, ग्राम्य विकास अनुभाग-1, उ०प्र० शासन के आदेश संख्या आर-20 / 38-1-2022-3508 / 2022 दिनांक 11.02.2022 द्वारा दी गई प्रतिकूल प्रविष्टि एवं अपचारी अधिकारी द्वारा अपने बचाव में अद्यतन स्थिति से भी अवगत कराने हेतु कोई साक्ष्य भी नहीं प्रस्तुत किया गया है, जिससे अपचारी अधिकारी को उक्त आरोप के सम्बन्ध में दोष मुक्त किये जाने पर विचार किया जा सके।

अतः आरोप संख्या-3 अपचारी अधिकारी के ऊपर सिद्ध पाया गया।"

29. The learned Senior Counsel for the petitioner urged that an inquiry had already been held in respect of the subject matter of Charge No.3 and an adverse entry awarded to the petitioner, against which his representation is pending before the Principal Secretary. The submission is that on the same charge, another adverse entry (the censure) could not have been awarded. In the counter affidavit filed on behalf of respondent Nos.1 and 2, the stand taken in paragraph No.10 is that due to lack of interest shown by the petitioner in the verification and uploading of the mapped self-help groups engaged in important tasks, like dry ration distribution under the Integrated Child Development Scheme (for short, 'ICDS') and bank accounts of such groups on the portal meant for the purpose, the progress of the scheme remained very slow. It is then said that for this laxity, an adverse entry was awarded to the petitioner. The stand in paragraph No.10 of the counter affidavit further is that an adverse entry is a negative evaluation of the employee's work, which does not fall into the category of punishment, whereas the censure now awarded for the same omission/ misconduct is a measure of punishment awarded in disciplinary proceedings.

30. This Court may say that the contention of the respondents during hearing, which is in accord with their stand in the counter affidavit, is well founded.

31. An adverse entry is a general evaluation of an employee's work and performance, which is invariably entered in his Annual Confidential Report (for, 'the ACR'). It is certainly not a punishment meted out after disciplinary proceedings. By contrast, a censure is a punishment, that is awarded after disciplinary proceedings. It is quite possible that for the same act/ omission/ laxity, the employee may be given an adverse remark in his ACR and then charge-sheeting the employee for the same omission/ misconduct, disciplinary proceedings may be initiated, where the punishment of censure may be awarded, like any other.

32. It may be true that for the same imputed omission, the petitioner has been awarded an adverse entry in his ACR and then proceeded with by the respondents in their disciplinary jurisdiction, where after holding inquiry, on the basis of the report submitted, the Disciplinary Authority has awarded a censure. This is not a case of the petitioner being punished twice or proceeded with against twice for the same misconduct. The contention of the learned Senior Advocate on this point, therefore, is not tenable.

33. The next point urged by the learned Senior Advocate for the petitioner is that the findings holding the petitioner guilty of Charge No.3 is based on a perverse view of the evidence, one recorded without consideration of relevant material, and, rather, consideration of irrelevant material. The findings are manifestly illegal. Charge No.3 has two

parts to it. The first is that out of 1155 self-help groups associated with the ICDS in District Pratapgarh and engaged in the work of delivering ration to the ICDS Centres or distribution of that ration, two of these groups alone had their bank details posted on the portal after verification up to 11.02.2022. The petitioner was charged of being guilty of not ensuring timely distribution of dry ration under the ICDS. Under the second part of the charge, the substance of imputation against the petitioner is that he did not post the bank account details of women volunteers associated with the self-help groups involved in the distribution of dry ration on the portal by ensuring its uploading and verification, which was essential to ensure payment of due wages to these volunteers.

34. The charge goes that despite the petitioner being directed by higher officials to undertake posting of all these volunteer details, he did not take any interest, leading to a delay in the implementation of the ICDS and further that for the said delay, the petitioner has been awarded an adverse entry in his ACR. The petitioner in his reply to the said charge has taken a categorical plea that in the initial stages of implementation of the scheme, there were teething problems encountered. It was his defence that compared to October, 2020, in February, 2022, 958 of the self-help groups out of 1155 had been mapped and the bank account details of two of them fed on the portal and verified. The mapping of the remainder of 197 self-help groups and posting of bank account details of the 1153 remaining could not be done due to technical problems in feeding the data on the portal. Steps were taken for the removal of difficulties. Some delay occurred at the level of the District Mission Management

Unit that lay outside the petitioner's control. On his part, the petitioner harnessing all his strength contacted the headquarters and coordinated with them to surmount the technical difficulties encountered in feeding the relevant data. He never delayed uploading the data, but on account of the computer application's technical problems, the delay occurred, which too was dealt with and the data feeding completed.

35. It is also the petitioner's defence that from time to time guidance was sought from the State Level functionaries through VC/ workshops in order to enable the petitioner to overcome the difficulties faced. The petitioner undertook his duties for the implementation of the scheme in right earnest from the beginning, but there was slow progress in implementation at the early stages. Relevant evidence, demonstrating the petitioner's efforts to ensure early feeding of data surmounting difficulties is mentioned in the petitioner's reply by reference. The petitioner also emphasized that whereas in District Pratapgarh, in consequence of the petitioner's efforts, the feeding of data relating to self-help groups and their volunteers was 63%, in the rest of the State it was just 50%. The petitioner claimed that he was in no manner negligent or lax in the performance of his duties.

36. A perusal of the findings recorded by the Inquiry Officer on Charge No.3 betrays a rather cryptic and a priori approach. The Inquiry Officer has, without assigning reasons with reference to any evidence, remarked that the petitioner did not show sufficient interest in mapping or uploading the bank account details after verification on the portal relating to self-help groups engaged in the distribution of dry ration under the scheme. It is then casually

remarked that the petitioner has not produced any evidence in support of his defence. Also, the Inquiry Officer has taken into consideration the fact that for the same lapse relating to delay in posting of bank account details of self-help groups and volunteers etc., the petitioner has been awarded an adverse entry. Now, the fact has been completely ignored, which the petitioner asserted and the respondents did not deny that the maximum feeding of data, i.e. 63%, was done in the District of Pratapgarh, whereas in the rest of the State, it was 50%. If that were ignored also, the technical glitches in the operation of the computer application necessary to upload data on the web portal was a defence that has not at all been considered by the Inquiry Officer. He has just glossed it over. To the contrary, he has taken into consideration the fact that for the same omission and misconduct, the petitioner has been awarded an adverse entry, ignoring evidence that the petitioner apparently offered to show that he made efforts to get over technical problems in the application necessary to upload details of self-help groups, volunteers etc., besides mapping of the said groups during the early stages of the scheme. It is apparently a case where relevant evidence has been ignored and at least one irrelevant evidence, that is the adverse entry taken into consideration. It is true that adverse entry and censure for the same act or omission can be awarded, but it is equally true that an adverse entry written in the ACR is not relevant material at all to return a finding based on the same omission in disciplinary proceedings. The findings of the Inquiry Officer are, therefore, based on ignorance of material evidence and taking into consideration of irrelevant material, besides being cryptic. The same cannot be sustained.

37. Now, to turn to Charge No.5, of which the petitioner has been held

partially guilty. The crux of the matter is that files relating to travel allowance reimbursement of 74 employees working under the NRLM scheme were found full of financial objections when presented by the petitioner to the Chief Development Officer on 09.05.2022 for approval. These objections were like non-verification of the travel allowance bills by the concerned Block Development Officer or in some of these, a Secretary signing for the Additional Development Officer, or the travel allowance claim form not being there in original, but a photostat copy. The petitioner's defence is that these files were all complete and relate to the period between June, 2020 to August, 2021, whereas the petitioner joined the post on 16.08.2021. The responsibility for any deficiencies in these papers are to be blamed on the incumbent officers of the time. Nevertheless, the petitioner got the objections removed when pointed out and presented these papers to the Chief Development Officer. It was held by the Inquiry Officer that the petitioner did not scrutinize the travel allowance claim papers before presenting them for administrative approval to the Chief Development Officer on 09.05.2022. The petitioner had inspected the papers. He could have got the objections removed at his level. The remark of the Inquiry Officer is that the petitioner did not take appropriate measures to present the TA Claim papers before the Chief Development Officer after due adherence to financial rules. The inference drawn is that the petitioner's act in presenting these defective papers for financial approval of the TA Bills shows slackness in supervision on his part.

38. This Court must remark that the Inquiry Officer did not at all the examine the petitioner's principal

contention that the papers relating to the TA claims of 24 employees related to a period of time when his predecessors in office were there, who had got the records completed. It is they who would be answerable. This case with reference to the material on record ought have been examined by the Inquiry Officer. Quite apart, the matter, that is subject of the charge, is indeed too trivial to be classed a charge. There are things in the course of discharge of official functions that may not show the best of performance by the officer, but would not constitute his omissions or actions into service misconduct of any kind. There are matters in official business, where some slackness or some failure may be no more than wear and tear of service. As already remarked, for such matters the petitioner may be rated poor in his ACR for the relevant year, if the competent Authority in the establishment feels so, but would not render his omission always a misconduct to be punished in the disciplinary jurisdiction; not even by a censure.

39. On a wholesome perspective of the matter, both Charges Nos.3 and 5 are no more than lapses of performance, short of what can be called misconduct. These could have led to an adverse ACR entry and did result in one against which the petitioner's representation is pending. Nevertheless, to treat such kind of lapses in the discharge of official duties a misconduct and proceed in their disciplinary jurisdiction seems to be a misplaced and manifestly illegal invocation by the respondents. Also, resort to proceedings for misconduct in their disciplinary jurisdiction by the respondents against the petitioner, where apparently no more than some lapses of performance are

exhibited, would constitute malice in law, if not in fact.

40. The distinction between malice in law and malice in fact has been adumbrated by the Supreme Court in **S.R. Venkataraman v. Union of India and another, (1979) 2 SCC 491** in the context of an order of premature retirement passed against a public servant under clause (j)(i) of Rule 56 of the Fundamental Rules thus:

“5. We have made a mention of the plea of malice which the appellant had taken in her writ petition. Although she made an allegation of malice against V.D. Vyas under whom she served for a very short period and got an adverse report, there is nothing on the record to show that Vyas was able to influence the Central Government in making the order of premature retirement dated March 26, 1976. It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is however, quite different. Viscount Haldane described it as follows in *Shearer v. Shields* [(1914) AC 808, 813] :

“A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts

ignorantly, and in that sense innocently.”

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.”

41. The distinction is also noticed in **State of A.P. and others v. Goverdhanlal Pitti, (2003) 4 SCC 739**, where it is observed:

“12. The legal meaning of malice is “ill-will or spite towards a party and any indirect or improper motive in taking an action”. This is sometimes described as “malice in fact”. “Legal malice” or “malice in law” means “something done without lawful excuse”. In other words, “it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others”. (See *Words and Phrases Legally Defined*, 3rd Edn., London Butterworths, 1989.)”

42. Similarly, the principle about what constitutes perverse finding has been explained by the Supreme Court in **Neelam Gupta and others v. Rajendra Kumar Gupta and another, 2024 SCC OnLine SC 2824**, which reads:

“15. That apart, a scanning of the impugned judgment would reveal that the High Court has picked up certain crucial perversities that infected the

judgments of the courts below. In Stroud's Judicial Dictionary of Words & Phrases, 4th Edn., the expression 'perverse' has been defined thus:—

“Perverse. - A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

In the decision in *Arulvelu v. State Rep.* by Public Prosecutor, (2009) 10 SCC 206 this Court held that 'perverse finding' would mean a finding which is not only against the weight of evidence but is altogether against the evidence itself.

In the decision in General Manager (P), Punjab & Sind Bank v. Daya Singh, (2010) 11 SCC 233, this Court held perverse finding as one which is based on no evidence or one that no reasonable person would arrive at. Furthermore, it was held that unless it is found that some relevant evidence had not been considered or that certain inadmissible material had been taken into consideration the finding could not be said to be perverse.”

43. This Court is, therefore, of opinion that the impugned order dated

04.09.2023, awarding censure to the petitioner, cannot be sustained.

44. Now, so far as the petitioner's claim to promotion is concerned, it is evident from paragraph No.13 of the counter affidavit that since he was awarded the punishment of censure a day before the Selection Committee meeting was held on 05.09.2023, he was found unfit and not recommended for promotion. Therefore, in consequence of the order of punishment being quashed, the petitioner would be entitled to a consideration for promotion by the Selection Committee to be promptly convened and subject to the outcome of their recommendations, the petitioner entitled to seniority, if promoted to the next higher cadre with effect from the date that juniors to him have been promoted. No financial benefits, of course, would accrue to the petitioner prior to the time that he is actually promoted to the next higher cadre.

45. So far as the order impugned in the other writ petition is concerned, it is an order passed by the State Government on a representation preferred by the petitioner against the order, awarding censure. The said representation, in fact, did not lie as the impugned order was passed by the State Government themselves. Once, the impugned order dated 04.09.2023 is quashed, no further orders would be required to be made as regards the order impugned in the connected writ petition, rejecting the petitioner's representation.

46. In the result, Writ-A No.18422 of 2023 succeeds and is allowed. The impugned order dated 04.09.2023 passed by the State Government is hereby **quashed**. The petitioner shall be entitled to a consideration for promotion to the next higher post by a Selection Committee to be

convened within a period of two months next of the receipt of a certified copy of this order, with a declaration of the result to follow within a week, and subject to the outcome of their recommendations, the petitioner entitled to seniority, if promoted to the next higher cadre with effect from the date that juniors to him have been promoted. No financial benefits, of course, would accrue to the petitioner prior to the time that he is actually promoted to the next higher cadre.

47. So far as Writ-A No.2255 of 2024 is concerned, the same is consigned to record.

48. There shall be no order as to costs.

(2024) 12 ILRA 639
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2024

BEFORE

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

Writ -A No. 34221 of 2017

Kumari Manisha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Shiv Raj Singh, Shri Ram Pandey, Sunil Kumar,
Sunil Kumar I

Counsel for the Respondents:

C.S.C., Jitendra Shanker Pandey

A. Service Law – UP Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Rule 7 – Compassionate appointment – Applicant, claiming the appointment, was born out of the deceased's second marriage – Entitlement of children of void marriage to

get compassionate appointment – Held, denial of opportunity to a consideration for compassionate appointment to a child born of a second marriage to a deceased employee contracted during the lifetime of the first wife was discriminatory – *Mukesh Kumar' case* relied upon – It is idle for the respondents to contend that the petitioner has no valid candidature to assert for compassionate appointment under the Rules of 1974. (Para 11 and 12)

B. Constitution of India – Article 14 – Right to equality – Classification between children of void marriage and children of valid marriage – Permissibility – Held, children, born whether of a void marriage, once legitimate, were held equally entitled to a consideration for compassionate appointment as children born of a valid marriage – *V. R. Tripathi's case* relied upon. (Para 10)

Writ petition allowed. (E-1)

List of Cases cited:

1. Ramesh Chandra Verma Vs U.P. Power Corporation Ltd. & ors.; (2013) 3 UPLBEC 2198
2. Ramesh Chand Vs Executive Engineer & ors.; 2012 (1) ADJ 143 (DB)
3. Rameshwari Devi Vs St. of Bihar & ors.; (2000) 2 SCC 431
4. Rakesh Kumar Pandey Vs St. of U.P.; 2006 SCC OnLine All 469
5. U.O.I.& anr. Vs V.R. Tripathi; (2019) 14 SCC 646

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

1. This writ petition is directed against an order of the Superintendent of Police, Maharajganj dated 02.07.2017,

rejecting the petitioner's claim for compassionate appointment.

2. The petitioner, Kumari Manisha, is the daughter of the late Virendra Prasad, a Constable in the Government Railway Police. He died in harness on 26.08.2013, after an illness. The late Virendra Prasad had two wives. Smt. Dulari Devi, he had married first, born of whom were two sons, Umesh Kumar, Rakesh Kumar and four daughters, Km. Sarita, Km. Suman, Km. Punam and Km. Renu. He married a second time Smt. Saraswati Devi, of whom were born three daughters, to wit, Km. Manisha (the petitioner), Km. Isha and Km. Nisha. The petitioner says that the late Virendra Prasad had solemnized his marriage with Smt. Saraswati Devi, with the consent of his first wife as well as the other family members. Therefore, both wives are said to hold equal rights upon their husband's estate, retirement benefits and privileges. Both the wives and their children were living with the late Virendra Prasad, being on good terms until Virendra Prasad's demise. After Virendra Prasad's death, according to the petitioner, the family pension as well as other allowances were credited in the name of Smt. Dulari Devi. By consent of Smt. Saraswati Devi, the petitioner's mother, an agreement was penned, in terms whereof the pension and other allowances would be distributed equally between both wives of the deceased. The said agreement was inked on 01.03.2014.

3. The petitioner says that the deceased's elder son, Umesh Kumar, born of Smt. Dulari Devi, is 38 years old, well settled in his business and lives in his parental house happily along with his family. The other son, born of Smt. Dulari Devi, Rakesh Kumar, is also well settled in

a government service. He is a junior engineer. All daughters, born of the deceased's marriage with Smt. Dulari Devi, to wit, Smt. Sarita, Smt. Suman, Smt. Punam and Smt. Renu, are all well settled in their matrimonial homes and living happily. The petitioner also says that there was a division of funds paid to Smt. Dulari Devi towards death-cum-retirement benefits between the two wives of Virendra Prasad, contrary to the contract agreed upon and reduced to writing on 01.03.2014. It is said that the post retiral funds were not equally divided nor was the monthly pension. This may not be much in issue because this cause is about the petitioner's right to compassionate appointment on account of her father's demise in harness. The only thing relevant that concerns the distribution of funds is that the deceased's family comprising his second wife and daughters did not receive any substantial benefit. According to the petitioner, as far as the death-cum-retirement benefits are concerned, all those were substantially retained by the deceased's first wife, Smt. Duari Devi, who was paid these funds by the respondents.

4. The petitioner says that she has no source of income and is very poor. She is suffering in life due to lack of education and livelihood, as are other members of the family. The petitioner made an application, seeking compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974') before the Superintendent of Police, Maharajganj on 25.09.2013. It is said, on the other hand, that the deceased's son Rakesh Kumar, who too has staked claim for compassionate appointment, is well settled in life, as are his brother and the four sisters, all of whom are happily

married. The petitioner pursued her claim with diligence, but nothing came out of it. She moved Writ-A No.12217 of 2015 before this Court, which was disposed of with a direction to the Superintendent of Police, Maharajganj to consider and decide the petitioner's claim preferably within a period of four months from the date of production of a certified copy of the order passed in the aforesaid writ petition, after putting the other private respondents to notice.

5. It is in consequence of the aforesaid direction that the petitioner's claim for compassionate appointment came to be rejected by the impugned order dated 02.07.2017.

6. Aggrieved, this writ petition has been instituted.

7. A notice of motion was issued on 08.08.2017. In compliance, a counter affidavit has been filed on behalf of respondent No.2 on 06.11.2017 and another on behalf of respondent No.3 on 18.04.2018. Two rejoinders have also been filed.

8. Heard Mr. Sunil Kumar, learned Counsel for the petitioner, Mr. Jitendra Shanker Pandey, learned Counsel on behalf of respondent No.3 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel on behalf of respondent Nos. 1 and 2.

9. A perusal of the impugned order shows that in essence the Superintendent of Police has held that the deceased's second marriage to Smt. Saraswati Devi, the petitioner's mother, was void under the Hindu Marriage Act, 1955, the deceased's first wife, Smt. Dulari Devi, being alive at

that time. The Superintendent of Police, Maharajganj has relied upon the authorities of this Court in **Ramesh Chandra Verma v. U.P. Power Corporation Ltd. and others, (2013) 3 UPLBEC 2198** and **Ramesh Chand v. Executive Engineer and others, 2012 (1) ADJ 143 (DB)**. It is then remarked that the deceased's act in marrying a second time during the subsistence of a valid marriage and his spouse being alive, violates Rule 29 of the Uttar Pradesh Government Servants Conduct Rules, 1956, all of which would render the marriage void. Reliance has also been placed upon the decision of the Supreme Court in **Rameshwari Devi v. State of Bihar and others, (2000) 2 SCC 431** and **Rakesh Kumar Pandey v. State of U.P., 2006 SCC OnLine All 469**. It is concluded in the order impugned that since the petitioner was born of the deceased's second marriage to Smt. Saraswati Devi during the lifetime of his first wife, Smt. Dulari Devi, the petitioner is not entitled to be considered for compassionate appointment.

10. Now, the reasoning in the impugned order primarily proceeds on principle that children born of a void marriage, though legitimate, have a right in the property of their parents, but that would not extend to compassionate appointment as that is not a right to property of the deceased parent, to wit, Virendra Prasad. It is true that a limited right has been given to children born of void marriages and a marriage solemnized by a Hindu during the lifetime of his wife, without the marriage being annulled or dissolved in accordance with law, would be void. The limited right under Section 16(3) of the Hindu Marriage Act, 1955 is the right to inheritance of property belonging to the parents. If this reasoning were extended, a right to public

employment, like compassionate appointment, may well be found not to extend to children of a void marriage, going by a narrow and literal interpretation of the Rules of 1974, in particular, the definition of 'family'. Nevertheless, tested on the anvil of Article 14 of the Constitution, their Lordships of the Supreme Court in **Union of India and another v. V.R. Tripathi, (2019) 14 SCC 646** found it difficult to uphold this classification between children as valid and held it to be violative of Article 14. Children, born whether of a void marriage, once legitimate, were held equally entitled to a consideration for compassionate appointment as children born of a valid marriage. The facts in *V.R. Tripathi* (supra) would show that the deceased was an employee of the Central Railways posted at Mumbai, who died in harness. He had contracted a second marriage during the subsistence of the first. A son born of the second marriage to the deceased employee had staked claim for compassionate appointment that was rejected by the Railways. This was done on the strength of a circular, which said that in cases of employees marrying a second time during the lifetime of the first wife, while retirement-cum-death benefits could be shared by both widows due to Court orders, or otherwise on the merits of a particular case, appointment on compassionate ground to the second widow or her children would not be considered unless the Railway Administration had permitted the second marriage in special circumstances, taking into account the personal law etc. The Central Administrative Tribunal, which was moved by the deceased employee's son, held in favour of his right to a consideration for compassionate appointment and the Railways' writ petition carried to the Bombay High Court was

dismissed. Affirming the orders of the High Court, it was held in **V.R. Tripathi**:

"15. In sub-section (1) of Section 16, the legislature has stipulated that a child born from a marriage which is null and void under Section 11 is legitimate, regardless of whether the birth has taken place before or after the commencement of amending Act 68 of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences of illegitimacy. Hence, though the marriage may be null and void, a child who is born from the marriage is nonetheless treated as legitimate by sub-section (1) of Section 16. One of the grounds on which a marriage is null and void under Section 11 read with clause (i) of Section 5 is that the marriage has been contracted when one of the parties had a spouse living at the time of marriage. A second marriage contracted by a Hindu during the subsistence of the first marriage is, therefore, null and void. However, the legislature has stepped in by enacting Section 16(1) to protect the legitimacy of a child born from such a marriage. Sub-section (3) of Section 16, however, stipulates that such a child who is born from a marriage which is null and void, will have a right in the property only of the parents and none other than the parents.

16. The issue essentially is whether it is open to an employer,

who is amenable to Part III of the Constitution to deny the benefit of compassionate appointment which is available to other legitimate children. Undoubtedly, while designing a policy of compassionate appointment, the State can prescribe the terms on which it can be granted. However, it is not open to the State, while making the scheme or rules, to lay down a condition which is inconsistent with Article 14 of the Constitution. The purpose of compassionate appointment is to prevent destitution and penury in the family of a deceased employee. The effect of the circular is that irrespective of the destitution which a child born from a second marriage of a deceased employee may face, compassionate appointment is to be refused unless the second marriage was contracted with the permission of the administration. Once Section 16 of the Hindu Marriage Act, 1955 regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would not be open to the State, consistent with Article 14 to exclude such a child from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires.

17. Even if the narrow classification test is adopted, the circular of the Railway Board creates two categories between one class of legitimate children. Though the law has regarded a child born from a second marriage as legitimate, a child born from the

first marriage of a deceased employee is alone made entitled to the benefit of compassionate appointment. The salutary purpose underlying the grant of compassionate appointment, which is to prevent destitution and penury in the family of a deceased employee requires that any stipulation or condition which is imposed must have or bear a reasonable nexus to the object which is sought to be achieved. The learned Additional Solicitor General has urged that it is open to the State, as part of its policy of discouraging bigamy to restrict the benefit of compassionate appointment, only to the spouse and children of the first marriage and to deny it to the spouse of a subsequent marriage and the children. We are here concerned with the exclusion of children born from a second marriage. By excluding a class of beneficiaries who have been deemed legitimate by the operation of law, the condition imposed is disproportionate to the object sought to be achieved. Having regard to the purpose and object of a scheme of compassionate appointment, once the law has treated such children as legitimate, it would be impermissible to exclude them from being considered for compassionate appointment. Children do not choose their parents. To deny compassionate appointment though the law treats a child of a void marriage as legitimate is deeply offensive to their dignity and is

offensive to the constitutional guarantee against discrimination.”

11. The question once again arose in **Mukesh Kumar and another v. Union of India and others, (2022) 14 SCC 161** in the context of the Railway Board Circular, saying that compassionate appointment cannot be granted to children born of a second wife to a deceased employee. In **Mukesh Kumar** (supra), a three Judge Bench of the Supreme Court examined the issue holding that denial of opportunity to a consideration for compassionate appointment to a child born of a second marriage to a deceased employee contracted during the lifetime of the first wife was discriminatory. **Mukesh Kumar** too was a case where the deceased employee had married again during the lifetime of his first wife. In **Mukesh Kumar**, it was held:

“7. This Court in **V.R. Tripathi** [Union of India v. **V.R. Tripathi**, (2019) 14 SCC 646 : (2020) 1 SCC (Civ) 768 : (2020) 2 SCC (L&S) 301] held that the scheme and the rules of compassionate appointment cannot violate the mandate of Article 14 of the Constitution. Once Section 16 of the Hindu Marriage Act regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would violate Article 14 if the policy or rule excludes such a child from seeking the benefit of compassionate appointment. The circular creates two categories between one class, and it has no nexus to the objects sought to be achieved. Once the law has deemed them legitimate, it

would be impermissible to exclude them from being considered under the policy. Exclusion of one class of legitimate children would fail to meet the test of nexus with the object, and it would defeat the purpose of ensuring the dignity of the family of the deceased employee. This judgment in **V.R. Tripathi** [Union of India v. **V.R. Tripathi**, (2019) 14 SCC 646 : (2020) 1 SCC (Civ) 768 : (2020) 2 SCC (L&S) 301] has now been followed by a number of High Courts as well [See **K. Santhosha v. Karnataka Power Transmission Corpn. Ltd.**, 2021 SCC OnLine Kar 12989 : (2022) 1 Kant LJ 154 (decided on 24-6-2021 by the High Court of Karnataka); **Yuvraj Dajee Khadake v. Union of India**, 2019 SCC OnLine Bom 299 (decided on 21-2-2019 by the High Court of Bombay); **Union of India v. Rohit Chand**, 2020 SCC OnLine Del 157 (decided on 24-1-2020 by the High Court of Delhi)].

8. Apart from the discrimination ensuing from treating equals unequally, which is writ large as demonstrated in the judgment of this Court referred to above, there is also discrimination on the ground of descent, which is expressly prohibited under Article 16(2). In **V. Sivamurthy v. State of A.P.** [**V. Sivamurthy v. State of A.P.**, (2008) 13 SCC 730 : (2009) 1 SCC (L&S) 335 : (SCC pp. 741-42, para 18)“18*. The principles relating to compassionate appointments may be summarised thus;(a) Compassionate appointment based only on descent is impermissible. Appointments in public service

should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.(b) Two well-recognised contingencies which are carved out as exceptions to the general rule are:(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the breadwinner while in service.(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the breadwinner. Another contingency, though less recognised, is where landholders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project-affected persons. (Particularly where the law under which the acquisition is made does not provide for market value and solatium, as compensation.)(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.(d) Compassionate appointments are permissible only in the case of a dependent member of the family of

the employee concerned, that is, spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, Classes III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts.”*Ed. : Para 18 corrected vide Official Corrigendum No. F.3/Ed.B.J./92/2008 dated 10-11-2008.] , this Court observed that appointments made only on the basis of descent is impermissible. However, compassionate appointments are a well-recognised exception to the general rule if they are carved out in the interest of justice to meet public policy considerations [Director General of Posts v. K. Chandrashekar Rao, (2013) 3 SCC 310, para 18 : (2013) 1 SCC (L&S) 596. Further, constitutionality of compassionate appointments was upheld in State of Haryana v. Ankur Gupta, (2003) 7 SCC 704, para 6 : 2003 SCC (L&S) 1165; Yogender Pal Singh v. Union of India, (1987) 1 SCC 631, para 17.] . It lends justification only that far and no further.

9. While compassionate appointment is an exception to the constitutional guarantee under Article 16, a policy for compassionate appointment must be consistent with the mandate of Articles 14 and 16. That is to say, a policy for compassionate appointment, which has the force of law, must not discriminate on any of the grounds mentioned in Article 16(2), including that of descent. In this regard, “descent” must be

understood to encompass the familial origins of a person [See, Gazula Dasaratha Rama Rao v. State of A.P., 1960 SCC OnLine SC 39 : (1961) 2 SCR 931 : AIR 1961 SC 564] . Familial origins include the validity of the marriage of the parents of a claimant of compassionate appointment and the claimant's legitimacy as their child. The policy cannot discriminate against a person only on the ground of descent by classifying children of the deceased employee as legitimate and illegitimate and recognising only the right of legitimate descendant. Apart from the fact that strict scrutiny would reveal that the classification is suspect, as demonstrated by this Court in V.R. Tripathi [Union of India v. V.R. Tripathi, (2019) 14 SCC 646 : (2020) 1 SCC (Civ) 768 : (2020) 2 SCC (L&S) 301] , it will instantly fall foul of the constitutional prohibition of discrimination on the ground of descent. Such a policy is violative of Article 16(2).”

12. This then being the position of the law, it is idle for the respondents to contend that the petitioner has no valid candidature to assert for compassionate appointment under the Rules of 1974. Therefore, in the present case, the Head of the Department or office faced with the rival claims of the petitioner and respondent No.3 has to regard both claims as maintainable and then judge the suitability for appointment on merits in accordance with Rule 7 of the Rules of 1974.

13. In the result, this petition **succeeds** and is **allowed**. The impugned

order dated 02.07.2017 passed by the Superintendent of Police, Maharajganj is hereby **quashed**. A mandamus is issued to the Superintendent of Police, Maharajganj, ordering him to consider both claims, that is to say, the petitioner's and that of respondent No.3, to compassionate appointment in accordance with Rule 7 of the Rules of 1974, within eight weeks of receipt of a copy of this judgment. The interim order dated 05.07.2024 is hereby **vacated**.

14. There shall be no order as to costs.

15. Let a copy of this judgment be communicated to the Superintendent of Police, Maharajganj by the Registrar (Compliance).

(2024) 12 ILRA 646
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.12.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ -C No. 9124 of 2024

Bhagwan Deen **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Mohd. Mateen, Vikas Pandey

Counsel for the Respondents:
 C.S.C.

A. Civil Law-Constitution of India,1950-Article 226-U.P. Revenue Code Rules,2016-Rule 57-lease of fishery rights-validity of Advertisement-recovery proceedings-the Petitioner participated in an auction for fishery rights in a village

pond and submitted the highest bid of Rs. 2,53000/- which he believed covered the entire lease period of ten years-the Tehsildar later issued a recovery notice treating the bid amount as an annual lease rent-The court observed that the auction advertisement itself was erroneous, as it pre-determined the lease rent without clarifying whether the highest bid would apply annually or for the full lease period-Rules 57(7) of the Rules 2016 prescribes a minimum and maximum lease rent only when a single eligible participant is found, not when an auction is held-Since no lease agreement was executed with the petitioner and an earlier recovery notice was withdrawn, the impugned recovery notice was stayed-directions issued to prevent future ambiguity in lease auctions(Para 1 to 15)

The writ petition is dismissed. (E-6)

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

1. Supplementary affidavit on behalf of petitioner filed today in Court is taken on record.

2. Mr. Akhilesh Kumar, Tehsildar, Sadar, District Balrampur is present.

3. Heard.

4. We have perused the original records pertaining to auction of fishery rights in respect of the pond in question. The advertisement which is in the records of Mr. Akhilesh Kumar, Tehsildar reads as under:

"कार्यालय तहसीलदार बलरामपुर - सदर
संख्या: 96/र.का. (गांवसभा/मतस्त शिविर)/
2016 दिनांक: 28.9.16

विज्ञप्ति

सर्वसाधारण को सूचित किया जाता है कि उ०प्र० राजस्व संहिता नियमावली 2016 नियम-57 छोटे तालाबों का पट्टा (धारा-61) के उपनियम -(7) के अनुसार पट्टा राज्य सरकार द्वारा समय-समय पर नियम वार्षिक भाटक की धनराशि जो प्रति एकड़ 1000 रुपये से कम और 2000 रुपये से अधिक नहीं होगी में वर्णित वरीयता क्रम एवं प्राविधानों के अनुसार गांवसभा में निहित ताल पोखरों मानी गयी जिसका विवरण निम्नवत है का 5वर्षीय मतस्य पालन आवंटन /नीलामी की समाचार में दिनांक 7.10.16 को सुबह 10.00 बजे से 2.00 बजे तक आवेदन पत्रों को प्राप्त किया जायेगा। इच्छुक एवं पात्र व्यक्ति इस शिविर में उपस्थित होकर फोटोयुक्त प्रार्थना पत्र दे सकते हैं। प्रार्थना पत्रों की वरीयता एवं पात्रता के आधार पर आवंटन /नीलामी किया जायेगा। नियत समय के बाद प्राप्त प्रार्थना पत्रों पर विचार नहीं किया जायेगा।

क्रं. सं.	म का नाम	गाटा संख्या	क्षेत्रफल	राजस्व निरीक्षक क्षेत्र
1		3	4	5
2-	रमैती	1235	0.817 हैं	रा.नि. मथुरा

शर्तें:- 1. शिविर में मछुवा समुदाय के लोगों को शासनादेश के अनुसार पात्रता के आधार पर वरीयता दी जायेगी। 2. 2 हे. से अधिक क्षेत्रफल वाले तालाबों का आवंटन रजिस्टर्ड मछुवा समिति के लिये अनुमत्य होगा। 3. आवेदन करते समय मछुवा समुदाय के सदस्यों द्वारा स्वयं उपस्थित होकर आवेदन पत्र प्रस्तुत करें। जिसके साथ जाति एवं निवास प्रमाण पत्र से सम्बन्धित शपथ पत्र आदि आवश्यक हैं।

तहसीलदार
बलरामपुर - सदर "

5. The advertisement itself is erroneous so far as the lease rent payable by the person in whose favour the auction is to be settled. Sub Rule (7) of Rule 57 of the U.P. Revenue Code Rules, 2016 reads as under:

"If the list of eligible persons prepared under sub-rule (4) consists of more than one person, then an auction shall be held on the spot in which only those shall be allowed to participate

whose names are included in such list. If there is only one person eligible for the lease aforesaid, the lease shall be granted on the annual rent of the amount fix by the State Government from time to time which shall not be less than Rs. 1000/- and shall not exceed Rs.2000/- per acre."

6. The minimum amount of Rs.1000/- and the maximum amount of Rs.2000/- per acre is payable only in a case if there is only one person eligible for the lease in pursuance to the auction, however, there is no way that the Tehsildar could have decided at the stage of issuance of the advertisement itself that there would be one person and mention the aforesaid amount. In the case of an auction it should have been clearly mentioned in the advertisement that this condition would apply where only one person is found eligible for the lease but where an auction is held and there are several participants, in that case, the highest bid would be the annual rent payable or would be the rent payable for ten years as the case may be. None of this is mentioned in the advertisement. The petitioner participated in the auction with the highest bid amount of Rs. 2,53,000/-. He deposited the aforesaid amount in two installments; first on 13.07.2016 and the second on 09.07.2018. He was under bonafide belief, as claimed, that the bid money was for the entire lease period of 10 years. The Tehsildar, however, issued a recovery certificate for recovery of the due amount treating the aforesaid bid money as payable annually. However, we do not find any such stipulation in the advertisement. In fact sub-Rule (7) of Rule 57 of the Rules, 2016 when it speaks of the minimum and maximum amount payable per acre as lease

rent in the eventuality where only one person is found eligible though the specific amount has to be fixed by the State but Mr. Akhilesh Kumar, Tehsildar could not place before us any such decision where the State Government may have fixed the amount.

7. At this stage, counsel for the State says that there is a stipulation in the lease agreement. He has placed before the Court a proforma lease agreement, however, no such lease agreement was entered into by the Tehsildar or the Sub Divisional Magistrate as the case may be with the petitioner, nor has the bid been cancelled at any point of time. It is submitted that a notice was issued to the petitioner for getting the lease executed and for deposit of lease rent on annual basis which is dated 04.11.2019 annexed as Annexure-6. The said notice was challenged by the petitioner by means of Writ Petition No. 32660 (MB) of 2019. During its pendency the notice dated 04.11.2019 was withdrawn. Accordingly, Writ Petition No. 32660 (MB) of 2019 was dismissed as infructuous vide order dated 12.12.2019. The said order reads as under:

" 1. Learned Standing Counsel submits a notice for deposit of lagan has been withdrawn.

A copy of the written instructions are taken on record.

2. In the light of the aforesaid, the writ petition has been infructuous.

3. The petition is dismissed as having rendered infructuous."

8. In spite of it a fresh notice has been issued, as stated by the petitioner's counsel, which is impugned herein.

9. The matter requires consideration.

10. As of now, apparently, so far as the payment of lease rent by the petitioner is concerned, the advertisement was not very clear on this count and the notice dated 04.11.2019, as claimed by the petitioner, has been withdrawn, presumably because the opposite parties themselves thought it to be incorrect. We, therefore, stay the impugned recovery notice and direct the opposite parties to file a counter affidavit in the matter within four weeks. Petitioner may file rejoinder affidavit, if any, within two weeks thereafter.

11. List thereafter.

12. In order to avoid any such confusion as to the lease rent payable, it would be better if in future whenever such auction notices are issued, it is specifically mentioned therein that if an auction takes place with more than one person participating in it, the bid money would be the lease rent payable and also as to whether it would be payable annually or for a period of ten years. For example, if the highest bid which is accepted is Rs.2.00 lacs then it should be made clear as to whether it is payable annually or it is the lease rent payable for the entire lease period of ten years as everyday we find such dispute coming before the Court. We also make it clear that so far as the minimum and maximum amount mentioned in sub-Rule (7) of Rule 57 of the Rules, 2016 is concerned that applies where only one person is found eligible for grant of lease and this would happen only after the exercise has been completed and not at the time of advertisement.

13. Let a copy of this order be sent to the Collector, Balrampur for ensuring compliance.

14. Considering larger interest of State revenue involved, if this aspect is looked into by the State Government and necessary remedial measures whether it be in the form of issuing a circular to all the Collectors and other Revenue Authorities who issue such auction notices is circulated in the light of the observations made hereinabove or necessary changes are made either in the Revenue Code, 2006 or the Rules made thereunder, if required, so that the confusion as to the lease rent payable under Rule 57 is removed.

15. Mr. Manish Mishra, learned Standing Counsel shall communicate our order to the Additional Chief Secretary/Principal Secretary, Revenue, Government of U.P. for necessary action.

(2024) 12 ILRA 649
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ -C No. 9481 of 2023

Rajeev Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Madhusudan Dikshit

Counsel for the Respondents:
C.S.C.

**A. Civil Law-Constitution of India,1950-
Article 226-Indian Forest Act,1927-
Section 11(2)-the petitioner challenged
the orders passed by the Forest
Settlement officer-the dispute concerned
khasra no.8 which was recorded in the
name of the petitioner's ancestors-the**

land was excluded from the reserved forest by an order dated 28.5.1965-however, later entries were made in revenue records classifying the land as "jungle jhadi"-FSO originally ruled in favour of the petitioner later recalled the order and dismissed the petitioner's case-Held, the court ruled that the FSO, being a quasi-judicial authority does not have the power to review its own order unless expressly provided by statute-quasi-judicial bodies cannot recall their own orders -the court quashed and set aside the orders-the state was given two months to challenge the order before an appropriate forum u/s 17 of the Forest Act.(Para 1 to 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Sunil Kumar Vs St. of UP & ors.(2016) 11 ADJ 749
2. Smt. Shivraji & ors. Vs DDC & ors. (1997) RD 562
3. Smt. Shivanit Chaurasiya & anr.Vs St. of U.P. & anr.(2024) AIR All 180

(Delivered by Hon'ble Vipin Chandra
Dixit, J.)

1. This writ petition has been filed on behalf of the petitioner challenging the orders dated 6.2.2023, 13.2.2023 and 22.2.2023 passed by Forest Settlement Officer, Bijnor/respondent no.2 in Case No. 02 of 2022 under Section 11(2) of Indian Forest Act.

2. Brief facts of the case are that Khasra No.8 was recorded in the name of Raja Harishchandra in basic year Khatauni 1356-1357 F and thereafter name of Kumar Chandra Bhan Singh, father of petitioner was recorded in Khatauni 1358-1359 F. The name of mother of petitioner Risal Manjari

Devi, wife of Late Chandra Bhan Singh was recorded in Khatauni of 1372-74 F by the order of Forest Settlement Officer. The land was excluded from reserved forest by the order of Forest Settlement Officer dated 28.5.1965 passed in Case No. 680 of 1965 under Section 11(2) of Forest Act. The State Government had never issued any notification under Section 4 of Forest Act declaring the said land as reserved forest but entries were made by Sub Divisional Magistrate reserving the land as 'Jungle Jhadi'.

3. The petitioner had moved an application under Section 11(2) of Forest Act challenging the illegal entries made in khatauni and case was registered as Case No. 02 of 2022. The Forest Settlement Officer, Bijnor after considering the report of Sub Divisional Magistrate as well as objection of DGC(Revenue) had passed a detailed order in favour of the petitioner vide judgment and order dated 7.12.2022 expunging the "jungle jhadi" and recorded the name of the petitioner. The finding has been recorded by the Forest Settlement Officer, Bijnor that entries of "jungle-jhadi" in revenue record is without any basis and direction was issued to record the name of petitioner being legal heir of Rani Risal Manjari Devi. The order dated 7.12.2022 was passed on merits after providing opportunity of hearing to the learned District Government Counsel(Revenue).

4. The District Government Counsel(Revenue) had moved restoration application on 21.12.2023 for recall of order dated 7.12.2022. The Forest Settlement Officer vide order dated 13.2.2023 had recalled the order dated 7.12.2022 and thereafter dismissed the case of the petitioner vide order dated 22.2.2023

which are impugned in the present writ petition.

5. Heard Sri Madhusudan Dikshit, learned counsel for the petitioner and learned Standing Counsel appearing on behalf of State respondents and perused the record.

6. It is submitted by learned counsel for the petitioner that khasra no.8 was recorded in the name of mother of petitioner namely Risal Manjari Devi and after her death the petitioner was recorded in revenue record and he has possession over the same. The Forest Settlement Officer vide order dated 28.5.1965 passed in case no. 680 of 1965 under Section 11(2) of Forest Act had excluded the land from the limits of proposed forest. The case filed by petitioner under Section 11(2) of Forest Act being Case No. 02 of 2022 was allowed by the Forest Settlement Officer vide order dated 7.12.2022 and the name of petitioner was directed to be recorded as legal heir of Rani Risal Manjari Devi. The order dated 7.12.2022 was recalled by Forest Settlement Officer vide order dated 13.2.2023 and case no. 02 of 2023 was dismissed vide order dated 22.2.2023. The order passed by the Forest Settlement Officer dated 13.2.2023 and 22.2.2023 are without jurisdiction, as the Forest Settlement Officer has no power under the law to review his own order.

7. It is further submitted that order dated 7.12.2022 was passed on merits and the appeal is provided under Section 17 of the Forest Act against any order passed by the Forest Settlement Officer under Sections 11,12,15 and 16. The only remedy available to the respondents was to file an appeal before the District Judge against the order dated 7.12.2022. The orders

impugned passed by Forest Settlement Officer are without jurisdiction as he has no power to review his own order.

8. On the other hand, learned Standing Counsel appearing on behalf of State respondents has submitted that jungle-jhadi' was recorded in revenue record the land was reserved for forest and the petitioner has no right or title of disputed land. The orders dated 13.2.2023 and 22.2.2023 have rightly been passed and there is no illegality in any manner. No ground for interference is made out and the writ petition is liable to be dismissed.

9. Considered the submissions of learned counsels for the parties and perused the record.

10. It is admitted fact that the order dated 7.12.2022 was passed by respondent no.2 under Section 11(2) of Forest Act after hearing counsel for the parties on merits. The respondent no.2 after considering the enquiry report submitted by Tehsildar, Nagina dated 16.4.2018 and report of Sub Divisional Magistrate, Nagina dated 15.3.2022, had passed a very detailed order on merits. The order dated 7.12.2022 was passed on merits after providing opportunity of hearing to the parties concerned. The respondent no.2 had erred in recalling the order dated 7.12.2022 by the impugned order dated 13.2.2023, which is not permissible under the law, as there is no provision of review under the Forest Act.

11. The law has been settled by the Hon'ble Apex Court as well as by this Hon'ble Court in series of cases that quasi judicial authority has no power to review its own order in absence of any power of review conferred under the Statute.

12. In the judgment passed by this Court in **Sunil Kumar vs. State of U.P. and others** reported in **2016(11) ADJ 749** the Court has held that quasi judicial authority has no power of review in absence of any specific provision under the Statute. The relevant paragraph 10 and 11 are quoted below:-

“10. It can not be disputed that the impugned order has been passed by a quasi judicial authority and such authority cannot review its order in absence of power of Review conferred under the Statute.

11. The power of review of quasi judicial authority in absence of specific provision under the statute has been dealt with in several cases of this Court as well as by the Apex Court. The Apex Court in the case of Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P. and Ors. reported in (1987) 4 Supreme Court Cases 525 has held that unless power of Review is expressly conferred on the authority by any statute under which it derives its' jurisdiction, the authority concerned has no power to Review its' earlier order. In Para-II of the aforesaid judgment following observations has been made:

A quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissed of the Principal, acts as a quasi-judicial authority. The

provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice- Chancellor. In the circumstances, it must be held that the Vice- Chancellor acted wholly without jurisdiction in reviewing, his/her earlier order. The review order of the Vice-Chancellor was, therefore, a nullity.”

13. The Full Bench of this Court in the case of **Smt. Shivraji and others vs. Deputy Director of Consolidation and others** reported in **1997 RD 562** has held that the Consolidation authorities have no power of review. The relevant paragraph 35 is quoted below:

“35. Coming to the provisions of the U. P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore, his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot re-open any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi judicial authority he has the power to correct any clerical mistake/arithmetical error manifest error in his order in exercise of his inherent power as a tribunal.”

14. Similar view has been taken in **Smt. Shivanit Chaurasia & Another vs. State of U.P. & Another reported in 2024 AIR(All) 180**. The relevant paragraph ‘7’ is quoted below:-

“7. From an overview of the judgments cited above, it is clear that the Collector (Stamp) cannot recall and/or review his own order as no such power has been conferred under Section 47-A of the Act. A quasi-judicial authority is limited in its functionality in as much as it has to act within the four corners of the statute from which it derives its authority. If the statute does not provide for a particular act, the same cannot be undertaken by that authority. Any such action taken de hors the legislative intent would amount to an overreach and beyond the power of the said authority”.

15. It is well settled law that quasi judicial authority has no right or authority to review its own order unless it is expressly conferred by the Statute itself. In the present case, there is no provision of review under the Forest Act. The orders impugned dated 6.2.2023, 13.2.2023 and 22.2.2023 that are passed by respondent no.2 reviewing its own order is without jurisdiction. The impugned orders are liable to be set aside.

16. The writ petition succeeds and is allowed. The impugned orders dated 6.2.203, 13.2.2-23 and 22.2.2023 passed by respondent no.2 are quashed and set aside.

17. However, it is open for the State respondents to challenge the order dated 7.12.2022 passed by respondent no.2

before the appropriate forum under Section 17 of Forest Act. If any appeal is filed by the State respondent under Section 17 of the Forest Act within a period of two months from date, the same shall be decided on merits without raising any objection regarding limitation.

(2024) 12 ILRA 653
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ -C No. 11305 of 2018
 With
 Writ-C Nos. 24819 of 2020, 304 of 2021 &
 19485 of 2021

Ravindra Kumar Verma & Ors.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Manoj Kumar Gupta, Gajendra Yadav, Manish Mani Sharma

Counsel for the Respondents:

C.S.C., Atul Kumar Dwivedi, Manish Kumar

Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sections 4, 6, 9, 117(1) & 117(6) - U.P. Zamindari Abolition and Land Reforms Rules, 1952 -Rule 26 - U.P. Land Revenue Act, 1901 - Sections 28, 32 & 33 - Petitioners houses and adjacent lands stood on land recorded as Abadi in Category 6(2) under Para A-124 of Uttar Pradesh Lands Records Manual since time of their forefathers - Presumed that houses and adjacent lands were settled with respective occupiers of land in terms of Section 9, and consequently, occupiers became owners of said land - Petitioners asserted that resumption of land, virtually amounts to acquiring land

of petitioners by administrative order - Petitioners contended that St. Government has no power to resume land and can be acquired as per relevant laws after paying proper compensation. (Para 2, 4)

Held, no document produced by petitioners which shows that property in question for which they are seeking benefit u/s 9 was lawfully held by them or their predecessors-in-interest and also certain buildings were existing on date of vesting - Copies of Parivar Register filed for some of petitioners cannot be relied upon as Parivar Register came to be maintained after coming into operation of U.P. Panchayat Raj Maintenance of Parivar Register Rules, 1970. (Para 75)

From revenue records it was clear that said land has been recorded as Sarvajanik Abadi since 1359 Fasli under Category 6(2) i.e. a Government land, also clear by Section 4 of U.P.Z.A. & L.R. Act, i.e after abolition of Zamindari, falls within area of eSt. covered by notification u/s 4 and vested in St. free from all encumbrances. (Para 81)

Petitioners are simply encroachers over Government Abadi land and their status was no more than that of an encroacher - Benefit of Section 9 can be claimed only in respect of such buildings as were in existence on date of vesting and any building, constructed later on, cannot be held to be settled with its owner, occupier etc. - Being owner and rightful title-holder of land, St. Government has power to resume land in terms of section 117(6). (Para 93, 96)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Committee of Management, Durga Narayan College and Aditya Kumari School & anr. Vs St. of U.P. & ors. reported in 2018 (140) RD 510

2. U.P. St. Sugar Corporation Ltd. Vs Deputy Director of Consolidation & ors. 2000 (2) SCC 572

3. Budhan Singh Vs Nabi Bux, AIR 1970 SC 1880, (Para 11)

4. Sheo Amber Singh Vs Allahabad Bank Ltd. Allahabad, 1962 (2) SCR 441

5. Pheku Chamar & ors. Vs Chandra & ors., AIR 1953 All 406, (Para 10)

6. St. of U.P. Vs Ram Shri & ors., AIR 1976 All 121, (Para 22), First Appeal No. 392 of 1964 decided on 23.05.1975

7. Maharaj Singh Vs St. of U.P. & ors., AIR 1976 SC 2602

8. Fruit and Vegetables Merchants Union Vs Delhi Improvement Trust, 1957 SCR 1, (Para 19)

9. Rajendra Tyagi & ors. Vs St. of U.P. & ors., 2016 131 RD 243, (Para 9)

10. Committee of Management, Imambara Qadeem & ors. Vs U.O.I. & ors., 2022 157 RD204

11. Durga Narain College and Aditya Kumari School Vs St. of U.P., 2018 (140) RD 510

12. U.P. St. Sugar Corp. Ltd. Vs Deputy Director of Consolidation & ors., 2000(2) SCC 572

13. Basti Ram Vs Nagar Nigam, Ghaziabad & ors., 1999 (90) RD 636

14. Sudesh Pal & ors. Vs St. of UP & ors., Second Appeal No. 487 of 2013 reported in 2013 (5) ALJ 690

15. Chandrajit Vs Baliram (dead) & ors., Second Appeal No. 251 of 2019 (Neutral Citation 2019: AHC: 193076)

16. Phool Singh & anr. Vs Board of Revenue through Member Judicial, Writ Petition No. 26078 (MS) of 2017 (Neutral Citation 2019: AHC- Lucknow-28181)

17. Masroor Ahmed & ors. Vs Deputy Director of Consolidation & ors., Writ-B No. 55259 of 2017 (Neutral citation 2017: AHC: 179434)

18. Bharat & anr. Vs Chaudhary Khazan Singh & anr., AIR 1958 Allahabad 332

19. Krishena Kumar Vs U.O.I., 1990 (4) SCC 481, (Para 19 and 20)

20. Islamic Academy of Education Vs St. of Karn., 2002 (8) SCC 481

21. Padma Sundara Rao Vs St. of T.N., 2002 (3) SCC 533

22. Haryana St. Financial Corporation Vs Jagdamba Oil Mills, 2002 (3) SCC 496

23. Sanjay Singh Vs Uttar Pradesh Public Service Commission, Allahabad; (2007) 3 SCC 720

24. Royal Medical Trust & ors. Vs U.O.I., (2015) 10 SCC 19

25. Quinn Vs Leathem 1901 AC 495: (1900-03) ALL ER Rep 1 (HL)

26. U.O.I.& ors. Vs Dhanwanti Devi & ors., (1996) 6 SCC 44

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. We have heard Sri R. S. Pande, learned Senior Counsel assisted by Sri Ankit Pande alongwith Shri Manish Mani Sharma, Shri Mohammad Yusuf Siddiqui, Ms. Pooja Devi, Shri Virendra Bhatt, Shri Gajendra Yadav and Shri Manoj Kumar Gupta, learned counsel appearing for the petitioners in all these writ petitions learned counsel for the petitioners, Sri Sudeep Seth, learned Senior Advocate assisted by Sri Atul Kumar Dwivedi, learned counsel for the N.T.P.C. and Sri Manish Mishra, learned Additional Chief Standing Counsel for the State Respondents.

2. All the four writ petitions have been taken up together as they challenge a common order of Resumption passed by the Commisioner Faizabad Division, dated 21.02.2013 and related to land recorded as Category 6(2) Abadi and Para A-124 of the Uttar Pradesh Land Records Manual in three villages of Salahpur Rajor, Hussainpur and Hasanpur Sudhana in Tehsil- Tanda, District- Ambedkar Nagar. The said land has been resumed for the purpose of setting up second unit of 660 Megawatts of Tanda Thermal Power Plant by National Thermal Power Corporation (hereinafter referred to as NTPC).

3. For the convenience of exposition, this judgment is divided into the following parts:

Sl No.	Particulars
I.	Case of Petitioners in Nutshell
II.	Details of the Writ Petitions
III.	Counter Affidavits of State Government and National Thermal Power Corporation (NTPC)
IV.	Submissions of the Parties
V.	Statutory Provisions
VI.	Earlier Pronouncements
VII.	Points for determination- A. What was vested in State of U.P. under Section 4(1) of U.P.Z.A. & L.R. Act of 1950? B. Effect of further vesting in the Gaon Sabha in terms of section 117(1) of the U.P.Z.A. & L.R. Act of 1950 and resumption of the land by the State Government under section 117(6);

	C. To what extent benefit can be availed under section 9 of Act 1950; D. Meaning of word “held” given in Section 9 of the Act 1950; E. To Whom Burden of Proof Lies for seeking Benefit of section 9 of U.P.Z.A. & L.R. Act; F. Relevance of Khasra (P-A-3) and Khatauni (P-A-11) prepared under Section 28 and Section 32, 33 of the Land Revenue Act, 1901 and Paragraphs A-60 to A-102 and A-121 to A-160 of the UP Land Records Manual respectively; G. Validity of order of Resumption, dated 21.01.2013 passed under Section 117 (6) of the Act, 1950, by Commissioner Faizabad Division, over the Land recorded as Abadi under Category 6(2) of Paragraph A-124 of the Uttar Pradesh Land Records Manual H. Government cannot and does not acquire its own land, only resumption can be done in terms of section 117(6) of the Act, 1950 because right, title and ownership still continues with the State.
VIII.	Applicability of Durga Narain College and Adity Kumari School v. State of U.P., 2018 (140) RD 510 in the present

	case
IX.	Doctrine of Precedents and their binding efficacy
X.	Conclusion

I. Case of Petitioners in Nutshell

4. In a nutshell, the case of the petitioners is that their houses and adjacent lands had stood on the land recorded as Abadi in Category 6(2) under Para A-124 of the Uttar Pradesh Lands Records Manual since the time of their forefathers. Therefore, it would be presumed that the houses and adjacent lands were settled with the respective occupiers of the land in terms of section 9 of the Act, 1950. The assertion of the Petitioners is that the resumption of land, virtually amounts to acquiring the land of the petitioners by an administrative order. A further assertion is that once houses of the petitioners are standing thereon since the time of their forefathers, it would be deemed that the houses and appurtenant land had been settled with the respective occupiers in terms of Section 9 of the Act, 1950, and consequently, the occupiers had become owners of said land. Hence, the Commissioner Faizabad Division, has no power to resume the land regardless of whether said land has been consistently recorded as Abadi in Category 6(2) of Para A-124 of the Uttar Pradesh Lands Records Manual. An argument has also been raised by the Counsel of the Petitioners that the State Government has no power to resume the land. It can only be acquired by the State Government as per existing relevant provisions and laws after paying proper compensation.

II. Details of the Writ Petitions

5. The Writ Petition No.11305 (MB) of 2018 has been filed by **Ravindra**

Kumar Verma and four others praying for quashing of the order dated 21.02.2013 contained in Annexure-2 to the petition passed by the Commissioner Faizabad Division. It is the contention of the petitioners that their predecessors in interest had filed Writ Petition No.28923 (LA) of 2016, praying for mandamus to be issued to the respondents to pay fair and proper compensation to the petitioners within a specified time frame for acquisition of their land and houses in terms of the Right to Fair Compensation and Transparency and Land Acquisition, Rehabilitation and Resettlement Act 2013 (hereafter referred to as the 'Act of 2013'), and other consequential prayers. The said petition was dismissed on 09.01.2018 with the observation that the petitioners have remedy to claim compensation under the 1894 Act and since the acquisition proceedings have not been challenged the question of making a direction for payment of compensation under the New Act of 2013 did not arise. After such order was passed, the petitioners came to know that the land on which their houses were standing was resumed under Section 117(6) of the Act, 1950 by an order passed by the Commissioner Faizabad Division dated 21.02.2013. The Commissioner Faizabad Division by the impugned Notification resumed the land of several plots recorded under category 6(2) of Para A-124 of the U.P. Land Records Manual relating to village Salahpur Rajor, Tehsil Tanda Ambedkar Nagar, and the Abadi land of the petitioners is mentioned in the order as Gata Nos. 86, 87, 206, 275, 276, 277, 332, 364, 370, 390 and 391; which related to village Abadi had the houses of the petitioners are standing thereon since the time of their forefathers. It has been mentioned in the petition that initially a notification under Section 4 read with

Section 17 of the Land Acquisition Act 1894 was issued on 07.09.2009 and the declaration and Section 6 was published on 14.07.2010, acquiring certain land, for the establishment of a power station by the National Thermal Power Corporation, Tanda Ambedkar Nagar (arrayed as respondents Nos.5 and 6). Later on, the impugned order has been issued by the Commissioner on 21.02.2013, under Section 117(6) of U.P.Z.A. & L.R. Act, intending to resume Abadi land of the Village Salahpur Rajor. It has also been averred that the land situated in the village of the petitioners was vested in the the Gaon Sabha Salahpur Rajor by a notification issued under Section 117(1) of the U.P.Z.A. & L.R. Act on 05.09.1986, and resumption has been made without amending or cancelling the said order. It has also been stated that on 29.03.2015, a Government Order was issued by the State to give compensation under, the New Act of 2013, in pursuance of which a High-level meeting was held on 07.08.2015, where it was decided that only One Time Settlement amount will be given to the petitioners and no other amount shall be given in relation to land which was being resumed. It has also been stated that the petitioners have not received any compensation till date. Hence the instant petition has been filed praying for compensation in terms of the New Act of 2013. It appears that no interim order was granted in the said writ petition and it remained pending.

6. The Writ Petition No. Writ-C - 24819 of 2020 *Ved Prakash and Another versus State of U.P. & others*, has been filed challenging the notification dated 21.2.2013 issued by the Commissioner Faizabad Division in so far as it related to the petitioners building/house and land

appurtenant thereto in Abadi Plot No.364 Ga, situated in village Salahpur Rajor, Tanda, Ambedkar Nagar and also for restraining the respondents from dispossessing the petitioners and demolishing their buildings in pursuance of the impugned notification on the ground that the house of the petitioners and the land appurtenant thereto stood settled in favour of the petitioners under Section 9 of the U.P.Z.A. & L.R. Act as their house was in existence much before the date of vesting i.e. prior to 01.07.1952. It has been alleged that Certificates have been issued by the village Pradhan that the petitioners were living in the village since the time of their forefathers.

7. The Writ Petition No.19485 (MB) of 2021 filed by **Shyam Lalli and 21 others**, all residents of village Salahpur Rajor and Hasanpur, Tehsil Tanda District Ambedkar Nagar, praying for quashing of resumption Notification dated 21.02.2013, in so far as it related to their houses and buildings, and lands, appurtenant thereto situated on Plot Nos.119, 63, 58, in Village Hasanpur and Plot Nos. 364 Ga, 332, 87 and 86 in village Salapur Rajor, and praying for a mandamus to be issued to the respondents not to demolish their houses. It has been averred in the petition that the petitioners were in use and occupation of land of the said plots recorded as Abadi in the two villages since the time of their forefathers and such land on which the houses were situated and other buildings and the land appurtenant thereto should be deemed as settled with them under Section 9 of the U.P.Z.A. & L.R. Act and not vested in the Gaon Sabha under Section 117(1) of the Act.

8. An interim order was granted by this Court on 16.12.2020 in this writ

petition the benefit of which was extended in all other writ petitions as well.

9. The Writ Petition No. 304 (MB) of 2021, which has been filed by **Haseena Khatoon along with 13 others** praying for quashing of the Notification dated 21.02.2013 issued by the Commissioner Faizabad Division Under Section 117 (6) of the U.P.Z.A. & L.R. Act in so far as it relates to the petitioners' houses and land appurtenant thereto situated in village Abadi Plot Nos. 50, 71, 69 Gha and 279 situated in village Husainpur Sudhana, Tehsil Tanda, District Ambedkar Nagar. The petitioners have also prayed for a mandamus to be issued to the respondents not to demolish their houses and dispossess them.

10. As all three writ petitions of Ved Prakash, Shyam Lalli and Haseena Khatun have been filed by the same counsel, the pleadings are more or less the same. It has been alleged that houses and buildings which were constructed prior to the abolition of Zamindari had not been vested in the State under Section 4 and Section 6 of the U.P.Z.A. & L.R. Act and the same had been settled and vested with the owners of such houses and buildings along with land appurtenant thereto, under Section 9 of the U.P.Z.A. & L.R. Act read with Rule 26 of the U.P. Z.A. & L.R. Rules, 1952. The Counsel for the petitioners had placed reliance upon judgements rendered by this Court in **Committee of Management, Durga Narayan College and Aditya Kumari School and Another Versus State of U.P. and Others reported in 2018 (140) RD 510**, and a judgement of the Hon'ble Supreme Court in **U.P. State Sugar Corporation Ltd. Vs. Deputy Director of Consolidation and others 2000 (2) SCC 572**.

III. Counter Affidavits of State Government and National Thermal Power Corporation (NTPC)

11. In Writ Petition of Ravindra Kumar Verma, the National Thermal Power Corporation (hereinafter referred to as “NTPC”) was arrayed as a respondent. However, in Writ Petitions filed on behalf of Ved Prakash, Shyam Lalli and Haseena Khatoon, NTPC was not arrayed as a respondent and it filed application for impleadment and application for vacation of interim orders along with counter affidavits and supplementary counter affidavits. The Court did not allow the impleadment application but gave a right of hearing as intervener to NTPC, who is being represented by Sri Sudeep Seth, learned Senior Advocate, assisted by Sri Amit Kumar Dwivedi, Advocate.

12. Counter Affidavits have been filed in all the four writ petitions by the State Respondents, praying for vacation of interim order dated 16.12.2020. In the counter affidavit filed by the State Respondent, the necessity for acquisition of private land and resumption of Village Abadi for expansion of the second stage of the 1320 MW Thermal Power Station has been mentioned. It has also been mentioned that 271.949 hectares of private land of different categories was acquired and 30.862 ha of Gram Samaj land, and 10.236 ha of Abadi land has been resumed. The total land which was acquired/resumed being 313.47 ha in Tehsil Tanda. In the order dated 21.02.2013 Abadi land under Category 6(2) was included from three villages i.e. Salapur Rajor, Hasanpur and Hussainpur Sudhana. The Abadi land was evaluated at ₹3600 per square metre as per Circle Rate prevalent in the year 2013 and total compensation of ₹36.85 crore as

determined by the district administration was deposited by the NTPC in the State Treasury. A Committee for deciding on compensation made a proposal which was accepted by the State Cabinet. The Government directed disbursal of compensation of ₹36.85 crores against Abadi land to displaced persons as part of a special welfare package. Out of the total amount of ₹36.85 crores a sum of ₹23.20 crores has already been paid to the displaced villagers. 12 plots recorded as Abadi in village Salapur Rajor, total land area measuring 2.560 ha, was resumed out of which 1.847 ha has already been handed over to NTPC. In Village Salapur Rajor, a total of 123 properties were evaluated out of which 99 property owners have voluntarily vacated their land. On Gata No. 364Ga only 64 properties were located out of which 48 properties have been vacated after receipt of compensation. Besides compensation being given at the rate of ₹3600 per square metre for land, which has been resumed, an amount of ₹9 lakhs per adult male member of a family having a house on more than 200 m² of land has also been determined whereas a sum of ₹11.5 lakhs will be given to every adult male member of a displaced family having land more than 200 m². Since the petitioners did not give their consent for handing over their land and house for the Project, payment of price of land and compensation to adult male members of their family could also not be given.

13. In the affidavits filed by the NTPC it was stated that for expansion of NTPC Tanda Thermal Power Project private land under different categories had been acquired in three villages in Tehsil Tanda earlier and later on Abadi land had been resumed by notification dated 21.02.2013 and land had been handed over

to the NTPC Tanda. Being a beneficiary of such order of resumption, it was a necessary and proper party liable to be impleaded as a Respondent. It was also mentioned in such application that at present, out of a total of 68 houses situated in Plot No.364 Ga of village Salapur Rajor 48 house owners have taken compensation and their houses have been dismantled. Eight house owners have not taken compensation. One house owner has taken compensation, but his house could not be dismantled. There are 11 more unmeasured houses on the plot in question and the village is situated in the middle of Tanda Thermal Power Project and resumption has been done to ensure safety of the people living there and for sustainable operation of the Power Plant.

14. The NTPC Tanda has brought on record that in the village Salapur Rajor out of 158 houses, 129 houses have been dismantled for the second phase of NTPC Tanda Thermal Power Project and compensation to all such persons has also been paid by NTPC. At the time of filing of such affidavit in March 2021, only 29 houses remained to be evaluated. NTPC has paid the amount towards compensation, including One Time Settlement to all adult male members of each family, whose house has been dismantled. The land is being utilised for construction of two Units of 660 MW, out of which one Unit has already been commissioned and is in operation and the second Unit is being constructed. Out of the total power generated from Tanda Power Plant 76.47% will be supplied to the State of U.P. The villagers need to be immediately evacuated to ensure their safety and security. It has also been stated that the petitioners have failed to place on record any material to establish their possession of Abadi plot No. 364 Ga in the

village before the date of vesting. It has also been stated that in Writ Petition No.24819 (M/B) of 2020, the petitioner no.1 Ved Prakash is not entitled to file the writ petition as in Regular Suit No. 433 of 1983, Ram and others versus Ram Kishore and others, the Petitioner No.1 Ved Prakash had filed a written statement and admitted on affidavit that on the basis of a mutual agreement, the said Ved Prakash has abandoned his share in the village Salapur Rajor in favour of his other family members. Hence, in so far as Petitioner No.1 is concerned, the petition is not maintainable.

15. In the counter affidavit filed by the State Respondents and the NTPC in all four writ petitions similar averments have been made regarding no documentary evidence being available of the petitioners houses standing on the village Abadi land since before 01.07.1952. It has also been stated that the land of Hasanpur Sudhana has been utilised for construction of 660 MW Thermal Power Plant and the land occupied by the petitioners houses is situated in the middle of the area marked for Ash Dyke-II of the said Power Plant. Physical identification of the houses/structures standing on village Abadi had been carried out in 2014 and 2015 itself and the petitioners contention that they came to know about the land having been resumed only in September 2020 has been disputed as false.

16. In the Rejoinder Affidavit filed by the petitioners copies of Parivar Register of only some of the petitioners showing that they were living in the village since very long have been filed.

17. An application for vacation of interim order has also been filed by NTPC,

where it has been stated that the petitioners have not approached the court with clean hands and have intentionally not disclosed that identification of buildings/houses over the plots in question had been carried out in 2014 and 2015, and that a large numbers of villagers have already taken compensation and vacated the houses and have misrepresented their case before the Court, saying that they came to know of the resumption order only in October 2020. The land that has been resumed has been handed over to the NTPC for the Second Phase of expansion of the Tanda Thermal Power Project and compensation has also been paid by the NTPC yet intentionally, it has not been arrayed as a Respondent, although it is a necessary and proper party. The claim of the petitioners regarding land on which their houses stand having been settled with them under Section 9 of the U.P.Z.A. & L.R. Act has been disputed on the ground that no documentary evidence has been filed by the petitioners to show that their houses existed prior to the date of vesting. Resettlement and Rehabilitation Policy was drafted by the NTPC as per guidelines issued from time to time by the State Government and the Central Government and the same was approved by the State Cabinet. Not only has the NTPC provided monetary compensation as aforesaid, resettlement measures like training for self-employment, community development, allotment of shops, and welfare activities has also been implemented for which an institutional mechanism has been created for monitoring. A copy of the Rehabilitation and Resettlement Policy dated 12.01.2014 has been filed as C.A.-1 to the Counter Affidavit. The petitioners and similarly situated persons, who can at best be said to be encroachers on village Abadi land, have been given four benefits, the cost of the

land, the cost of the construction standing thereon including trees, etc., and also ₹9 lakhs or ₹11.5 lakhs as the case may be for each adult male member of the family of Homestead Oustees (HSO) as on 21.02.2013, the date of the order of resumption has also been given. The rate of the compensation for the land was determined by the State Government as per the Circle Rate prevalent at the time for the three villages concerned. Out of a total of 1238 HSO, 433 are similarly situated as the petitioners who are encroachers on Abadi land. Out of them 372 persons have already entered into an agreement and have taken the compensation amount. It has also been stated that out of the 1238 HSOs, 793 persons have entered into agreement and have all got compensation. The compensation provided to Home Stead Oustees on the basis of Rehabilitation and Resettlement Policy in pursuance of the resumption order 21.2.2013, is much more than what the petitioners would have been entitled to in case of compulsory acquisition. A comparative calculation chart has been filed as Annexure to the Counter Affidavit. It has also been stated that out of 116 houses situated in village Abadi of Salapur Rajor, 93 have been dismantled.

18. In another application filed for vacation of interim order in April 2023, the NTPC has mentioned that the land of village Hussainpur Sudhana is situated in the middle of Ash Dyke-II A and the construction of the Lagoon has been stopped due to interim order operating in favour of the petitioner since 08.01.2021. The project cost of construction of the Ash Dyke is ₹139 crores, which has to be completed in May 2019 but was delayed by 34 months, and it is causing huge loss to the NTPC. Also, the presence of the petitioners within the campus of the Tanda

Power Project is a big industrial hazard, posing a threat to the petitioners as well as Manpower engaged in the running of the Power Plant and the public at large, specially in the case of an industrial accident and/or sabotage. The Power Plant in question is a national asset built with thousands of crores of rupees, and the presence of the petitioners in the middle of the Project poses a threat to the Power Plant and its machinery as well. Copies of photographs showing location of the houses protected by interim order of the Court have been filed as annexures to the Affidavit filed in support of application for vacation of interim order. It has also been said that without the availability of Ash Dyke-IIA in time, the operation of the power plant will also not be feasible. In the counter affidavit of the Respondents it has been stated that in village Hasanpur, there were a total of 37 houses which were being affected by the resumption notification and 31 house owners have taken compensation and their houses had been dismantled.

19. However, the interim order granted earlier continued to be extended from time to time and on 24 July 2023, all four petitions were taken up together, and this Court passed an order referring the matter to Mediation and Conciliation Centre so that the parties can take a chance to get the issues resolved amicably. A Direction was issued that one petitioner representing all petitioners in each of the four petitions should take part in the mediation proceedings along with Additional District Magistrate, District Ambedkar Nagar, and Head of the Police Station NTPC Tanda, or any other officer nominated by him should also participate. The lawyers representing the parties would also be allowed to participate in the mediation process by the mediators if they

feel it to be necessary. The NTPC was directed to bear the expenses of to and fro journey to be undertaken by the petitioners on each day of mediation and also for other miscellaneous expenses incurred by them. The matter was directed to be listed on 05.09.2023 along with the mediation report before the Court. Status report of Mediation and Conciliation Centre dated 04.09.2023 was submitted thereafter. There is another Mediator's report January 2024, which was also placed on record. From such Mediation Reports it is evident that the mediation proceedings failed. The matter continued to be listed on various dates thereafter.

20. An application for disposal of Stay Vacation Application on behalf of the State Respondents has also been filed in July 2024, where it has been stated that various benefits have been given to the petitioners / residents of the three villages of which land has been resumed for the Second Stage of NTPC Power Plant at Tanda. More than 78% of the land and 82% of the houses have been vacated in the three villages. In respect of the three villages, out of 445 land owners, 398 have received compensation in lieu of the land. Out of 708 property owners, 623 have received compensation in lieu of property. Out of a 389 houses, 320 have been dismantled and only 69 houses/Hutments are remaining. The Land in Hussainpur Sudhna is required for completion of Ash Dyke-IIA which is presently lying incomplete. "Ash Dyke" is a huge pond required for storage of ash generated after coal is burnt in boilers. The bottom ash (portion of ash that drops in hoppers after coal burning) is disposed/transported through a pipeline in the form of a slurry to the Ash Dyke in the pond. The ash is then deposited in the Ash bed, and the water is

recycled for use. Hence, the bed of ash is a marshy land mass having huge water storage. The Ash Dyke is an essential requirement of a Coal based Thermal Power Plant and currently Ash Dyke IIB is being operated and Ash Dyke IIA will be required for continuous running of the thermal Power Plant in the near future. Village Hussainpur Sudhana is located inside the site under construction for Ash Dyke Lagoon IIA. Since the interim order is operating, and habitation is situated within the area required for construction of Ash Dyke-IIA, it would be difficult to run the Power Plant in the near future. Also, there is a great risk to life, health, and security of the petitioners as well as to the security of the Power Plant. The State Respondents have to deploy additional security of CISF personnel. The petitions that are pending before this Court with interim orders relate to only 2.204 ha of total 313.047 ha land acquired/resumed for NTPC Tanda Stage-II i.e. approximately 0.7% of the total area. The total estimated project completion cost in 2014-15 was 9,188.98 crores, but due to inordinate delay because of Interim Order operating in favour of the writ petitioners, the Project cost has escalated to more than 101,016.10 crores in January 2024.

21. It has also been stated that the additional expenditure incurred in completion of Stage-II shall be treated as “Fixed Cost of Energy” and a proportionate rise in price of Electricity will be passed on to the consumers.

22. It has been stated that out of 123 houses of village Salapur Rajor 110 house owners have given their consent and their houses have been dismantled and out of ₹53.30 crores that has been determined as compensation for the three villages

where land has been resumed, ₹48.39 crores has already been disbursed to the claimants. It has also been stated that the land of village Hasanpur has about 16 structures still standing over Abadi land which has been resumed and the petitioners are living in the middle of the Power Plant and separate passage has been given to them for ingress/ egress severely compromising the safety and security not only of the Power Plant, but also of the petitioners. The access road provided to the villagers is passing through the construction area of the Flu Gas Desulphurisation System, where movement of heavy construction machinery like cranes, trailers, and other equipment is taking place all the time having a potential of accident being caused to freely roaming villagers. The Human habitation including children, ladies, and cattle is situated dangerously close to high risk machinery and chemicals, as the Power Plant is in operation and Transformers, live High Voltage wires, Boilers, Flue Gas Desulphurisation System, and other machinery along with hazardous substances and chemicals, low density diesel, and petroleum products, coal etc. is stored in the Plant area. Also, the Power Plant has an installed capacity of 1760 MW and caters to the electricity requirement of North India and is connected to the National Grid and any malfunction in the same can lead to Grid failure and major industrial catastrophe and loss of life and property.

IV. Submissions of the Parties

23. Learned counsel for both sides have argued the matter in detail. The learned Senior Counsel Dr. Ram Surat Pandey for the petitioners strenuously argued his case mainly on the strength of the decision rendered by this Court in the

case of *Durga Narain College and Aditya Kumari School v. State of U.P.*⁹. He strongly assailed the order of the Commissioner Faizabad Division, Faizabad, dated 21.02.2013, passed under Section 117(6) of the Act, 1950 and urged that authority has possessed of any jurisdiction to pass the impugned order dated 21.02.2013 which virtually amounts to acquiring the land of the petitioners by an administrative order. He further urged that the property in dispute never vested in the Gaon Sabha in terms of Section 117(1) of the Act so as to be amenable to resumption under Section 117(6) of the Act. Being a building, the property in dispute had been settled with the forefathers of the petitioners. The Counsel for the Petitioners next contended that once houses are standing on the said land since the time of their forefathers and, therefore, such land on which the houses were situated and other buildings and the land appurtenant thereto should be deemed as settled with them under Section 9 of the Act, 1950 and not vested in the Gaon Sabha under Section 117(1) of the Act. Therefore, the Gaon Sabha cannot be divested of the same under Section 117 (6) of the U.P.Z.A. & L.R. Act by the State Government by issuance of the impugned order of resumption. He further urged that houses/ buildings which were constructed prior to the abolition of Zamindari had not been vested in the State under Sections 4 and 6 of the Act, 1950 and the same had been settled and vested with the owners of such houses and buildings along with land appurtenant there to, under Section 9 of the Act, 1950 read with Rule 26 of the U.P.Z.A. & L.R. Rules 1952, irrespective of the said land has consistently been recorded as Abadi in Category 6(2) of Para A-124 of the Uttar Pradesh Lands Records Manual.

24. The Counsel for the State respondent and National Thermal Power

Corporation (NTPC) have vehemently argued that no documentary evidence is available to show the houses were standing on the village Abadi land since before or after the date of vesting, i.e., on 01.07.1952. They further stated that these houses were constructed much later after abolition of Zamindari Act, 1950. Therefore, the benefit of section 9 of the ZA Act cannot be extended to petitioners. The benefit of section 9 can be given only to those houses that were standing on the date of vesting. They further contended that the intention of the legislature is very clear and provides for the settlement of lawfully standing wells or buildings with the existing owners or occupiers thereof on the land in question on the date of vesting, i.e., 1st of July 1952.

25. We have considered the submissions of the learned Counsel for the parties and have perused the records.

V. Statutory Provisions

26. ***“Section 4-Vesting of estate in the State. --(1) As soon as may be after the commencement of this Act, the State Government may, by notification, declare that, as from a date to be specified, all estates situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified (hereinafter called the date of vesting), all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances.***

(2) It shall be lawful for the State Government, if it so considers necessary to issue, from time to time, the notification referred to in sub-section (1) in respect only of such area or areas as may be

specified and all the provisions of sub-section (1) shall be applicable to and in the case of every such notification.

27. Section-6. Consequences of vesting of an estate in the State. --When the notification under Section 4 has been published in the Gazette, then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensure in the area to which the notification relates, namely-

(a) all rights, title and interest of all the intermediaries--

(i) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries, trees (other than trees in village abadi, holding or grove), fisheries, tanks, ponds, water-channels, ferries, pathways, abadi sites, hats, bazars and melas (other than hats, bazars and melas held upon land to which clauses (a) to (c) of sub-section (1) of Section 18 apply).

(ii) in all sub-soil in such estates including rights, if any, in mines and minerals, whether being worked or not;

shall cease and be vested in the State of Uttar Pradesh free from all encumbrances;

(b)all grants and confirmations of title of or to land in any estate so acquired, or of or to any right or privilege in respect of such land or its land revenue shall, whether liable to resumption or not, determine;

(c)(i) all rents, cesses, local rates and sayar in respect of any estate or holding therein for any period after the date of vesting and which, but for the acquisition would be payable to an intermediary, shall vest in and be payable to the State Government and not to the intermediary and any payment made in contravention of this clause shall not be valid discharge of the person liable to pay the same;

(ii) where under an agreement or contract made before the date of vesting any rent, cess, local rate or sayar for any period after the said date has been paid to or compounded or released by an intermediary the same shall, notwithstanding the agreement or the contract, be recoverable by the State Government from the intermediary and may without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(d)all arrears of revenue, cesses or other dues in respect of any estate so acquired and due from the intermediary '[or an arrear on account of tax on agricultural income assessed under the U.P. Agricultural Income Tax

Act, 1948] (U.P. Act III of 1949) for any period prior to the date of vesting shall continue to be recoverable from such intermediary and may, without prejudice to any other mode of recovery, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(e) all amounts ordered to be paid by an intermediary to the State Government under Sections 27 and 28 of the U.P. Encumbered Estates Act, 1934 (U.P. Act XXV of 1934) and all amounts due from him under the Land Improvement Loans Act, 1883 (U.P. Act XIX of 1883), or the Agricultural Loans Act, 1884 (U.P. Act XIX of 1884), shall notwithstanding any thing contained in the said enactments, become due forthwith and may, without prejudice to any other mode of recovery provided therefor, be realized by deducting the amount from the compensation money payable to such intermediary under Chapter III;

(f) the interest of the intermediary so acquired in any estate shall not be liable to attachment or sale in execution of any decree or other process of any Court, Civil or Revenue and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of Section 73 of the Transfer of Property Act, 1882 (IV of 1882), cease to be in force;

(g) (i) every mortgage with possession existing on any estate or part of an estate on the date

immediately preceding the date of vesting shall, to the extent of the amount secured on such estate or part, be deemed, without prejudice to the rights of the State Government under Section 4, to have been substituted by a simple mortgage;

(ii) notwithstanding anything contained in the mortgage deed or any other agreement, the amount declared due to a simple mortgage substituted under sub-clause(1) shall carry such rate of interest and from such date as may be prescribed;

(h) no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or is secured by mortgage of such estate or part thereof shall, except as provided in Section 73 of the Transfer of Property Act, 1882 (IV of 1882), be enforceable against his interest in the estate;

(i) all suits and proceedings of the nature to be prescribed pending in any Court at the date of vesting and all proceedings upon any decree or order passed in any such suit or proceeding previous to the date of vesting shall be stayed;

(j) all mahals and their sub-divisions existing on the date immediately preceding the date of vesting and all engagements for the payment of land revenue or rent by a proprietor, under-proprietor, sub-proprietor, co-sharer or lambardar as such shall determine and cease to be in force.

28. Section 9- Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof.— *[All wells], trees in abadi and all buildings situate within the limits of an estate belonging to or held by an intermediary or tenant or other person whether residing in the village or not, shall continue to belong to or be held by such intermediary tenant or person, as the case may be, and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed.*

29. Section 117. Vesting of certain lands, etc. in Gaon Sabhas and other Local Authorities. —

(1) At any time after the publication of the notification referred to in Section 4, the State Government may [by general or special order to be published in the manner prescribed], declare that as from a date to be specified in this behalf, all or any of the following things, namely—

(i) lands, whether cultivable or otherwise, except lands for the time being comprised in any holding or grove;

(ii) forests;

(iii) trees, other than trees in a holding or on the boundary of a holding or in a grove or abadi;

(iv) fisheries;

(v) hats, bazars and melas held on lands to which the provisions of Clauses (a) to (c) of sub-section(1) of Section 18 apply or on sites and areas referred to in Section 9; and

(vi) tanks, ponds, private ferries, water channels, pathways and abadi site:-

which had vested in the State under this Act, shall vest in a Gaon Sabha or any other local authority established for the whole or part of the village in which the said things are situate or partly in one such local authority (including a Gaon Sabha) and partly in another :

Provided that it shall be lawful for the State Government to make the declaration aforesaid subject to such exceptions and conditions as may be [specified in such order].

30. Section 117(6). The State Government may at any time, [by general or special order to be published in the manner prescribed], amend or cancel any *[declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority and resume such thing and whenever the State Government so resumes any such things, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that things :

Provided that the State Government may after such resumption make a fresh declaration under sub-section (1) or sub-section (2) vesting the thing resumed in the same or any other local authority (including a Gaon Sabha), and the provisions of sub-sections (3), (4) and (5), as the case

may be, shall *mutatis mutandis*, apply to such declaration.

31. Rule 26. Private wells and buildings.—(a) Subject to sub-rule (b), the site of a [***] well [***] or building along with the area appurtenant thereto situate within the limits of an estate shall be deemed to be settled with the owner of the said well, [***] or building, on the following terms and conditions :

(i) He shall have a heritable and transferable interest in the site.

(ii) He shall not be liable to ejectment on any ground whatsoever.

(iii) He shall have the right to use the site for any purpose whatsoever subject to the existing rights to easement.

(iv) Succession shall be governed by personal law.

(v) If the building is abandoned or if the well goes out of use, or if the owner dies without any heir entitled to succeed, the site shall escheat to the State.

vi) (1) He shall pay to the Gaon Sabha rent for the site equal to the amount of rent payable therefor on the date immediately preceding the date of vesting. He shall however not be liable to pay any rent for the site if no such rent was payable on the date.

(2) (i) In case the site is assigned for any public purpose, such as roads, hospitals, dispensaries, schools and the like, which will not yield any income either in the present or in the near future to the individual or body assigning it the Goan Sabha] '[or the assignor] shall report the fact

to the Collector, giving the details of the land and the amount of rent involved. The Collector may exempt the site from the payment of rent for so long as it is utilized for any purpose of the nature indicated above.

(ii) When such exemption has once been sanctioned by the Collector the [Gaon Sabha] may sanction the continuance of exemption from year to year so long as the land is being put to the same use.

(iii) At the beginning of every revenue year the '[Gaon Sabha] shall enquire whether all land in respect of which exemption has been allowed is still used for the purpose which made it eligible for exemption. If it is found that the land or any portion thereof has ceased to be so used or though used for the same purpose as before has started to yield an income to the body or the individual concerned the '[Gaon Sabha] shall report the fact to the Collector with necessary details. The Collector may, after making such inquiry as he considers necessary, direct that the exemption from the payment of rent should cease wholly or in part, as the case may demand.

(3) The person or body assigning the site [unless the assignment is of the entire interest of such person or body in the same], has no right to claim exemption from the payment of rent as a matter of course. Such exemption can only be granted by the Collector who has full discretion to reject any case which

does not completely fulfill the requirements of sub-clause (2) (i) above.]

(b) The site of a private well or a building in a holding or grove shall be deemed to be settled with the tenure holder on the same tenure as the holding or the grove in which it is situate.

VI. Earlier Pronouncements

32. The Statutory Provisions have been considered by this Court and by the Supreme Court in the following decisions:-

1. *Budhan Singh v. Nabi Bux*, AIR 1970 SC 1880; ¹

2. *Sheo Amber Singh v. Allahabad Bank Ltd. Allahabad*, 1962 (2) SCR 441; ²

3. *Pheku Chamar and others v. Chandra and others*, AIR 1953 All 406; ³

4. *State of U.P. vs. Ram Shri and Ors.*, AIR 1976 All 121; ⁴

5. *Maharaj Singh v. State of U.P.*, AIR 1976 SC 2602; ⁵

6. *Fruit and Vegetables Merchants Union v. Delhi Improvement Trust*, 1957 SCR 1; ⁶

7. *Rajendra Tyagi and Ors. vs. State of U.P. and Ors.*, 2016 131 RD 243; ⁷

8. *Committee of Management, Imambara Qadeem and Ors. vs. Union of India and Ors.*, 2022 157 RD204; ⁸

9. *Durga Narain College and Aditya Kumari School v. State of U.P.*, 2018 (140) RD 510; ⁹

10. *U.P. State Sugar Corporation Limited v. Deputy Director of Consolidation and others*, 2000(2) SCC 572; ¹⁰

11. *Basti Ram Vs. Nagar Nigam, Ghaziabad and Others*, 1999 (90) RD 636; ¹¹

12. *Sudesh Pal and Others Vs. State of UP and Others*, Second Appeal No. 487 of 2013 reported in 2013 (5) ALJ 690; ¹²

13. *Chandrajit Vs. Baliram (dead) and Others*” (Neutral Citation 2019: AHC: 193076); ¹³

14. *Phool Singh and Another Vs. Board of Revenue through Member Judicial, Writ Petition No. 26078 (MS) of 2017 (Neutral Citation 2019: AHC-Lucknow-28181)* ¹⁴

15. *Writ-B No. 55259 of 2017, Masroor Ahmed and Others*, (Neutral citation 2017: AHC: 179434) ¹⁵

Before we consider these judgments, we would first enumerate the issues that need to be decided in these petitions.

VII. Points for determination-

33. From the pleadings of the parties and submissions made, following points which arise for determining the controversy involved in these four writ petitions-

A. What was vested in State of U.P. under Section 4(1) of U.P.Z.A. & L.R. Act ?

B. Effect of further vesting in the Gaon Sabha in terms of section 117(1) of the Act 1950 and resumption of the land by the State Government under section 117(6) of the U.P.Z.A. & L.R. Act, 1950;

C. To what extent benefit can be availed under section 9 of U.P.Z.A. & L.R. Act, 1950;

D. Meaning of word “held” given in Section 9 of U.P.Z.A. & L.R. Act, 1950;

E. To Whom Burden of Proof Lies for taking Benefit of Section 9 of U.P.Z.A. & L.R. Act, 1950;

F. Relevance of Khasra (P-A-3) and Khatauni (P-A-11) prepared under Section 28 and Sections 32, 33 of the Land Revenue Act, 1901 and Paragraphs A-60 to A-102 and A-121 to A-160 of the Land Record Manual respectively;

G. Validity of order of Resumption, dated 21.01.2013 passed under Section 117 (6) of the Act, 1950, by Commissioner Faizabad Division, over the Land recorded as Abadi under Category 6(2) of Paragraph A-124 of the Uttar Pradesh Land Records Manual

H. Government cannot and does not acquire its own land, only resumption can be done in terms of section 117(6) of the Act, 1950 because right, title and ownership still continues with the State; and

34. We shall expound the Issues A, B, C, D & E together while applying the case laws as mentioned hereinabove.

35. In *Budhan Singh and Others Vs. Nabi Bux and Others*¹, the scope of Section 9 of the U.P.Z.A. & L.R. Act came up for decision before the Supreme Court. The Court read Sections 4, 6 and 9 together and observed that under Section 4 all estates vest in the State free from all

encumbrances. The proprietors or tenure holders retain no interest in respect of them whatsoever. However, in respect of land or building sites in Section 6 and Section 9, the State settled certain rights with persons who held them at the time of vesting i.e. 01.07.1952. Vesting of the estates and the deemed settlement of certain rights in respect of certain classes of land or buildings included in the estates took simultaneously, but they must be treated as different transactions. Vesting of estates in the State was absolute and free from all encumbrances. It was then followed by deemed settlement of some rights with persons mentioned in Sections 6 and 9. Therefore, in law, it would not be correct to say that what vested in the State are only those interests not coming within Section 6 or Section 9.

36. The Supreme Court in *Budhan Singh* (supra) referred to judgement rendered in *Sheo Amber Singh Vs. Allahabad Bank Ltd*²; while dealing with the language of Section 9 of the Act, the Supreme Court defined the words “belonging to or held” as meant for the benefit of only those persons who were lawfully holding the wells, trees in Abadi Land or the buildings situated within the limits of the estate. Although the counsel for the appellant tried to convince the Court that Section 9 merely contemplates physical possession and nothing more on the date of vesting of the sites as well as the buildings situated on it, and therefore the building must be deemed to have been settled with them, the Supreme Court supported the contention on behalf of the respondent that the word ‘held’ in Section 9 of the Act means ‘lawfully held’ and that Section does not confer any benefit on a trespasser. The Supreme Court referred to two Division Benches of the Allahabad

High Court and also to a Full Bench decision of this Court, where the meaning of the word “held” in Section 9 came up for consideration.

37. In *Pheku Chamar and Others Vs. Harish Chandra and Others* ³, the Division Bench of this Court observed that the legislature deliberately used the word ‘held’ and that word connotes the existence of a right or title in the holder. They further found that Section 9 does not confer a right on the persons having no title to the land. The settlement contemplated by the Section 9 is confined in its application to the case where the building is ‘lawfully held’ by the person in possession. Section 9 does not mean that if a person has made some construction whatsoever over any land lying within the limits of an estate, however, wrongful or recent the possession might be, that construction must be deemed to have been settled with him by the State Government. Later on, the meaning of the word ‘held’ in Section 9 came up for interpretation before another Division Bench of the Allahabad High Court in *Bharat and Another Vs. Chaudhary Khazan Singh and Another*, AIR 1958 Allahabad 332; the learned Judges declined to follow the decision in Pheku Chamar’s case and came to the conclusion that the legislature used a wide language in Section 9, and it covers the case of buildings belonging to persons who constructed them lawfully or unlawfully.

38. The Supreme Court thereafter referred to the question of law being again referred to a Full Bench in view of the conflict of opinion of two Division Benches. While the Chief Justice Desai (as he then was) who presided over the Bench, did not deal with the meaning of the word ‘held’ in Section 9, the two other judges

agreed with the view taken in Pheku Chamar’s case. The Supreme Court upheld the view taken by the Division Bench in Pheku Chamar’s case and observed in paragraph 10 as follows:—

“We are unable to persuade ourselves to believe that the legislature intended to ignore the rights of persons having legal title to possession and wanted to make a gift of any building to a trespasser; howsoever recent the trespass might have been if only he happened to be in physical possession of the building on the date of vesting. We are also unable to accept any Legislative policy in support of that construction. — — — the settlement contemplated by Section 9 is a deemed settlement. That settlement took place immediately when the vesting took place, no enquiry was contemplated before that settlement. If there is any dispute as to with whom it was settled, the same has to be decided by the Civil Courts. The State is not concerned with the same. Section 9, merely settled the building on the person who was holding it on the date of vesting.”

39. In Paragraph-11 of its judgement in Budhan Singh (supra), the Supreme Court observed that it is true that according to the dictionary meaning, the word ‘held’ can mean either a lawful holding or even a holding without any semblance of a right such as holding by a trespasser. But the real question is as to what is the legislative intent? Did the legislature intend to settle the concerned building with a person who was lawfully

holding, or with any person holding, lawfully or otherwise? It thereafter observed that :-

...”....it is true that the legislature could have used the words “lawfully held” in place of the word “held” in Section 9, but while referring to dictionary meanings given to the word “held” the Supreme Court went on to observe that in legal parlance the word “held” means to possess by legal title.

“The word “held” is technically understood to mean to possess by legal title. Therefore, by interpreting the word “held” as “lawfully held”, we are not adding any word to the Section. We are merely spelling out the meaning of that word. It may further be seen that the section speaks of all buildings – – within the limits of an estate, belonging to or held by an intermediary or tenant or other person – – the word “belonging undoubtedly refers to a legal title. The word “held by an intermediary also refers to a possession by legal title. The words “held by tenant also refers to holding by legal title”. In the sequence mentioned above, it is proper to us to the word ‘held’ in Section 9 when, used in relation to the words “other person” as meaning lawfully held by that person. That interpretation flows from the context in which the word ‘held’ has been used. We have mentioned that the said interpretation accords with Justice...”

(emphasis supplied by us)

40. In making such observations, the Supreme Court also referred to its earlier judgements relating to different statutes and then the scheme of the Act which was to abolish all estates and vest the concerned property in the State. But at the same time, certain rights were conferred on persons lawfully in possession of lands or buildings at the date of vesting. The Court observed that :-

“...it is reasonable to think that the persons who are within the contemplation of the Act are those who are in possession of lands or buildings on the basis of some legal title. Bearing in mind the purpose with which the legislation was enacted, the scheme of the Act and the language used in Section 9, we are of the opinion that the word ‘held’ in Section 9 means lawfully held...”

(emphasis supplied by us)

41. In ***State of U.P. Vs. Ram Shri and Others***⁴, ***First Appeal No. 392 of 1964 decided on 23.05.1975***, a Division Bench of this Court was dealing with an appeal filed by the State of U.P. against the judgement of the Civil Judge, Etawah dismissing the suit. The suit was filed initially by the State of U.P. and the Gaon Sabha Mauja Vedpura on 06.01.1959 for the relief of declaration that the plaintiffs no.1 and 2 were the owners in possession of certain land situated in the village, and sought a permanent injunction, restraining the defendant not to interfere in the ownership and possession of the plaintiffs. In the alternative, if they were not found in possession over the plots in dispute including the trees standing there on, they might be given possession over the same, excluding the buildings. This suit was filed

with regard to 10 plots of land recorded as Banjar, Usar, Abadi and Rasta. The plaintiffs suggested that prior to the passing of the U.P.Z.A. & L.R. Act, Shrimati Ram Shri, the defendant was the Zamindar of the aforesaid village, but on the abolition of Zamindari the right, title and interest in the said Zamindari of the village including the plots, ceased to exist and was extinguished. The rights of the defendant vested in the State of U.P., w.e.f. 01.07.1952, and since the defendant was neither the owner of the aforesaid Banjar, Usar, Rasta and Abadi plots, nor she had any right to hold any Mela or Bazaar over those plots, after abolition of Zamindari, she may be restrained, from holding such Mela or Bazar. Zila Panchayat, Etawah was added as plaintiff no.3, by way of amendment in the suit as it was alleged that the Zila Panchayat was managing the Mela and the Bazaar. The suit was contested by the defendant on the ground that all these plots were Abadi plots over which constructions belonging to her stood and therefore by virtue of these constructions, these plots would be deemed to have been settled with her under Section 9 of the Act. The suit was dismissed by the Trial Court on the finding that the land in suit was a cattle market site of the defendant and would be deemed to have been settled with her under Section 9 of the Act.

42. Aggrieved, the State of U.P. filed the First Appeal on its own without the Gaon Sabha and the Zila Panchayat Etawah, arrayed as appellants. The defendant raised a preliminary objection about the maintainability of the appeal on the ground that the State of U.P. did not have any right or interest in the land involved in the suit as it had given the same to the Gaon Sabha i.e. the plaintiff no.2 by means of a notification issued

under Section 117(1) of the Act. The Division Bench of the Court considered the definition of “aggrieved person” as given in English case-laws. “A person aggrieved must be one who has suffered a legal grievance, a man against whom a decision has been pronounced, which had wrongfully deprived him of something, or wrongfully refused him, something or wrongly affected his title of something.”

43. The Division Bench of this Court also considered whether after Abolition of Zamindari the land which was vested in the State of U.P., could be said to be divested, and its ownership vested in the Gaon Sabha under Section 117(1) of the Act. The Court referred to Section 4, Section 6 and Section 117 of the U.P.Z.A. & L.R. Act and held that a review of the provisions would indicate that the State Government became the owner of the entire estates which were vested upon it, consequent to abolition of Zamindari. All the intermediaries ceased to have any interest in the properties which passed on to the State Government consequent upon issuance of a notification under Section 4 of the Act. The State was the absolute owner of the property. However, to provide for proper management of the properties which were vested in the State Government, it was provided in Chapter VII of the Act that the State Government could pass on all or anyone of the things mentioned in Section 117 of the Act to the Gaon Sabha or any other local authority. The legislature has used the word ‘Vest’ in Section 117 of the Act, but the vesting under this section is altogether with a different object and purpose than the one which is contemplated by Section 4 and 6 of the Act. The purpose behind Section 117 is only a limited one for the purpose of

superintendence, management and control, as laid down in Section 122-A of the Act.

buildings/Chabutaras standing thereon since long.

44. This Court in *State of U.P. Vs. Ram Shri and others* (supra) referred to the meaning given to the word 'Vest' in the *Black's Law Dictionary* and also in the *Webster's Third International Dictionary* and in various English case laws and also the observations made by the Supreme Court in the *Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust* ⁶.

The Division Bench also considered whether the defendant could succeed in getting these plots declared as settled with her under Section 9 of the Act. Section 9 of the Act is an exception to the general state of affairs and, therefore, burden was on the defendant to establish that the land was such to which provisions of Section 9 applied. The defendant simply asserted that the entire area was *Abadi* covered by constructions. The Court also observed that after abolition of Zamindari the right to hold *Hats, Bazars and Melas* became exclusively that of the State. The Supreme Court had held in several judgements that the State had, and the proprietor had not, with effect from the date of vesting of the estate, the right to hold *Mela* on the land of the proprietor. Sections 4 and 6 of the Act envisaged complete vesting, and after abolition of Zamindari, no one could be held to have a right to hold *Haat, Bazar, and Melas* on the lands vested in the State. This being the position, the land appurtenant to a building under Section 9 of the Act could be settled only for the purpose permissible under the Act and not contrary to the same. The respondent therefore could not be given any land for the purpose of holding *Haats, Bazar and Melas* on the ground that the same is appurtenant to the

45. The Division Bench of this Court in *State of U.P. Vs. Ram Shri and Others* ⁴, discussed the meaning of the word 'Vest' as employed in Section 4 and Section 117 of the Act of 1950 in detail and held as follows: –

“The legislature has used the word Vest in Section 117 of the Act as well. But the vesting in Section 117 of the estates mentioned is altogether for a different object and purpose than one which is contemplated by Section 4 and 6 of the Act. The purpose behind Section 117 is only a limited one for the purpose of superintendence, management and control as laid down in Section 122-A of the Act. By the notification issued under Section 117 of the Act. The State Government does not transfer the ownership of the property. It only transfers its possession. Sub-Section (2) and (6) of Section 117 of the Act, bear out the above position. By Sub-Section (2) as noted above, it has been laid down that notwithstanding the notification under Sub-Section (1) of Section 117 of the Act, the State Government can take it back from the Gaon Sabha in whose favour the vesting had initially taken place under Section 117, and may give the same to any other local authority, including another Gaon Sabha. Similarly, Sub-Section (6) of Section 117 also empowers the State Government to amend or cancel any declaration made under Sub-Section (1) of Section 117 and

resume such things whenever the State Government desires. The State Government has only been made liable to pay compensation for development which might have been carried on by the Gaon Sabha on the land given to it. These provisions does make it fully clear that the Gaon Sabha, in whose favour a notification under Section 117 is made, does not become the absolute owner of the property. Had that been the fact, the State Government could not take it back from the Gaon Sabha, as provided in Sub-Section (2) and (6). The fact that the State Government has only been made liable to pay development charges and not the cost of property taken back in pursuance to the notification under Sub-Section (6) of Section 117 of the Act also establishes that what had been passed on by the State Government under Sub-Section (1) of Section 117 was only right of management, superintendence and control. As a matter of fact, Section 122-A specifically deals with the power of Land Management Committee saying that it will only have superintendence, management and control of the land. It is worthy of note that this Section or any other Section in the Act, does not empower the Gaon Sabha to alienate the land given to it under Section 117 permanently. Refusing to confer the power of alienation on the Gaon Sabha is antithesis to the right of ownership. In our opinion, therefore, the State Government does have an interest in the property despite the notification under Sub-Section (1) of Section

117 of the Act. Any decision given by Court in which the State Government is a party is bound to injure or prejudice the interest of the State Government. The State Government would in that event be entitled to file an appeal against the same. -- -- Sri Shanti Bhushan, learned Counsel for the defendant submitted that as the entire rights and liabilities had been transferred to the Gaon Sabha, therefore, the State Government ceased to have any interest in the subject matter and, consequently, the State of U.P. had no right to file an appeal. but, we are unable to accept the above submission of the learned counsel for the respondent as, in our opinion, the same has no merits . The State Government, as stated above , has a legal grievance, which had a tendency to injure its interest --..”

(emphasis supplied by us)

46. The Division Bench in State of U.P. Vs. Ram Shri and others (supra)⁴ observed in paragraph-22 as follows: –

“Having thus found that the word ‘Vest’ does not have a fixed connotation or meaning, we will consider the relevant provisions of the Act having a bearing on this point. We have already mentioned these provisions exhaustively. It is not necessary to repeat them. It would suffice to mention, that vesting of right, title or interest has the object of divesting the intermediaries, whereas the vesting under Section 117 of the Act has the limited purpose of placing the Gaon Sabha

into possession for the purposes of enabling the Gaon Sabha to acquire present and immediate right to enjoy the same. With reference to the context in which the word 'Vest' has been used in Section 117 (1) of the Act, it does not mean that Gaon Sabha was conferred with absolute title or right over the things mentioned therein after divesting of the State of its title. As explained above, the Gaon Sabha has been given the right of superintendence, management and control. Title over these items regarding which notification under Sub-Section (1) of Section 117 has been issued, still remains with the State. It is this retention of title that justifies the power of resumption under Section 117 (6) of the Act. The submission of the learned Counsel for the respondent that the State was merely a formal owner and does not have paramount title is wholly untenable. With the distinction of phraseology used in Sub-Section (4) and (6) to that of Section 117 (1) of the Act. The learned counsel for the respondent asserted that the same was done by way of abundant caution and no special significance could be attached to it. We do not find any merit in this approach. The distinction made is obvious, deliberate and purposive, incorporated to achieve different objects. We, accordingly find that Section 117 (1) of the Act when it speaks of certain rights vesting in the Gaon Sabha it does not mean that ownership has passed there in to the Gaon Sabha."

(emphasis supplied by us)

47. In *Maharaj Singh Vs. State of U.P. and Others* ⁵, the judgement of the Division Bench of this Court in *State of U.P. Vs. Smt. Ram Sri* (supra) was affirmed. The Supreme Court was considering the question of *locus standi* and whether the State can be treated as a person aggrieved against an order of the Trial Court in favour of Zamindar of an acquired estate. In the High Court as well as the Supreme Court, the defendant stated that the land having vested in the Gaon Sabha, on the issue of notification under Section 117(1) of the Act, the State has no surviving interest in the property, and therefore, forfeited the position of a person aggrieved who alone could competently appeal against the decree. Such plea was negatived in appeal by the High Court. The Zamindar, Maharaj Singh, who was legal heir to Smt. Ram Sri had come up in appeal.

48. While discussing the question of whether the State can be said to be an aggrieved person, the Supreme Court considered the various Sections of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as U.P.Z.A. & L.R. Act).

49. The Supreme Court observed that by promulgating the U.P.Z.A. & L.R. Act, State of U.P. extinguished all Zamindari Estates and implemented a scheme of settlement of lands with intermediaries, tenants, and others by first vesting all estates in the State and empowering it to vest, divest, and vest again from time to time according to needs and requirements, the same estates in Gaon Sabha or other local authorities. Settlement of trees, buildings, or other specified items with the intermediaries, tenants or other persons found in possession was also part of the agrarian reform. *The Act had for its*

primary object the extinction of intermediary rights and the Supreme Court observed that the goal of legislation must make its presence felt while the judicial choice of meaning of words of ambiguous import or plurality of significations is made. The Court considered section 4, which related to vesting of estates in the State and the State Government.

50. The Supreme Court in *Maharaj Singh* (supra)⁵ also considered Section 6 which dealt with consequences of the vesting of estate in the State. The consequences were enumerated in Sub-Section (a) and its various subclauses important for the purpose of dealing with the issue of locus. Sub-Section (a) provides that right, title and interest of all intermediaries (i) in every estate in such area, including land (cultivable or barren), groveland, forests, trees (....), fisheries, tanks, ponds, waterchannels, ferries, pathways, *abadi sites*, Haats, Bazars, and Melas, (.....), and in all subsoil in such estates, including rights, if any, in mines and minerals....; shall cease and be vested in the State of U.P. free from all encumbrances.

The Supreme Court then observed:

—

“Reading the two sister sections together certain clear conclusions emerge. Emphatically, three things happened on the coming into force of the Act. By virtue of Section 4, the right, title and interest of all intermediaries in every estate including Hats, Bazaars, and Melas stood terminated. Secondly, this whole bundle of interests came to be vested in the State, free from all

encumbrances, the quality of vesting being absolute. Thirdly, one and only one species of property in Hats, Bazar and Melas was expressly excluded from total vesting of estates in the State viz Such as had been held on lands to which Section 18 (1) (a) to (c) applied. Section 9, at this stage needs to be read since it is geared to the nationalisation of Zamindari by providing for settlement, under the State, of some kinds of landed interest in existing owners or occupiers.

51. The Supreme Court thereafter considered Chapter VII of the U.P.Z.A. & L.R. Act which related to Gaon Sabha and vesting by the State of resumed estates in them and limitations and other conditions to which such vesting is subject. The Court observed that Gaon Sabha had been given a legal personality under Section 3 of the Act and had been given the right to own and hold property, to transfer and otherwise deal with movable and immovable property and manage their landed assets through Land Management Committee. This comprehensive proprietary personality of the Gaon Sabha, however, did not confer right of ownership of land which was vested in it. The Supreme Court considered Section 117 (1) (2) and (6) and took into account the power of the State Government to declare that from the date of vesting all land and areas referred to in Section 6, which had vested in the State, shall vest in the Sabha or/and other local authority established for the village or part thereof subject to such exceptions and conditions as may be specified by the State Government in the notification. However, under Sub-Section (6) of Section 117, the Supreme Court observed that the

Government may not only vest the estates in the Gaon Sabha or a local authority, but may also take away such things vested in the Gaon Sabha and transfer it to some other Gaon Sabha or local authority. The State Government thus retains the power to divest the land so vested and make it over to another local authority. Such retaining of power meant that the State remains the legal master with absolute powers of disposition over the land, vested on a temporary basis in a particular Gaon Sabha, and the Gaon Sabha is only given the power of management and supervision over land which is vested in it as it can be divested at any point of time and given to either another gaon Sabha or another local authority. The State Government continues to have a constant hold on these estates, and when it chooses, it can take away what it had given possession of to a Gaon Sabha, notwithstanding the illusory expression “vesting” which may mislead one into the impression that an absolute and permanent ownership has been created.

52. Hence, the Supreme Court observed that the estates first vest in the State for the fulfilment of the purpose of the Act, free from all encumbrances. Such initial vesting is absolute and when the State Government acting under Section 117(1) notifies a further vesting in Gaon Sabha, the State retains the residuary legal interest, and its proprietary rights persist in it, despite its act of vesting the same estate in the Gaon Sabha. While considering the question, whether the word “vest” Connotes and denotes divergent things in the same Section and Act vis a vis the Government and the Gaon Saba, the Supreme Court held that the State retained a proprietary interest which entitled it to take legal action to stop its land from going into alien hands.

53. In paragraph 14 onwards upto paragraph 19 of the judgement in Maharaj Singh (Supra)⁵, the Supreme Court went on to explain that a word can have many meanings and to find out the exact connotation of a word in a statute, we must look to the context in which it is used. *“The context would quite often provide the key to the meaning of the word and the sense it should carry. Its setting would give colour to it, and provide a cue to the intention of the legislature in using it.” It observed... “to be literal or be blinkered by some rigid canon of construction, maybe to miss the life of the law itself.”*

54. The Supreme Court observed in Maharaj Singh (supra)⁵ that the U.P.Z.A. & L.R. Act contemplates the taking over of all Zamindari rights as a part of land reform. However, instead of centralising management of all estates at the State level, the Act gives an enabling power to make over these estates to the Gaon Sabhas, which will look after them through Land Management Committees, which will be under the statutory control of the Government under Section 126. Apart from management, no power is expressly vested in the Gaon Sabha to dispose of the estates absolutely, for under Section 117(6), if for any reason the State thinks fit to amend or cancel the earlier vesting declaration or notification, it can totally deprive the Gaon Sabha of and resume from it, any estate. The Supreme Court observed that the nature and incidents of interest vested in the Gaon Sabha is not full ownership, incapable of being divested under no circumstances, but it is only a partial ownership and supervision with the paramount interest still surviving in the State. It went on to observe that the vesting in the State was absolute, but the vesting in the Gaon Sabha was limited to possession

and management subject to divestiture by the Government. The Supreme Court observed that the term “*Vest is a word of slippery import and has many meanings. The context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning*”. So the sense of the situation suggests that in Section 117(1) of the Act, “vest in the State” carries a-plenary connotation, while “shall vest in the Gaon Sabha” imports only a qualified disposition, confined to the right to full possession and enjoyment so long as it lasts.

55. The Supreme Court referred to the Black’s Law Dictionary where “to vest” has been defined as “*to give an immediate fixed right of present or future enjoyment, to clothe with possession, to deliver full possession of land, or of an estate, to give seisin*”.

56. The Supreme Court also referred to the Websters’ Third International Dictionary, which gave the meaning of “to vest” as “*to give to a person a legally fixed immediate right of present or future enjoyment.*”

The Supreme Court observed further that - “*The expression Vest has a fluid or flexible content and can, if the context so dictates, bear the limited sense “of being in possession and enjoyment”, and an explanation of the term ‘vesting’ which will rationalise and integrate the initial vesting, and the subsequent resumption is preferable, and more plausible and better fulfilled the purpose of the Act.*” The Supreme Court, therefore held that the State was entitled to sustain the action in a suit for ejectment. The Supreme Court observed that the Government has a right of resumption from

the Gaon Sabha which is to be exercised in public interest and such right will be seriously jeopardised if the estate slips into the hands of a trespasser. The estate belonged to the State, which is vested in the Gaon Sabha for community benefit and is controlled by the State through directions under Section 126 and such control is liable to be divested, if the Gaon Sabha for any reason is likely to lose the bounty. The State has a continuing duty to salvage public property for public use.

57. The Division Bench in State of U.P. Vs. Smt. Ram Shri (supra) had placed reliance on Supreme Court’s decision in ***Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust*** ⁶, and the Supreme Court in *Maharaj Singh Vs. State of U.P.* (supra)⁵ affirmed the decision of the Division Bench of this Court. In ***Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust*** ⁶, the Supreme Court observed in paragraph 19:-

“*that the word Vest is a word of variable import is shown by the provisions of Indian statutes also. For example, Section 56 of the Provincial Insolvency Act empowers the Court at the time of the making of the order of adjudication or thereafter to appoint a Receiver for the property of the insolvent and further provides that such property shall there upon vest in such Receiver. The property vests in the Receiver for the purpose of administration of the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the Receiver not for all purposes, but only for the purpose of the Insolvency Act and*

the Receiver has no interest of his own in the property. On the other hand, Section 16 and 17 of the Land Acquisition Act, 1894 provides that properties, so acquired, upon happening of certain events, shall Vest absolutely in the Government free from all encumbrances. In the cases contemplated by Sections 16 and 17, the property acquired becomes the property of the Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the Vesting of the property is not for any limited purpose or limited duration. It would appear that the word 'Vest' has not got a fixed connotation, meaning in all cases that the properties owned by the person or the authority in whom it may Vest either in title or it may be vest in possession, or it may vest in a limited sense, as integrated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Sections 45 to 49 and 54 and 54 A, when they speak of a certain building, a street or square or other land vesting in a municipality or other local body or in a Trust, do not necessarily mean that ownership has passed to any of them."

58. In a more recent decision of this Court, a Division Bench in **Rajendra Tyagi and Others Vs. State of U.P. and Others**⁷, was considering a challenge in a public interest litigation to resumption notifications issued by the Commissioner

Meerut Division with respect to certain land, which had earlier been vested in Nagar Nigam Ghaziabad and was sought to be resumed and vested with the Ghaziabad Development Authority. Challenge was also made to the auction notice issued by the Ghaziabad Development Authority, for allotment of such plots and giving freehold rights in favour of two private respondents. The main ground of attack was that the land had vested in the State under the provisions of Section 4 (1) of the U.P.Z.A. & L.R. Act after which under Section 117 (1) of the Act, the land which had vested in the State was again vested in the Gram Sabha/Nagar Nigam, by declaration in this regard by the State. Under Sub-Section (6) of Section 117, the State Government is empowered to amend or cancel any notification made with respect to Gram Sabha or a local authority and to resume the land upon which the Government is empowered to vest the land resumed in the same or any other local authority. Hence it was urged that the provisions of Sub-Section (1) and Sub-Section (6) of Section 117 would indicate that absolute title to the land, vests in the State under Section 4, and the Ghaziabad Development Authority could not have proceeded to allot the land and give freehold rights to private builders on such land.

59. The Division Bench in **Rajendra Tyagi and others (supra)**⁷, while dealing with the provisions of Section 4 and Section 117 (1) and (6) referred to the judgement rendered by the Supreme Court in **Maharaj Singh Vs. State of U.P.**⁵, and observed in paragraph 9 as follows: –

The effect of Section 117 (1) of the Act is that after the estate has vested in the State Government under Section 4, the State

Government is empowered to direct that the land, among others things which had vested in the State, shall vest in the Gram Sabha or any other local authority established in respect to the village in question. Under Sub-Section (6), however, the State Government is empowered to amend or cancel any declaration or notification made by it and order resumption. When the State Government issues an order of resumption, the Gram Sabha or local authority as the case may be, is entitled to receive compensation on account only of development if any affected by it on or over the land or thing. Under the proviso to Sub-Section (6) of Section 117, the State Government upon resumption is empowered to make a fresh declaration, vesting the land resumed in the same or any other local authority, including the Gaon Sabha. The provisions of Sub-Section (1) and Sub-Section (6) make it abundantly clear that the vesting of the land in the Gram Sabha or the local authority does not confer an absolute title which at all material times continues to vest in the State Government. Indeed, that is the basis on which the State under Sub-Section (6) of Section 117 is empowered to cancel or amend notification of vesting which has been issued under Sub-Section (1). Upon the issuance of such a notification, the gram Sabha or local authority in which the land has originally vested, is entitled to receive compensation in respect of development carried out by it thereon.

(emphasis supplied by us)

60. The Division Bench in *Rajendra Tyagi and others (supra)*⁷ also considered the challenge made to the allotment of freehold plots to private builders by the Ghaziabad Development Authority and held that it was clearly not consistent with the position in law as laid down by the Supreme Court in *Maharaj Singh (supra)*⁵. The GDA had proceeded on the basis that whether the land had been acquired under the Land Acquisition Act 1894, or the land had been resumed under a notification issued under Section 117 (6) of the U.P.Z.A. & L.R. Act, the GDA becomes the owner of the land and is competent to deal with it on that basis. This was contrary to the settled legal position that the entrustment under Sub-Section (6) of Section 117 is for controlling and managing the land and the land does not fall in the title or ownership of the Gaon Sabha/ local authority. Title has vested in the State under Section 4 of the Act. The land continues to be in the ownership and title of the State Government. The GDA could not have proceeded to allot the land to the private respondents on a freehold basis. It set aside the allotment of land to private developers on a freehold basis while at the same time clarifying that it had not entertained the challenge to the order of resumption, which was passed under section 117 (6) of the Act.

61. In Committee of ***Management, Imambara Qadeem And Others Vs. Union of India and Others***⁸, a Division Bench of the Court was considering the challenge made by the petitioner in 2022 to the notification issued by the State Government on 28.06.2012, under Section 117 (6) of the U.P.Z.A. & L.R. Act for resuming plot no. 146, ad-measuring 1500 m² in a village in District Prayagraj. The petitioner had alleged that he and his forefathers had lived

in the said village since a very long time, and his father had constructed a building known as Imambara Qadeem over an area of 1500 m², situated in plot no. 146, which was more than hundred years old and members of the community had created a Society to look after the property. According to the petitioners, Abadi sites, particularly buildings do not vest in the Gaon Sabha so as to be amenable to the States power of resumption under Sub-Section (6) of Section 117 of the Act.

62. The Court in *Committee of Management, Imambara Qadeem and others* (supra) agreed with the argument raised by the respondents that the petition was highly belated and should be dismissed on that ground alone but it also considered the merits of the case set up by the petitioners and held that they had *prima facie* not produced any evidence to show that on the date of vesting, the building that is said to-be an Imambara Qadeem was in existence. The Court observed that the burden of proof lay on the petitioners to establish that the building was in existence on the date of vesting. The benefit of Section 9 of the Act can be claimed only in respect of such buildings as were in existence on the date of vesting. A building constructed later on, cannot be held to be settled with its owners/occupiers et cetera, as held by the High Court in the case of *Basti Ram Vs. Nagar Nigam Ghaziabad* (supra)¹¹. The Court found that there was absolutely no evidence on record, except for an averment to that effect that the building was in existence since before 07.07.1949. A claim without evidence could not be accepted, and it could not be held that the land on which it stood had been settled with the petitioners' forefathers.

63. Learned counsel for the petitioners has also placed reliance on *U.P. State Sugar Corporation Limited Vs. Deputy Director of Consolidation and Others*¹⁰. The Supreme Court in the said judgement was considering a dispute relating to consolidation proceedings in respect of three plots in a village in Meerut District UP. The private respondent had filed a Section 9 application for declaration before the Consolidation Officer that in pursuance of a lease granted by the Land Management Committee, he has Sirdari rights over the land in dispute. Objections were filed by the appellant saying that it had a storage tank for molasses and a tank for sullage water on the disputed land since 1932-33, under the previous owners and a portion of the plots was also used as land appurtenant to staff quarters of the Mill. Surrounding the plots on all sides was other land belonging to the Mill. On the strength of these facts, the appellants contended that the plots had never vested in the State under the U.P.Z.A. & L.R. Act, 1950. Initially, the Consolidation Officer decided in favour of the appellant. The Settlement Officer Consolidation also dismissed the appeal. The Revision was also rejected by the Deputy Director Consolidation, on a procedural point, but it was remanded to him by the High Court exercising writ jurisdiction for decision afresh on merits. Thereafter the DDC reversed his earlier judgement and held that the private respondent had become Sirdar of the disputed land. The petition of the appellants was dismissed by the High Court.

64. Before the Supreme Court, it was contended on behalf of the appellants that the Mill was entitled to the benefit of Section 7 of the U.P.Z.A. & L.R. Act, which provided for saving of certain rights of landholders. It was contended that the

respondent was not in possession of any part of the plots in question as the Consolidation Officer on local inspection had found that there were two tanks on the land and he had also found that the plots were appurtenant to the Mill building and its Staff colony, and that the Mill had been in possession throughout. These findings had remained undisturbed, and it was thus contended that the judgement of the DDC and that of the High Court was erroneous.

65. The Supreme Court in *U.P. State Sugar Corporation Limited (supra)* considered the fact that the predecessor in interest to the appellants M/S. Jaswant Sugar Mills had been established by Seth Inder Sain, who had initially set up M/S Indira Sugar Works in 1932–1933 over the land in question. On such plots, there existed a storage tank for molasses and a tank for sullage water, and a portion of the said land was also used for better enjoyment of other property of the Mill, i.e. the staff colony, being land appurtenant to it. Jaswant Sugar Mill could therefore claim rights under Section 7 of the U.P.Z.A. & L.R. Act for easement and other similar rights for more beneficial enjoyment of the land it was enjoying immediately before the date of vesting and under Section 9 of the U.P.Z.A. & L.R. Act, which provided for settlement of buildings and the sites on which they were standing and land appurtenant there to, with the those persons who held them lawfully before the date of vesting, i.e. before 01.07.1952.

66. The Supreme Court in the aforesaid judgement observed that wells, trees in Abadi and buildings or the site of building, which are fictionally settled with the owner whereof, including the land appurtenant would not vest in the State as a consequence of notification issued under

Section 4 of the U.P.Z.A. & L.R. Act. The right of easement available under Section 7 would also continue to be available to the person who had been enjoying that right on the appurtenant land for the better enjoyment of the land in his possession, and such right would not be destroyed on account of vesting of all rights, title and interest in the State. Under Chapter VII of the U.P.Z.A. & L.R. Act, which deals with Gaon Sabha Section 117 provides for vesting of land et cetera in the Gaon Sabha, including Abadi sites situated in a Circle, which had vested in the State under the Act to Vest in the Gaon Sabha established for the Circle. Before a property vested in the Gaon Sabha, it should have first vested in the State Government under Section 6 of the U.P.Z.A. & L.R. Act. Inspection by Consolidation Officer had found that Jaswant Sugar Mill and before that Indira Sugar Works, were in possession of the land surrounding the plots in question and on the plots in question there was a molasses tank and also a tank for storage of sullage water and some part of the land was being used as land appurtenant to the Staff colony, and other buildings of the Mill, the property at no stage had vested in the State, and it was settled with the owner of the buildings i.e. the predecessor in interest of the appellant. Since the property at no stage had vested in the State, therefore it could not at any subsequent stage vest in the Gaon Sabha. Therefore, the Gaon Sabha could not legally execute any lease in respect of these plots in favour of the respondent.

67. Having considered the observations of the Supreme Court in the case of *Budhan Singh and another Vs. Nabi Bux (Supra)* and in the case of *Maharaj Singh Vs. State of U.P. (Supra)*⁵, where it affirmed the decision of this Court in *State*

of *U.P. Vs. Smt. Ram Shri (Supra)*, regarding Sections 4, 6, 9 and 117 of the U.P.Z.A. & L.R. Act and also judgments rendered by Division Bench of this Court in *Rajendra Tyagi and Imam Bara Qadeem (Supra)*; we have also considered the judgments cited by learned Counsel in *U.P. State Sugar Corporation (Supra)*. Now we shall consider the questions arising in the instant case, necessary for determining the controversy involved.

We shall consider issues framed by us and mentioned as A, B, C, D & E as aforesaid together.

68. What was vested in the *State of U.P. under Section 4 read with Section 6 of the Act*? It is clear from the language of Section 4 and Section 6 of the Act as interpreted by binding precedents of the Supreme Court and of this Court that all rights, and interest in all properties in land and water including Village Abadi of all intermediaries in every estate were taken away and vested in the State of U.P. free from all encumbrances. This vesting was absolute and inalienable. The lands in villages in question i.e. Salapur Rajor, Hasanpur and Hussainpur Sudhana recorded as Village Abadi sites also stood vested in the State of U.P. under Section 6 (a) (vi) of the Act w.e.f. 01.07.1952.

69. *The effect of further vesting in the Gram Sabha under Section 117(1) of the Act and resumption of land under Section 117(6) of such land by the State on need arising for the same.* The effect of Section 117(1) of the Act is that after the estates have vested in the State of U.P. under Section 4 of the Act, the State Government is empowered to direct that the land, among other things enumerated in Section 6, shall further vest in the Gram

Sabha or any other local authority in respect of the village in questions. Such vesting however is not absolute and is only for superintendence, management and control. The Gram Sabha cannot alienate the property so vested in it. Under Sub-Section (6) of Section 117 of the Act the State Government is empowered to resume such properties and declare them to be vested in another village or local authority and the Gram Sabha is only entitled to receive compensation for development, if any, it has carried out on such properties. The vesting in the State is absolute, but the vesting in the Gaon Sabha is limited and contingent upon the State Government's satisfaction that may lead it to resume such land for another public purpose.

70. *With regard to the applications of Section 9 of the Act and its scope.* It has been argued that Section 9 creates an exception and settles the buildings, land on which such buildings, houses etc. stand and land appurtenant thereto with the owners/occupiers thereof who 'held' them on the date of vesting. Since such building sites and Land appurtenant thereto stood settled with their respective owners it could not be resumed. It can only be acquired. On a plain reading of Section 9 and its Rule 26 it is abundantly clear that only existing wells or buildings on the land in question on the date of vesting shall be settled with the owners/occupier thereof. The Legislative intent is very clear and it provides the settlement of existing wells, trees, buildings and area appurtenant thereto on those persons who "Lawfully held" them on the date of vesting i.e. 01.07.1952 with the intention to provide continuity of possession.

71. In the case of *Basti Ram Vs. Nagar Nigam, Ghaziabad and Others* ¹¹,

this Court, while interpreting the provisions of Section 9 of the Act had held: –

“Provisions of Section 9 are applicable only when there is evidence and proof of the fact that there existed a well or building on the land in question on the date of vesting. There is no averment in the plaint. Nor there is any finding of fact in this regard. Therefore, the finding of the lower Court that the land cannot be said to have been settled with the plaintiff is correct.”

72. In *Sudesh Pal and Others Vs. State of UP and Others, Second Appeal No. 487 of 2013*¹³, the Court was considering the argument raised by the plaintiffs that the disputed land was shown as Abadi in the Khasara of Fasli year 1337, and therefore, the plaintiffs were entitled to the benefit of Section 9 of the U.P.Z.A. & L.R. Act. After considering the language of Section 9 of the Act, it was observed by the Single Judge that when the evidence and proof were led that there existed a well or a building on the land in question on the date of vesting, only then Section 9 would be applicable. The Trial Court had considered the fact that on the date of vesting there was no building, et cetera, which was being enjoyed by the plaintiff and on the contrary, the record of the consolidation proceedings clearly showed that the land was Banjar and had therefore vested in the State. The Court relied upon judgement rendered by the High Court in *Basti Ram Vs. Nagar Nigam Ghaziabad and others* 11 and the decision rendered in *Budhan Singh Vs. Nabi Bux (supra)* 1. The Court relied upon observations made in paragraph 10, 11, and 12 of the judgement in *Budhan Singh (supra)* and observed that the Supreme Court had specifically observed

that the word “held” cannot be extended as to include within its ambit a mere trespasser or a person having no otherwise right to hold the building so as to extinguish or overlook the legal right or title of State over the disputed property. The Apex Court had said that the “word held means lawfully held”.

73. In *Second Appeal No. 251 of 2019, “Chandrajit Vs. Baliram (dead) and Others” (Neutral Citation 2019: AHC: 193076)*¹³, the Court was dealing with the claim of the Appellants that they had a residential house since the time of their ancestors and they had started using the disputed land as their Sahan and under Section 9 such land used by them as Sahan had vested in them, and they cannot be dispossessed in any manner by a third-party. The Court observed that in a suit for Perpetual Injunction against the defendant-appellant restraining them from interfering in physical possession over the land in dispute, and to restrain them from raising construction over it, the question whether the plaintiffs-respondent could avail the benefit of Section 9 of the Act, even where there was an admission that there was no construction in existence over the disputed land had to be gone into.

74. The Court considered the judgement rendered in *Budhan Singh and Another Vs. Nabi Bux and Another (supra)* and the essential ingredients to invoke the provisions of Section 9 of the Act of the person claiming interest should have a house on it, then only such land can be treated to have vested in the owner of such house in terms of the provisions of Section 9 of the Act. Referring to paragraph 30 of the judgement in *Budhan Singh and Another (supra)*, the Single Judge observed that the Supreme Court had defined the

expression “held” to connote possession by legal title. The expression “held” in various sections of the U.P.Z.A. & L.R. Act meant “held lawfully” and the Court cannot overlook the context in which that expression is used in section 9. Referring to the judgement rendered earlier by it, the Supreme Court had observed that the expression “holds” includes a twofold idea of actual possession of a thing and also of being invested with a legal title. It referred to the scheme of the Act, which was to abolish all Estates and vest the property in the State, but at the same time to confer certain rights on persons in possession of lands or buildings in existence on the date of vesting on persons who within the contemplation of the Act were those who were in possession of lands or buildings on the basis of some legal title. Also in case the claimant is claiming possession over land which is vacant, he must show that the land is necessary for the enjoyment of his building, which was existing on the site on the date of vesting. Dealing with the definition of “appurtenant land” as given in Black’s Law Dictionary, the Court held that there was no evidence that such land was legally “held” as per the requirement laid down by the Supreme Court in *Budhan Singh and Another (supra)*, and there was also no evidence led by the plaintiff that the land is appurtenant to his house.

75. The burden of proof to establish that the building in question was in existence on the date of vesting shall be on the petitioner. A building constructed later on, cannot be held to be settled with its owner, occupier, et cetera. In the present case, no document has been produced by the petitioners to the effect that the property in question for which they are seeking benefit under Section 9 of the Act was lawfully held by them or their

predecessors-in-interest on the date of vesting. Even no document has been produced by the petitioners for showing that on the date of vesting, certain buildings, et cetera were existing on the property in dispute so as to bring it within the ambit of section 9 of the Act, 1950. *The copies of Parivar Register filed for some of the petitioners cannot be relied upon as Parivar Register came to be maintained only after the coming into operation of U.P. Panchayat Raj Maintenance of Parivar Register Rules, 1970.*

76. A Supplementary Affidavit has been filed by Haseena Khatoon in October 2023 where it has been stated that the writ petition was referred to Mediation and Conciliation Centre, High Court Lucknow, for settlement of dispute between the petitioners and the NTPC and the State authorities in regard to compensation for the land resumed in village Hasanpur Sudhana. It is also stated that Haseena Khatoon Petitioner No.1, had moved an application to Additional District Magistrate, Ambedkar Nagar on 12.04.2021, stating therein that the ancestor of Haseena Khatoon namely Mohammed Hasan was the Zamindar of village Hussainpur Sudhana and according to the revenue records of 1865, Late Mohammed Hasan was living on and using land of Gata No. 403, having his house, mosque, well and cattle shed and other buildings in about 12 Bigha 10 biswa recorded in his name. Gata No.403 was later converted into Gata Nos.406, 407, 408, 409, 412, 413, 414, 415, 416, 417, 418, 419 and 420, in 1301 Fasli and later on changed to Gata No. 319, 323, 306, 426, 428, 429, 435, and 494 in 1331 Fasli, which Gata Numbers have remained the same in 1359 Fasli but during Consolidation Operation, new Gata numbers were allotted to different villagers

and some forged entries were made in the name of some private persons who were encroachers on land of late Mohammed Hassan. During consolidation operations the land of old Gata No.403 has been given new numbers and some of it has been recorded as Abadi land, while some has been recorded as Manure pit, Groveland, Mosque, Banjar and Abadi. It has been alleged that all the land of village Hussainpur Sudhana belonged to late Mohammed Hassan, the ancestor of Haseena Khatoon and its nature has been changed during consolidation operations. The copy of the application, made by Haseena Khatoon on 12.04.2021 and the enquiry report dated 26.09.2021 submitted by the Revenue authorities along with the old and new Gata No.s have been annexed as Annexure-1 to the Supplementary Affidavit most of which is illegible. The enquiry report, it is alleged, admits that Late Mohammed Hasan was the ancestor of Haseena Khatoon and Petitioner Nos.1 and 2 are entitled to get compensation of land acquired in village Hussainpur Sudhana. It has been alleged that no decision has been taken on such report by the Additional District Magistrate.

77. We are not convinced with the averments made in the supplementary affidavit as it is the admitted case of Haseena Khatoon that her forefathers were Zamindars of the Village Hussainpur Sudhana and as per statutory provisions of Section 4 and Section 6 all lands, wells and other properties of Zamindars had vested in the State w.e.f. 01.07.1952. The petitioner herself states that in consolidation operations the nature of the property earlier owned by her ancestors was changed and recorded as Abadi, Usar, Banjar, Manure Pit etc. Without vesting of such estate, such change in ownership and nature of

properties could not have been made. The petitioners forefathers never challenged such vesting. On abolition of Zamindari they had also been compensated by the Government.

F. Relevance of Khasra (P-A-3) and Khatauni (P-A-11) prepared under Section 28 and Section 32, 33 of the Land Revenue Act, 1901 and Paragraphs A-60 to A-102 and A-121 to A-160 of the UP Land Records Manual respectively.

78. Khasra (P-A-3)- Paragraph A-60, of the U.P. Land Records Manual provides that the Khasra (field book) shall be prepared in Form No. P-A-3. Under section 28 of the Land Revenue Act and now Section 30 of the Revenue Code, 2006, the Collector is required to maintain a field book of each village in his district. The field book is an index to the map and is known as the Khasra. An entry in the khasra is an indicator of possession only. Whether there has been continuous possession over the land can be ascertained from a khasra entry. It contains all agricultural facts such as crops, irrigation, etc and also all facts required for the preparation of the Khatauni, such as names of tenure-holders, etc. Khasra is the foundation of the Record of the Rights and the source of all agricultural statistics. Its correct preparation is, therefore, of the utmost importance. Rules for its preparation are contained in paragraphs A-60 to A-102, of the U.P. Land Records Manual and its checking is done by the Supervisor Kanungo under paragraphs 422 to 426.

Khatauni- Paragraphs A-121 and A-123 of the U.P. Land Records Manual provide that the Khatauni shall be prepared in Form No. P-A-11. The Khatauni is a

register of persons cultivating or otherwise occupying land in a village prescribed by Section 32 of the Land Revenue Act, 1901 or Section 32 of the Revenue Code, 2006. The Khatauni contains details of persons cultivating or “otherwise occupying land”. Detailed rules for preparation of the Khatauni are contained in paragraphs A-121 to A-160 of the U.P. Land Records Manual. The rules for its verification and test by the Supervisor Kanungo are also given in paragraphs 433 to 435 of the U.P. Land Records Manual. The khatauni is a Record of title. If it is not forged or surreptitiously obtained it has great evidentiary value for determining title.

It is, therefore, clear that, Khasra is record of possession and Khatauni is record of right. In other words, Khasra is an indicator of possession where as Khatauni relates to title and nature of occupancy over the land. In the present case at hand, petitioners have led no evidence whatsoever to show that they had lawful right over the land and were also in lawful possession over the land in question.

G. Validity of order of Resumption, dated 21.01.2013 passed under Section 117 (6) of the Act, 1950, by Commissioner Faizabad Division, over the Land recorded as Abadi under Category 6(2) of Paragraph A-124 of the Uttar Pradesh Land Records Manual

79. There is no dispute between the parties regarding the nature of the land in question recorded in the revenue record. There is also no dispute regarding recording of land in revenue record as Sarvajanik Abadi Land under category of 6(2) of para A-124 of the U.P. Land Record Manual. Now, the question that has to be examined by this Court is that whether the

title and ownership of the land recorded as Sarvajanik Abadi Land under category 6(2) of para A-124 of the U.P. Land Records Manual, where houses have existed since long will still continue with the State Government or the lands and houses of respective occupiers have automatically been settled with them in terms of Section 9 of the Act, 1950.

80. Category 6 is described in para A-124 of the U.P. Land Records Manual, which pertains to barren land and the said category comprises of—

(i) lands covered with water / (ii) sites, road, railways, buildings, and other lands put to non-agricultural uses/ (iii) graveyard, and cremation grounds, other than those included in land held by tenure holders or Abadi area and/ (iv) otherwise barren land.

A plain reading of category (ii) makes it abundantly clear that no land, which is held or owned by a private person, has been included. further, this Court in the case of **Phool Singh and Another Vs. Board of Revenue through Member Judicial** ¹⁴, and in **Masroor Ahmed and Others Vs. Deputy Director of Consolidation and others** ¹⁵ held that the land recorded as Abadi Land under category of 6(2) of para A-124 of the U.P. Land Records Manual, belongs to the State/Gaon Sabha and is, therefore, vested in the State.

81. In the instant case, it is clear from the revenue records that the land in

question has consistently been recorded as Sarvajanik Abadi since 1359 Fasli under Category 6(2) of para – 124 of the U.P. Land Record Manual i.e. a Government land, and it is more clear as mandated by Section 4 of the U.P.Z.A. & L.R. Act, which, as we have discussed above, after abolition of Zamindari, falls within the area of the estate covered by notification under Section 4 of the Act and stood vested in the State free from all encumbrances.

82. Hence, there is no fetter on the part of the State Government to resume the land recorded as Abadi Land under category of 6(2) of para A-124 of the U.P. Land Record Manual, which belongs to the State/Gaon Sabha.

H. Government cannot and does not acquire its own land, only resumption can be done in terms of section 117(6) of the Act, 1950 because right, title and ownership still continues with the State

83. The learned counsel for the petitioner placed much emphasis on the application of Section 9 of the Act and consequently it was argued that the land has been settled with the respective occupiers of the land covered under Category 6(2) of para A –124 of the U.P. Land Records Manual. He further submitted that after settlement of the land with the respective occupiers in terms of Section 9 of the Act, the State Government has no power to resume the land, it can only be acquired by the State, as per the relevant provisions of the Land Acquisition Act.

84. So far as the contention of the counsel for the petitioners that the State Government has no power to resume the

land and it can only be acquired by the State as per relevant provisions of the Land Acquisition Act is concerned, this argument is without any substance and is hence rejected. We have already discussed above that the land in question falls in category 6(2) of para–A 124 of the U.P. Land Records Manual and belongs to the State /Gaon Sabha and therefore the Government should not and does not acquire its own land, only resumption can be done in terms of Section 117(6) of the Act because title and ownership still continued with the State.

VIII. Applicability of Durga Narain College and Adity Kumari School v. State of U.P., 2018 (140) RD 510 in the Present case.

85. The learned Senior Counsel for the petitioners argued his case mainly on the strength of decision rendered by this Court in the case of *Committee of Management, Durga Narain College and Adity Kumari School v. State of U.P.*⁹, and sought benefit in the same line.

86. In *Committee of Management, Durga Narain College (supra)*; a Division Bench of this Court was dealing with a challenge to an order of resumption passed by the Commissioner under Section 117(6) of the U.P.Z.A. & L.R. Act with respect to land which was being used by the petitioner as a playground. It was not disputed that the then Zamindar of *Tirwa*, District Farukhabad, Raja Durga Narayan Singh had established a school in his name and that of his wife Srimathi Adity Kumari, by raising several buildings on land belonging to him for purpose of school like classrooms, hostel and other facilities, over plot numbers 795 and 819, from which new plot nos. 623 and 738 had been carved out

during consolidation operations, which were proposed to be resumed for the purpose of *Shahri Garib Awas Yojana* under the Integrated Housing and Slums Development Programme. These plots were in the shape of Abadi even on the date when institution was established in 1923 and was recognised in the year 1926; and was upgraded to High School and thereafter recognised as an Intermediate College in 1946. To establish their claim of such lands being settled under Section 9 of the U.P.Z.A. & L.R. Act with the School and College, on the date of vesting, i.e. with effect from 01.07.1952, the petitioners had brought on record the *Khatauni* (record of rights), and the *Khasra* (field book) of 1348 *Fasli* of the village with regard to the old plot numbers out of which the new plot numbers had been carved out, which showed such plots to be recorded as Abadi-school, *Angrezi* (English school). CH Form 41 prepared during consolidation operations and CH form 45 were also brought on record. The Record of Rights and the Record of Possession were maintained in terms of the Land Records Manual, which had statutory prescription under the UP Land Revenue Act. The revenue records which were prepared after the abolition of Zamindari entered this land as part of Abadi under Category 6(2) of para-A-124 of the Land Record Manual and revenue records were maintained accordingly.

87. The Court found that the occupation of the petitioners since 1923 onwards had never been disputed before the abolition of the Zamindari. The entries prepared under CH form 41 and CH form 45 during settlement proceeding under Consolidation of Holdings Act, demonstrated the connectivity of the plots in dispute with that of old plot numbers 795

and 819, particularly plot nos. 623 and 738M, which had been shown as Abadi certainly showed that the area was occupied and inhabited since before abolition of Zamindari. Also, it was stated in the counter affidavit that six plots, excluding the disputed plots were exclusively recorded in the tenancy of the Institution about which there was no dispute. The two plots about which the dispute had been raised were evidently contiguous and appurtenant to the said plots, admittedly recorded in the name of the Educational Institution. There was also nothing on record to indicate that the institution was ever called upon to disassociate or withdraw itself from the said plots by any Authority. The revenue map and the actual location of these plots together with the plots already recorded in the name of the institution about which there was no dispute, showed clearly that the land in question was appurtenant to and part of the building complex of the educational institution which was established by the then Zamindar. The Register of Proprietorship, namely, the Khewat, was also not disputed. In the revenue records of Khewat, Khatauni and Khasra prior to the abolition of Zamindari, the land continued to be recorded in the name of the school. The fact of the records of the Pre-Zamindari abolition period being correct, had also not been denied by the respondents in the counter affidavit.

88. The Court also considered in detail the provisions of Section 4, Section 6 and Section 9 of the U.P.Z.A. & L.R. Act and discussed the law as laid down in *State of UP Vs. Smt. Ram Sri; and Maharaj Singh Vs. State of U.P. (supra)*⁵ with regard to Section 117(1) and Section 117(6) of the U.P.Z.A. & L.R. Act. After considering Section 9, together with the provisions of

Rule 26 of the U.P.Z.A. & L.R. Rules, 1952, which provided that the site of a well or building along with area appurtenant thereto situated within the limits of an estate shall be deemed to be settled with the owner of the said well or building, and that he shall have a heritable and transferable interest in the site, and that he shall not be liable to ejectment on any ground whatsoever, and that he shall have right to use the site for any purpose whatsoever subject to existing rights to easement, and that succession shall be governed by personal law; the Division Bench held that —

“the vesting under Section 117(1) would be subject to exceptions under Section 9 of the Act read with Rule 26 of the 1952 Rules, which by way of fiction mandated that buildings existing over Abadi sites and the site of the building with the area appurtenant thereto, shall be deemed to be settled with the existing owners and occupier thereof.

89. It was observed by the Division Bench that the State by virtue of Section 9 acknowledged the existing rights on *Abadi sites* together with building and land appurtenant thereto, in favour of the existing owners and occupiers and such land was, therefore, beyond the control, superintendence or management of the Gaon Sabha. The Division bench observed—

“.....The Gaon Sabha, therefore, could not claim any such vesting in it in terms of Section 117(1) of the Act of 1950. The natural corollary of the same was that if such land which had been settled with the existing owner or

occupiers as on the date of vesting which is 01.07.1952, then the Gaon Sabha cannot be presumed to have been conferred with the right of superintendence, control or management over the same. The issue of the divesting such an owner or an occupier under Section 117(1) therefore does not arise, nor the said land vested in the Gaon Sabha for superintendence, management and control. Accordingly, such land which has been settled, cannot be the subject matter of resumption under section 117(6) of the U.P.Z.A. & L.R. Act in as much as resumption can be only of such land which has vested in the Gaon Sabha for superintendence, management and control...”

“25. This is a statutory right of property acknowledged under Section 9 of the 1950 Act, which is further explained by Rule 26 quoted hereinabove, which reinforces the rights settled with the existing owner or occupiers, making it inheritable and even not liable to ejectment on any ground whatsoever. Thus, if Rule 26 of the 1952 Rules creates a statutory bar on ejectment, then land which has settled with the existing owner or occupier cannot be made subject matter of resumption under section 117(6). The right created under Section 9 read with Rule 26 of the 1952 Rules is a right through a settlement which is permanent in nature. The fiction of deemed settling acknowledges pre-existing rights. It is heritable and transferable and is to be governed in matters of succession by

personal law. It may be for this reason that the Apex Court in the case of Hinch Lal Tiwari Vs. Kamla Devi and Others, (2001) 6 SCC 496, in paragraph 8 while construing the provisions of Section 117(1) has held that the expression “and Abadi sites”, has been wrongly placed in clause (vi) of Section 117(1). The reason is not far to see, namely, land which has been settled in terms of Section 9 would fall outside the purview of section 117, (1) and (6)”

90. Therefore, In ***Durga Narain College (supra)*** admittedly, an institution was established in year 1926 and that Abadi land recorded under Category 6(2) of Para-A-124 of U.P. Land Record Manual, was in possession of School as playground from very inception and this Court while interpreting the word “appurtenant”, especially in context of school, gave the benefit, while holding that playground is a necessary part of any educational institution. This Court further held that all activities associated with such a building, as in the present context a school, being carried out on such premises would be beneficial for the Institution and for its use in present as well as in future, and hence, would fall within the definition of the word land “appurtenant”. The division bench also observed that Section 9 which is the saving-cum- exception provision which settles buildings, site of buildings and land appurtenant thereto alongwith wells etc. with the existing owners or occupiers on the date of vesting i.e. 1.7.1952, and it is a condition precedent for getting benefit of section 9 that the house must be lawfully existed on the date of vesting i.e. 1.7.1952.

91. In ***Durga Narain College (supra)***, the petitioner institution has very well established its case regarding possession over Abadi land (under Category 6(2) land) as playground on the cut-off date i.e., the date of vesting, 1.7.1952 and it was also established through record of possession i.e., khasra in which it was recorded as ‘Abadi’ and ‘field’. In that facts and circumstances this Court very rightly held that playground (field) is a necessary corollary of school and will come in the definition of appurtenant and will be deemed to be settled with the school. There is no such facts and circumstances in the present case at hand.

92. The factual matrix of the ***Durga Narain College (supra)*** is entirely different from the present case at hand. The observation and conclusion made in that case was correct on its own facts and circumstances and this judgment would not apply to the present case and would be of no help to the petitioners. Thus, the facts of ***Durga Narain College (supra)*** are totally different and not at all applicable in the case at hand.

93. Therefore, in the cases at hand, we have no hesitation in holding that petitioners are simply encroachers over the Government Abadi land recorded under Category 6(2) and their status is no more than that of an encroacher. As we have already discussed above, the benefit of Section 9 of the Act can be claimed only in respect of such buildings as were in existence on the date of vesting. A building, constructed later on, cannot be held to be settled with its owner, occupier etc as also held in ***Basti Ram v. Nagar Nigam, Ghaziabad and another (supra)***¹¹. and ***Committee of Management, Imambara***

*Qadeem and Ors. vs. Union of India and Ors. (supra)*⁸, the law in this regard is very clear.

94. In the present case, petitioners have not produced any document which shows that on the date of vesting, certain buildings etc. were existed on the property in dispute so as to bring their case within the ambit of Section 9 of Act, 1950. A building, constructed later on, cannot be taken into consideration for extending benefit under section 9 of the Act. Existence of building is a condition precedent for providing benefit under section 9 of the Act, 1950. The petitioners have not produced any document for establishing the factum of existence of houses on the date of vesting.

95. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain. The job of a Judge is judging and not law-making. In Lord Devlin's words: "*Judges are the keepers of the law, and the keepers of these boundaries cannot, also, be among outriders*".

96. Therefore, we hold that, being an owner and rightful title-holder of the land, the State Government has all and every power to resume the land in terms of section 117(6) of the Act, 1950, and any building, constructed later on, cannot be held to be settled with its owner, occupier etc. and Petitioners are simply encroachers over the village Abadi land recorded under Category 6(2) of Para-A-124 of U.P. Land Record Manual. It is not the case of the petitioners that their claims have further been settled with State Government in terms of section 123 of the Act, 1950 or

declaration has been made under section 229B of the ZA to that effect.

IX. Doctrine of Precedents and their binding efficacy

97. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. It provides a basis for orderly development of legal rules. The doctrine of judicial precedent thus involves an application of the principle of stare decisis. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides uniformity in the law.

98. Since heavy reliance has been placed upon the judgement rendered in *Durga Narain Inter College (supra)* and *U.P. State Sugar Corporation Vs. DDC (supra)*, it would be useful to briefly discuss the connotation of the term ratio decidendi which, according to Glenville Williams may mean either (i) Rule that the judge who decided the case intended to lay down and apply to the facts; or (ii) the Rule that a later Court concedes him to have had the power to lay down. According to GW Patons, 'Jurisprudence':—

“The words **ratio decidendi** are almost always used in contra distinction to **orbiter dictum**. An orbiter dictum of course is always something said by a judge. It is frequently, easier to show that something said in a judgement is **orbiter** and has no binding authority. Clearly something said by a judge about the law in his judgement, which is not part of the course of reasoning,

leading to the decision of some question or issue presented to him for resolution has no binding authority, however, persuasive it may be, and it will be described as an **orbiter dictum**.”

While deciding the **ratio decidendi** first, it is necessary to determine all the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge. In Black’s Law Dictionary *ratio decidendi* is explained as “*the principle or rule of law on which a Court’s decision is founded and also as the rule of law on which a latter Court thinks that a previous Court founded its decision, a general rule, without which a case must have been decided otherwise.*”

99. A Constitution Bench of the Supreme Court in the case of **Krishena Kumar Vs. Union of India, 1990 (4) SCC 481**; has observed in paragraph 19 and 20 as follows: “19. *The doctrine of Precedent, that is, being bound by a previous decision, is limited to the decision itself and as to what is necessarily in Abadi involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain propositions wider than the case itself required . This was what Lord Selborne said in Caledonia Railway Company Vs. Walkers Trustees, and Lord Halsbury in Quinn Vs. Leathem. Sir Frederick Pollock has also said, –*

“*Judicial Authority belongs not to the exact words used in this or that judgement, nor even to all the reasons given, but only to the*

principles accepted and applied as necessary grounds of the decision.”

“20. *In other words, the enunciation of the reason or the principle upon which a question before a Court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on, the context abstracted from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge made and a minor premise, consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the Court to spell it out with difficulty in order to be bound by it.*”

(emphasis supplied by us)

100. A Constitution Bench in **Islamic Academy of Education Vs. State of Karnataka 2002 (8) SCC 481**; observed as follows: –

“139. *A judgement it is trite, is not to be read as a Statute. The ratio decidendi of a judgement is its reasoning which can be discovered only upon reading the same in its entirety. The ratio of a case or the principles and reasons on which it is based is distinct from the relief, finally granted or the manner adopted for its disposal.*

(emphasis supplied by us)

101. In ***Padma Sundara Rao Vs. State of Tamil Nadu, 2002 (3) SCC 533***; it is Stated:

*“9 – – there is always peril in treating the words of a speech or judgement as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, Said Lord Morris in *Herrington Vs. British Railway Board; Circumstantial flexibility, one additional or different fact may make a world of a difference between conclusions in two cases.*”*
(emphasis supplied by us)

102. In ***Haryana State Financial Corporation Vs. Jagdamba Oil Mills, 2002 (3) SCC 496***; the Supreme Court had said that the courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclids’ Theorem nor as provisions of the statute. These observations must be read in the context in which they appear. Judgements of courts are not to be construed as statutes. To interpret words, phrases, and provisions of a statute, it may become necessary for judges to embark upon lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes, their words are not to be interpreted as statutes.

103. It is a settled position of law that only the ratio decidendi of a judgment is binding as a precedent. It is the ratio decidendi which forms a precedent and not

the final order in the judgment, vide ***Sanjay Singh v. Uttar Pradesh Public Service Commission, Allahabad; (2007) 3 SCC 720***. Therefore, the decision applicable only to the facts of the case cannot be treated as a binding precedent.

104. The Apex Court in the case of ***Royal Medical Trust and Ors. vs. Union of India, (2015) 10 SCC 19***, held that the ratio of a decision has to be understood regard being had to its context and factual exposition. The ratiocination in an authority is basically founded on the interpretation of the statutory provision. If it is based on a particular fact or the decision of the Court is guided by specific nature of the case, it will not amount to the ratio of the judgment. Lord Halsbury in *Quinn v. Leathem* 1901 AC 495: (1900-03) ALL ER Rep 1 (HL) has ruled:

“... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found.”

105. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a Clause or a provision in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of

precedents. (Vide *Union of India and Ors. v. Dhanwanti Devi and Ors (1996) 6 SCC 44*). The essence of a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. We have no hesitation in saying that the pronouncement made in *Durga Narain Inter College (supra)* has to rest on its own facts and not binding in all circumstances and would be of no help to the petitioners because facts of *Durga Narain Inter College (supra)* case is totally different from the case at hand, have not at all applicable.

X. Conclusion

106. In light of the discussion above, we summarise our findings as follows:

a. the effect of Sections 4 and 6 of the Act 1950, is that all the estates in State of U.P. to which the Act applies shall stand transferred to and shall vest in the State of U.P. free from all encumbrances;

b. an absolute title and ownership vested in the State of U.P., free from all encumbrances under Sections 4, 3(8) and 6 of the Act, 1950 and all rights stood terminated and vested in State of Uttar Pradesh;

c. the vesting in the State was absolute but the vesting in the Gaon Sabha was limited to

possession and management subject to divestiture by Government;

d. the vesting of land in Gaon Sabha only provided the better management and superintendence of the land by the Gaon Sabha and the vesting of land in the Gaon Sabha by virtue of Section 117(1) is clearly not a complete vesting of right, title and interest;

e. the Legislative intent of Section 9 of the Act, 1950, is very clear and it provides a settlement of existed/standing wells, trees, buildings and the area appurtenant thereto to those persons who lawfully held them at time of date of vesting, i.e., on 1st of July 1952, with the intention to continuity of the possession;

f. the idea behind Section 9 of the Act is to provide continuity of the possession of the wells, trees, buildings to those persons who lawfully held them before the date of vesting shall be deemed to be settled with the said person who had been in the lawful possession before the date of vesting;

g. the expression 'held' occurs in Section 9 of Act is interpreted to mean "lawfully held, to possess by legal title" as held by the Supreme Court in *Budhan Singh v. Nabi Bux*¹, and not gained wrongful possession. In other words, the expression 'held' connotes possession by the legal title. The word "held" cannot be extended so as to include within its ambit the mere trespasser or persons having no otherwise right to hold the building so as to

extinguish or overlook legal right or title over the disputed property of others.

h. the benefit of section 9 of the Act can be extended only when there is evidence and proof of factum that there was lawfully existing/standing well or building on the land on the date of vesting, i.e., on 1st of July 1952;

i. the Burden of proof to establish that building in question was in existence on the date of vesting shall lie on the person who is seeking benefit of section 9 of the Act. It cannot shift to other parties. A building, constructed later on, cannot be held to be settled with its owner, occupier etc.

j. the copies of Parivar Register (Kutumb Register) issued under the U.P. Panchayat Raj Maintenance of Parivar Register Rules, 1970, cannot be relied upon as the Parivar Register Rules came to be maintained only after the coming into operation of U.P. Panchayat Raj Maintenance of Parivar Register Rules, 1970. Petitioners could not produce any of the documents which establish that they were residing on the land in question on the date of vesting, i.e., 1st July 1952. Existence of building on date of vesting is a necessary condition for providing benefit under section 9 of the Act, 1950;

k. Khasra is an indicator of possession where as Khatauni relates to title and nature of occupancy over the land. In the present case, petitioners have led no evidence whatsoever to show that they had lawful right over the

land and were also in lawful possession over the land in question;

l. the land recorded as Sarvajanik/Village Abadi Land under category 6(2) of para A-124 of the U.P. Land Records Manual, belongs to the State/Gaon Sabha and is vested in the State as held in Phool Singh and Another (supra) and Masroor Ahmed and Others (supra). Therefore, there is no fetter on the part of the State Government to resume the land recorded as above;

m. Government cannot and does not acquire its own land, only resumption can be done in terms of section 117(6) of the Act, 1950 because right, title and ownership still continues with the State;

n. The observation and conclusion made in the case of *Committee of Management, Durga Narain College and Adity Kumari School v. State of U.P.*⁹, were correct on its own facts and circumstances and would not apply to the present case. The factual matrix of Durga Narain College case is entirely different from the present case;

o. Petitioners are simply encroachers over the Government village Abadi land recorded under Category 6(2) and their status is not more than an encroacher. Existence of building on the date of vesting is a condition precedent for providing benefit under section 9 of the Act, 1950. The petitioners have not produced any document for establishing the factum of existence of houses on the date of vesting;

p. the essence of a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found;

q. the ratio of a decision has to be understood regard being had to its context and factual exposition. In order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute.

107. In view of the aforesaid discussion, we hold that the order of Resumption of land dated 21.02.2013, has been made in accordance with the power given under section 117(6) of the Act. We do not find any ground in the writ petitions to quash the order of resumption dated 21.02.2013. In view of the foregoing discussion, all the four writ petitions deserve to be dismissed. In the result, all the four writ petitions are *dismissed*.

(2024) 12 ILRA 698
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -C No. 22622 of 2021

M/S Oriental Structural Engineers Pvt. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:

Abhishek Khare, Akber Ahmad, Amrendra Nath Tripathi, Avdhesh Kumar Pandey, Chinmay Mishra, Gaurav Mehrotra, Rani Singh, Saumya, Sudeep Kumar, Tushar Mittal, Yogeshwar Sharan Srivastava

Counsel for the Respondents:

C.S.C., Prashant Kumar, Sachin Upadhyay, Waseeq Uddin Ahmed

A. Acquisition Law – Land Acquisition Act, 1894 – Sections 4 & 17 – Allotment of land – Though possession certificate was issued by the Authority, but actual possession of land was continued with the original landowner/farmers due to interim protection granted by Supreme Court, which was operative till 14.05.2015 – Lessee claimed the benefit of the zero period policy disputing the handing over of the possession –Benefit of the zero period policy was also given for some period – Effect – Notice of cancellation of allotment was sent and penal interest and penalties was levied – Validity challenged – Held, the St. Government never obtained the physical possession of the land and consequently the GNIDA could not have given the physical possession of land – From the fact that the petitioner attempted to initiate construction, that too of the boundary wall, it cannot be said that it had actual physical possession of the entire plot – Execution of possession certificate issued to the petitioner does not amount to handing over of the actual physical possession of the plot – High Court set aside the demand raised against the petitioner with direction to hand over the physical possession of the allotted land to the petitioner forthwith. (Para 31, 42, 43, 47, 50 & 51)

Writ petition allowed. (E-1)**List of Cases cited:**

1. Indore Development Authority Vs Manoharlal; 2020 (8) SCC 129
2. Gajraj & ors. Vs St. of U.P. & ors.; 2011 SCCOnline 1711
3. Savitri Devi Vs St. of U.P.; 2015 (7) SCC 21

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

1. Heard Sri Nitesh Jain, learned counsel for the petitioner as well as learned Standing counsel and Sri Sachin Upadhyay for the respondents.

2. The Petitioner who had been allotted a plot from the Greater Noida Industrial Development Authority (hereinafter referred to as GNIDA) has disputed the handing over of the possession of the said plot and has claimed benefit of the zero period policy of the respondents. The respondents on the other hand have rejected his claim of possession and proceeded to levy penalty and notice for cancellation of the allotment of the plot, and even the revision preferred before the State Government has been rejected leading to the present writ petition.

3. It has been submitted by learned counsel for the petitioner that on 12/03/2008 and 30/06/2008 notifications under section 4 read with section 17 of the Land Acquisition Act, 1894 were issued by the State Government for acquisition of land of 589.188 Ha. situated at village Patwari, Greater Noida, Gautam Budh Nagar. Subsequent to the acquisition, the land was developed and offered for allotment of institutional plots for setting up educational hub, University, Training centers, Schools, Hospitals and office plots

for self-use of various sizes. The petitioner made an application on 30/05/2008 for allotment of a plot of 20,000 m² for the purpose of setting up an office for self-use and deposited 10% of the application amount. The application of the petitioner was successful, and he was informed that he has been allotted a plot of 20,000 m² for a total premium of ₹ 15.80 Crores. Considering that the petitioner has already paid 10% of the sale consideration, he was required to pay the 20% of the amount within 60 days of the allotment letter, and the balance 70% of the premium was to be paid in 12 half yearly installments with an interest of 12% from 12/07/2009 onwards.

4. According to the terms and conditions of the allotment, the petitioner was required to complete the construction over the plot within 5 years from the date of the allotment. Though by means of the letter of allotment 20,000 m² of space was allotted to the petitioner, but the plot number was never communicated, but he proceeded to deposit further 20% of the premium. It is only on 13/11/2009 that the GNIDA informed the petitioner that the plot of an area 20,007.52 m² has been allotted at plot No. 3, Techzone IV, Greater Noida, and that he was to complete the formalities to get the lease deed registered. On 16/03/2010 a lease deed was executed in favour of the petitioner and a formal letter of possession was also issued by the GNIDA on the same day.

5. It has been submitted that plot No. 3 Techzone IV Greater Noida was carved out from khasras nos. 321, 323, 324, 325, 342, 343, 344, 340, 331 village Patwari, District Buddhnagar. The petitioner stated that despite possession certificates having been issued in favour of the petitioner, the actual physical

possession of the said plot was never given to him, and therefore the petitioner made repeated representations to the respondents to hand over the actual physical possession.

6. It is stated that on 15/06/2010, the Manager Institutional wrote a letter to the Officer on Special Duty (Project, Greater Noida) to nominate some officer to hand over actual physical possession. According to the petitioner, the letter dated 15/06/2010 evidences the fact that actual physical possession was never given to the petitioner, and even subsequently a number of letters and representations by the petitioner did not yield the result.

7. It is stated that by means of letter dated 02/06/2011, the petitioner was informed that the revised lease plan has been received by the respondents according to which the total area of the plot of the petitioner has been reduced from 20,007.52 m² to 20,000.76 m² and accordingly a correction deed was executed on 24/06/2011. Simultaneously a corrected possession certificate was also signed and delivered to the petitioner without handing over actual physical possession.

8. It is the case of the petitioner that even after execution of the correction deed, he repeatedly requested the respondents to hand over the actual physical possession of the plot, but the same was not done, and when the petitioner attempted to construct a boundary wall of the plot the local farmers prevented him from undertaking any construction, and this fact was also informed to the respondents as well as the District Administration and the police officials.

9. According to the petitioner, he has deposited the outstanding amount

totaling Rs. 18.85 Crores against the total premium of ₹ 15.8 crores till 31/03/2013. The petitioner was also given a default/cancellation notice on 02/05/2017 asking him to deposit an amount of ₹ 6,81,22,500.47 within 15 days failing which, the lease would be deemed cancelled and the possession of the land would be resumed by GNIDA. The petitioner submitted a detailed reply to the said notice on 10/05/2017 once again narrating the entire sequence of events, and also emphatically stating that the actual possession of the property had never been given to the petitioner. A query was made by the petitioner under the Right to Information Act in this regard, but no information was supplied to him with regard to handing over the possession.

10. It is in the aforesaid circumstances that a request was made to defer all the future instalments and interest thereon and also to reverse all the interest levied on the plot. In sum and substance, the benefit of Zero Period Policy was claimed by the petitioners along with the actual physical possession of the allotted plot. When the grievance of the petitioner was not redressed despite writing numerous representations to GNIDA, the petitioner preferred a writ petition being writ petition No. 57227 of 2013 seeking a direction to the respondents to reckon the payable dues from the date of actual physical possession rather than the date of execution of the lease deed and further not to realise the lease rent and interest from the petitioner and also grant the moratorium from payment of interest till actual physical possession is granted to the petitioner. It was during the pendency of the writ petition the GNIDA responded to the representations of the petitioners on 14/09/2018 informing them that no action

can be taken by them in light of the pending writ petition.

11. The petitioner thereafter preferred a revision under Section 41(3) of the U.P Urban Planning and Development Act, 1973 read with Section 12 of the U.P Industrial Area Development Act, 1976, on 29/04/2019 and during pendency of the aforesaid revision a fresh demand for additional compensation was made by GNIDA through letter dated 24/09/2019 and 15/10/2019.

13. The petitioner had preferred two appeals before the respondent no.1, the first appeal was dated 29/04/2019 made to the State Government with the following prayer:-

“Without prejudice to our rights in the writ petition mention above, we put forward our representation for refund of the entire amount deposited by us in shape of reservation money, allotment money, premium, lease rent, interest, location charges etc. along with interest at the rate of 15% per annum from the date of its deposit along with the losses made by us explained in para 14 above, which comes to INR 114 crores.”

14. Another appeal/revision was preferred on 15/10/2019 to the State Government for the following reliefs:-

“ In view of the above, you are requested to withdraw your demand made vide your above referred letter dated 24/09/2019 being illegal, contempt of court proceedings as subject matter is sub-judice before court. Moreover,

our request for refund of entire amount deposited with GNIDA along with 18% interest is pending with GNIDA. Under the circumstances, you are requested to keep a demand made through letter dated 24/09/2019 in abeyance till the writ petition is subjudice before the court or till actual peaceful and physical handing over of the subject plot.”

15. Both the revisions/appeals of the petitioners were decided by the common order dated 27/10/2020 whereby the State Government defenestrated the prayer made by the petitioner. A perusal of the impugned order would indicate that determination was only regarding the issue of giving possession of the plot allotted to the petitioner. The petitioner repeatedly stated that he had never been given possession and had given only a symbolic possession by letter dated 16/03/2010 and actual physical possession was never handed over to him. The State Government while rejecting the appeal was of the view that the petitioner himself has admitted that he had started construction of the boundary wall which itself was an admission with regard to possession, and accordingly the delay if any in commencing the construction work was of the petitioner himself and hence he was not entitled for any relief and both the appeals were rejected.

16. Assailing the aforesaid order dated 27/10/2020 the present writ petition was filed with the following reliefs:-

i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 27.10.2020, passed by the

Respondent No.1 (Annexure No.1), and direct the Respondent No.1 for fresh consideration.

ii) Issue a writ, order or direction in the nature of Certiorari quashing the demand dated 24.09.2019 as contained in Annexure No.2 with this writ petition.

(iii) Issue a writ, order or direction in the nature of Certiorari quashing the notice dated 04.03.2020 as contained in Annexure No.3 with this writ petition.

(iv) Issue a writ order or direction in the nature of Mandamus directing the Respondent Authority to grant the benefit of "Zero Period" in terms of the office order dated 04.01.2017 for the period when no development could be undertaken on account of the orders of status quo passed by the Hon'ble Court on the parcel of land leased to the petitioner.

v) Issue a writ, order or direction in the nature of Mandamus directing the Respondents not to take any coercive action against the petitioner for realization of the disputed outstanding lease rent, lease premium, interest or cancellation of the lease deed dated 22.12.2009.

vi) Issue a writ order or direction in the nature of Mandamus directing the Respondent Authority to reschedule the installments, lease rent, penal interest, if any, etc. after accounting for the benefit of "Zero

period" admissible to the Petitioner. ..."

17. During pendency of the writ petition a fresh demand was raised by order dated 17/01/2023 issued by the GNIDA wherein it was stated that failure to deposit the said amount would result in cancellation of the leased plot, and therefore the following prayer added in the writ petition:-

"(III.a) Issue a suitable writ, order or direction in nature of certiorari, quashing the demand letter no. Gr.No./Sansthatgat 2023/232 dated 17/01/2023 issued by Officer on Special Duty (Institutional), GNIDA, (enclosed as Annexure no. 39 to the petition).

(III.b) Issue a suitable writ, order or direction in nature of prohibition, restraining or prohibiting the respondents, their servants and agents in proceedings in any manner whatsoever pursuant to the demand letter number Gr/Sansthatgat 2023/232 dated 17/01/2023 issued by Officer on Special Duty (Institutional), GNIDA, (enclosed as Annexure no.39 to the petition).

(III.c) issue a suitable writ, order or direction in nature of mandamus commanding the respondents to refund Rs. 1,61,71,657/- by GNIDA along with a compound interest @15% per annum to be calculated from the last date of payment i.e 21/03/2013 till the date of actual payment."

18. Respondents have opposed the writ petition and filed a counter affidavit stating that the petitioners themselves have

conceded that the possession of the plot is with them when they lodged complaint to the police station Bishrek Gautam Buddhnagar on 13/03/2013 seeking police protection for continuing with the construction. It has further been stated that the benefit of Zero Period has already been given to all the developers including the petitioner during the pendency of the case from 21/10/2011 to 24/08/2012, and further asserted that the petitioner had the physical possession of the plot since 2011 and accordingly it is liable to pay penal interest.

19. A detailed counter affidavit was subsequently filed reiterating the stand disclosed in the short counter affidavit but did not comment on paragraph No. 51 to 62 of the writ petition where the petitioner has asserted that there were interim orders passed by the High Court and the Supreme Court according to which the possession of the disputed land of the farmers could not have been interfered with, by the State Government as well as by GNIDA.

20. I have heard the counsel for the parties and perused the record.

21. The controversy in the present case centers around the fact as to whether the “actual physical possession” of the disputed plot was handed over to the petitioner or not, and whether merely by issuance of possession certificate dated 24/06/2011, it would be sufficient to conclude that the said plot is physically vested with the petitioner. In the present case the petitioner was allotted a plot No. 3 Techzone IV Greater Noida was carved out from khasras nos. 321, 323, 324, 325, 342, 343, 344, 340, 331 village Patwari, District Buddhnagar by the GNIDA. A lease deed was executed in favour of the petitioner on 16/03/2010. The possession of the said plot

was not given to the petitioner, who wrote several letters requesting GNIDA to hand over the possession, and the possession certificate was given to the petitioner on 24/06/2011. The respondents Stated that by handing over of the possession certificate they have handed over the possession of the plot to the petitioner, while the petitioner contends that the petitioner was never handed over to them. The petitioner tried to take the physical possession of the property himself and build a boundary wall, but he was stopped by the villagers on 25/01/2012 and 13/03/2013, and he duly intimated this fact to the respondents as well as the police. The contention of GNIDA is that they have handed over the possession of the plot to the petitioner, and he is thereafter under a mandate to pay the premiums, lease rent and interest on delayed payment and penalty, while the petitioner has been contending that in absence of handing over of the physical possession of the property he would not be liable to pay the aforesaid, and also relies upon the Zero period policy of the GNIDA which provides that in case the physical possession cannot be handed over to the allottee then GNIDA will not charge interest penalty and also defer the instalments which are due for such period till the property is actually handed over to the lessee.

22. The manner of taking possession of land which has been subjected to acquisition proceedings under the Land Acquisition Act, 1894 have been dealt by the Supreme Court extensively in the case of **Indore Development Authority v. Manoharlal**, 2020 (8) SCC 129 where it was observed:-

261. Now, the Court would examine the mode of taking possession under the 1894 Act as

laid down by this Court. In Balwant Narayan Bhagde [Balwant Narayan Bhagde v. M.D. Bhagwat, (1976) 1 SCC 700] it was observed that the act of Tahsildar in going on the spot and inspecting the land was sufficient to constitute taking of possession. Thereafter, it would not be open to the Government or the Commission to withdraw from the acquisition under Section 48(1) of the Act. It was held thus : (SCC pp. 711-12, para 28) “28. We agree with the conclusion reached by our Brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned Brother Untwalia, J., in regard to delivery of “symbolical” and “actual” possession under Rules 35, 36, 95 and 96 of Order 21 of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned Brother Untwalia, J., in that connection, nor do we wish to express our assent with the discussion of the various authorities made by him in his judgment. We think it is enough to State that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking “symbolical” possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor

would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard-and-fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tahsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tahsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where

possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.”

262. In **T.N. Housing Board v. A. Viswam** [**T.N. Housing Board v. A. Viswam**, (1996) 8 SCC 259] it was held that drawing of panchnama in the presence of witnesses would constitute a mode of taking possession. This Court observed : (SCC p. 262, para 9) “9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land.” (emphasis supplied)

263. In **Banda Development Authority** [**Banda Development Authority v. Moti Lal Agarwal**, (2011) 5 SCC 394 : (2011) 2 SCC (Civ) 747] this Court held that preparing a panchnama is sufficient to take possession. This Court has laid down thus : (SCC p. 411, para 37) “37. The principles which can be culled out from the abovenoted judgments are:

(i) No hard-and-fast rule can be laid down as to what act

would constitute taking of possession of the acquired land.

(ii) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

(v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3 A) and substantial portion of

the acquired land has been utilised in furtherance of the particular public purpose, then the court may reasonably presume that possession of the acquired land has been taken."

264. In *State of T.N. v. Mahalakshmi Ammal* [State of T.N. v. Mahalakshmi Ammal, (1996) 7 SCC 269], this Court dealt with the effect of vesting on possession and mode of taking it and opined thus : (SCC p. 272, para 9) "9. It is well-settled law that publication of the declaration under Section 6 gives conclusiveness to public purpose. Award was made on 26-9-1986 and for Survey No. 2/11 award was made on 31-8-1990. Possession having already been undertaken on 24-11-1981, it stands vested in the State under Section 16 of the Act free from all encumbrances and thereby the Government acquired absolute title to the land. The initial award having been made within two years under Section 11 of the Act, the fact that subsequent award was made on 31-8-1990 does not render the initial award invalid. It is also to be seen that there is stay of dispossession. Once there is stay of dispossession, all further proceedings necessarily could not be proceeded with as laid down by this Court. Therefore, the limitation also does not stand as an impediment as provided in the proviso to Section 11-A of the Act. Equally, even if there is an irregularity in service of notice under Sections 9 and 10, it would be a curable irregularity and on account thereof, award made under

Section 11 does not become invalid. Award is only an offer on behalf of the State. If compensation was accepted without protest, it binds such party but subject to Section 28-A. Possession of the acquired land would be taken only by way of a memorandum, panchnama, which is a legally accepted norm. It would not be possible to take any physical possession. Therefore, subsequent continuation, if any, had by the erstwhile owner is only illegal or unlawful possession which does not bind the Government nor vested under Section 16 divested in the illegal occupant. Considered from this perspective, we hold that the High Court was not justified in interfering with the award."

23. A perusal of the aforesaid judgments of the Supreme Court would clearly demonstrate that the normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land.

24. An important aspect of the present case is the litigation between the farmers/landowners who had challenged the land acquisition proceedings before the High Court. Plot No. 3 Techzone IV Greater Noida which was allotted to the petitioner was carved out from khasras nos. 321, 323, 324, 325, 342, 343, 344, 340, 331 village Patwari, District Buddhnagar. The challenge was made to the notification under section 4 of the Act of 1894 dated 12/03/2008 and notification under Section 6/17 dated 30/06/2008. A bunch of writ petitions were filed challenging the land acquisition proceedings, and the land of

village Patwari in writ petition No. 17068 of 2009 Writ C. All the petitions were allowed by means of judgement dated 19/07/2011 and the land Acquisition proceedings were quashed. **In the said judgement it has been clearly mentioned that interim orders were passed to maintain status quo during the pendency of the petition.**

25. The matter was subsequently placed before a full bench in the case of **Gajraj and Others Vs State of U.P. and Others** reported in 2011 SCCOnline 1711. The full bench had specifically formulated an issue pertaining to taking of possession of the acquired land by the State of U.P which is as follows:-

“8. Taking of possession: One of the submissions which has been pressed by petitioners' counsel in all the writ petitions is that no possession of the plots in question have been taken by the Collector on the spot. It is submitted that possession as contemplated under Section 17, sub Section 1 has to be actual physical possession. It is submitted that the District Revenue Authorities as well as NOIDA authority/greater NOIDA authorities have never taken physical possession of land in dispute and the possession memo has been prepared without coming on the spot and there are neither signatures of land holders nor there are signatures of any independent witnesses in the possession memo.”

26. Considering the rival submissions of the petitioner as well as the respondents full bench concluded by holding that taking of possession by the

respondents cannot be said to be in accordance with law and further observed that the possession was not taken by the State authorities of the land in accordance with law and the possession memo which has been filed by the State authorities cannot be treated to be valid possession memo evidencing taking of possession. The relevant findings are quoted hereinbelow:-

“Copy of the possession memo as claimed by the State dated 2nd February, 2007 was also filed as Annexure 5 to the writ petition. The possession memo Annexure 5 to the writ petition also contains the Statement “details of the land possession of which is being transferred to acquiring body/greater NOIDA Industrial Development authority”. The said memo has again been signed by four officers of the Greater NOIDA authority and Additional District Magistrate Land Acquisition, Gautam Budh Nagar. The aforesaid possession memo are not the possession memo or the document showing taking of possession by the State. There is no occasion to transfer the possession to the Greater NOIDA authority by the State unless the possession is obtained by the State.”

27. Furthermore, as held by the Apex Court as noticed above, even if the land is vacant the State authority has to go to the spot and prepare a Panchanama which ordinarily has to be treated as sufficient to constitute taking of possession. The possession memo filed by the State in the counter affidavit cannot be termed to be a Panchanama as signatures of Panch

(independent witness) are absent. Thus, the taking of possession by the respondent cannot be said to be in accordance with the law.

28. We find merit in the submission of the learned counsel for the petitioners that possession was not taken by the State authorities of land in accordance with law and possession memo which has been filed by the State authorities cannot be treated to be valid possession memo evidencing taking of possession.

29. The full Bench of the High Court while deciding the writ petitions had categorised the cases into groups and Group 1 cases pertain to village Patwari. In its judgement dated 21/10/2011 it in unequivocally terms returned a finding that the State Government had not taking possession of the said land pursuant to the acquisition proceedings and the possession of the land continued to be with the farmers/landowners. Against the judgement of the full bench special leave petitions were filed before the Hon'ble Supreme Court where also interim protection was granted restraining the State Government from forcefully dispossessing the landowners/farmers.

30. The Supreme Court while deciding the bunch of cases in the matter of *Savitri Devi vs State of U.P 2015 (7) SCC 21 on 14/05/2015* where in paragraph No. 44 of the said judgement it has been observed that many residents of Patwari village had entered into the agreement with the authorities agreeing to accept enhanced compensation at the rate of 64.7%, and the special leave petitions filed by the authority were dismissed.

31. Considering the findings of the writ petition that interim orders were passed in all the cases at the very initial

stage, and subsequently the finding of the full bench that the possession of the land continued to be with the landowners/farmers, and subsequently interim protection was granted by the Supreme Court, it is clear that the State Government never obtained the physical possession of the land and consequently the GNIDA could not have given the physical possession of land till 14/05/2015.

32. It is against the backdrop of the aforesaid facts that the issue to be considered is as to whether actual physical possession of the land was given to the petitioner or not? The GNIDA considering the fact that there were farmers agitations and litigations were pending, pursuant to the land acquired by the State Government, which was handed over to the GNIDA for development, a policy was framed to grant benefit to the allottees and developers who are being given land by the GNIDA.

33. The board of GNIDA in its 103rd board meeting held on 14/12/2015 considered and passed a policy known as the Zero period Policy decided that in case certain situations were found to be existing then they will declare that period to be a Zero period during the said period the premium and interest would be deferred, no penalty interest would be charged in installments would be adequately shifted ahead. The said policy was issued on 28/03/2016. The pre- conditions for grant of the zero policy benefit were:-

1. In the authority has been unable to hand over the physical possession of the plot for any reason.

2. If due to breach of public order due to which the possession cannot be handed over or there is

encroachment over the allotted land due to which the development is not possible on the land;

3. In case there is a stay order passed by any court due to which the allotment, execution of lease deed or possession has been Stated due to which the construction work cannot be carried on,

4. In case any order has been passed by the State Government or GNIDA due to which the lease deed could not be entered into; Then subject to the determination of the aforesaid conditions, during the zero period the interest which falls due for payment during the said period would be shifted till the end of the Zero period, and no penal interest would be charged.

34. In the 103rd board meeting, the matter specially pertaining to Ecoteck 11 was deliberated and it was determined that the physical possession of the plot could not be handed over to the developer and therefore they were given the benefit of the zero period policy from 01/04/2011 to 21/03/2016. The similar policy was reiterated by the board of GNIDA in its 107th board meeting held on 24/12/2016 and notified by order dated 04/01/2017, where it stated that the standing committee would consider and recommend the case for grant of zero period to the Chief Executive Officer of GNIDA, which would take final decision in the matter.

35. The GNIDA in its counter affidavit filed on 08/08/2023 in paragraph 13 have Stated that the petitioner has been given the benefit of zero period during pendency of the litigation before the High

Court from 21/10/2011 to 24/08/2012. No reason has been given for limiting the benefit of zero period only for the period 21/10/2011 to 24/08/2012 and not extending it till actual physical position has been handed over has been stated.

36. In the impugned order the only issue which has been dealt with by the State Government is with regard to the handing over of the possession of the plot after execution of the lease deed to the petitioner.

37. Analysing the aforesaid facts, it is seen that writ petitions challenging the land acquisition in village Patwari were filed between 2008-09 and in all the writ petitions interim orders were passed to maintain status quo, and the full bench has categorically held that the possession land including the land situated village Patwari was never taken by the State Government. During the pendency of proceedings before the Supreme Court interim protection was given in favour of the existing landowners and against the GNIDA and the State Government. Despite the orders of maintenance of status quo having been passed by the High Court in the case of **Har Karan Singh vs State of U.P** writ petition no. 17068 of 2009 regarding the land situated in village Patwari, the GNIDA proceeded to allot the land in favour of private developers and the possession certificates were also issued. The certificates were signed only by the officers of the GNIDA without there being any independent witness or drawing up a panchnama evidencing that the actual possession of the plot has been handed over to the petitioner.

38. The GNIDA in an order passed on 09/06/2013 have stated that in the 92nd

Board meeting had considered the aspect of granting the benefit of Zero period for the land acquired in village Shahberi and Patwari as there were some orders of the High Court and consequently decided to grant the benefit of Zero period From 21/10/2011 to 24/08/2012. From the order dated 09/06/2013 it is clear that the GNIDA was fully aware of the interim orders passed by the High Court and subsequently by the Supreme Court and for which reason possession could not have been given to the allottees, which was duly considered in the 92nd board meeting and the benefit of zero period was granted.

39. Further, it is noticed that the letter was got signed from the petitioner which was titled as possession certificate on 16/03/2010 on the basis of which the respondents contended physical possession was handed over to the petitioner.

40. Considering the various judgements as considered above including *Indore Development Authority v. Manoharlal*, this Court is of the considered opinion that a mere paper signed by an authority of GNIDA without it being signed by any other independent person it cannot be said that actual physical possession was handed over to the petitioner. The petitioner, on the other hand, has been repeatedly requesting GNIDA to hand over the actual physical possession of the plot. The petitioner had further intimated that it would initiate building the boundary wall, and in fact, it had engaged a contractor to build the boundary wall, which was obstructed by the farmers, and the GNIDA as well as police authorities were duly intimated about the said fact on 25/01/2012.

41. It has been contended by GNIDA, the mere fact that the petitioner had commenced construction of boundary wall evidences that the petitioner had the possession over the said plot.

42. The aforesaid premise on which the impugned order has been passed is itself a baseless and not believable. From the fact that the petitioner attempted to initiate construction, that too of the boundary wall, and from the said facts it cannot be said that it had actual physical possession of the entire plot. On the other hand, we find that, the GNIDA itself never had the actual physical possession of the said plot which was allotted to the petitioner due to various interim orders passed by the High Court and the Supreme Court, and they themselves have considered this fact when they passed the order dated 09/06/2013 and gave benefit of the zero period for the allotments made in village Patwari. The declaration of Zero period was from 19/07/2011 to 24/08/2012. During this period, even the respondents admit that there were sufficient reasons due to which the possession could not be given to the allottees.

43. There is no material on record to suggest that after 24/08/2012 actual physical possession was given to the petitioner. We also take due notice of the fact that during the pendency of the special leave petition before the Hon'ble Supreme Court, interim orders were operative against the respondents in favour of the landowners. The said cases came to be finally decided on 14/05/2015 and accordingly till the said date the possession could not have been handed over to the petitioner.

44. Assertions made by the respondents which run contrary to the findings recorded by the High Court and Supreme Court cannot be accepted. The insistence of the respondents with regard to the handing over possession, in fact, amounts to the contempt of the orders of the High Court, as when an order of status quo has been passed with regard to the disputed plot, it was not open for the GNIDA to change the said status quo by handing over possession to the petitioner.

45. It is for the aforesaid reasons that the contention of the respondents cannot be accepted and is accordingly rejected. As the petitioner was not given the benefit of zero period policy, the respondents continued to raise demands due to non-payment of the premium and other dues and thereby issued a letter dated 17/01/2023 which has also been assailed by the petitioner in the present writ petition. In the said demand letter, the petitioner has been required to pay

(a) an amount of ₹ 15,57,54,818/- on account of default in the payment of premium,

(b) an amount of ₹14,55,26,129/- on account of default in payment of the lease rent and

(c) an amount of ₹3,01,86,595/- as additional charges for the default committed by the petitioner.

46. The petitioner, on the other hand, insists that had the benefit of Zero period should be granted to it and therefore the petitioner is not be liable to pay the said amount, and without considering the aspect of non-handing over of the possession, the said demand having been raised is illegal

and arbitrary. It has further been contended that the computation of the amount is, on the face of it, arbitrary and has been made without taking into account the premium already paid by the petitioner, and further that the benefit of the zero period already granted to it for a limited period.

47. The revisions preferred by the petitioner before the State Government have been considered and decided in the most cursory and summary manner without taking into account the relevant facts or properly applying the mind to the facts in issue. It was incumbent on behalf of GNIDA to fairly disclose before the State Government, the facts pertaining to the interim order passed by the High Court as well as by the Supreme Court for maintenance of status quo due to the litigation preferred by the farmers/landowners by challenging the land acquisition proceedings. There is no doubt that the possession of the disputed land was never handed over to the allottees, and it is for this reason that the GNIDA itself had granted the benefit of Zero period from 21/10/2011 to 24/08/2012 petitioner. The GNIDA being an instrumentality of State is under a mandate to act reasonably and fairly, and consequently should have itself considered the fact that the possession of the disputed land could not have been given to the petitioner in light of the interim order passed by the High Court and Supreme Court, and also that this fact was recognised by them when they granted the benefits of Zero period to the petitioner. No material has been adduced by the respondents which may indicate that actual physical possession was handed over to the petitioner, and therefore, the only conclusion which can be drawn by this court with regard to actual physical possession is that the same was never given

to the petitioner subsequent to the allotment, and the execution of possession certificate issued to the petitioner does not amount to handing over of the actual physical possession of the plot to the petitioner.

48. This Court is also of the considered view that when the actual physical possession of the allotted plot has not been given to the allottee, due to existence of any condition stated in the zero period policy of GNIDA it cannot demand enhanced interest, penal interest etc. which may be payable by the allottee in case he fails to pay the dues within the prescribed time. The unreasonableness on part of the respondents is writ large on the face of the record where on one hand they themselves have given and admitted the benefit of Zero period to be petitioner, but have subsequently opposed the grant of the same for subsequent period without there being any change in the circumstances, or any intervening fact which may demonstrate that the actual physical possession of the disputed plot was given to the petitioner.

49. We also express our deep concern as to the manner in which the appeal/revisions are being decided by the State Government. In exercising the statutory power vested with the State Government, it is mandated to act as independent arbiter and not as spokesperson for the authority concerned who is duty bound to defend their actions. The manner in which the State has proceeded to reject the revision preferred by the petitioner clearly indicates non-application of mind and the cursory manner of dealing with such important disputes which leaves much to be desired. The State while delegating its power to the Government officials, should adequately

consider their seniority and the capability to deal with such important matters.

50. Considering the fact that we have already held that actual physical possession of the allotted plot was not given to the petitioner, and even the benefit of the zero period was given for a limited period between 21/10/2011 and 24/08/2012, we see no reason for rejection of the claim of the petitioner regarding handing over of the actual physical possession. Considering that levy of penal interest and other penalties having been raised on the petitioner only on account of the fact that he has not deposited the said amounts claiming benefit of zero period, the demand raised by the respondents without adequately considering the claim of the petitioner is also illegal and arbitrary and, therefore, set aside.

51. For the aforesaid reasons the writ petition is **allowed**. Order dated 27/10/2020 passed by the State Government as well as the demand letters dated 24/09/2019 and 17/01/2023 are quashed. Respondent no.2 is directed to hand over the physical possession of the allotted plot to the petitioner forthwith, within a period of two weeks from the date a certified copy of this Judgment is submitted to the opposite party no.2.

52. Respondent no.2(GNIDA) is directed to pass appropriate order for the grant of benefit of zero period to the petitioner taking into account all the relevant factors including the interim orders of the High Court and Supreme Court and findings recorded by this Court hereinabove, and only thereafter issue a fresh demand letter taking into consideration the amounts already deposited by the petitioner. Let the said

exercise be concluded expeditiously, say within a period of 2 months from the date a certified copy of this Judgment is submitted to the opposite party no.2.

(2024) 12 ILRA 713
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ -C No. 25200 of 2024

M/s Sandeep Entp., Varanasi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Nikhil Kumar

Counsel for the Respondents:
 Sri Krishna Agarwal, Sri Gireesh Chandra Tiwari
 (S.C.)

Civil Law - Uttar Pradesh Procurement Manual, 2016 - Clause 9.17 - Issue in instant writ petition relates to a condition in tender document issued by respondent No.3 for procurement of super enamelled aluminium winding wire wherein performance guarantee at the rate of 10% of contract value was required to be furnished by person, who was awarded tender. (Para 3)

Argument by petitioner that it being a micro and small enterprise and Clause 9.17 exempted it from furnishing performance security/guarantee against contract for supply of goods manufactured by it - Clause 1.2 of Manual St.s that provisions of Manual was to apply to Government departments and its ancillaries - As seen in both judgments cited by respondents, one cannot in any manner treat companies enacted under

Electricity Act, 2003 and governed by Companies Act, 1956 to be part of Government departments - In instant case, tender was issued after Board of Directors finalised the same - Conditions in tender decided in Board meeting, and thereafter, letter was issued by U.P. Power Corporation Limited to other distribution companies - As U.P. Power Corporation Limited and respondent No.3 are not part of any Government department, person who participated in tender issued by said companies cannot take benefits of provisions of Manual - In fact, petitioner first applied for tender and thereafter raised objection with regard to performance security deposit. (Para 7)

Contracts given for supply of materials by infrastructure companies such as respondent Nos.2 and 3, as independent companies, cannot be subject to any of conditions in Manual unless companies themselves agree to same. (Para 8)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Maa Vind Vasini Industries Vs Purvanchal Vidut Vitran Nigam Ltd. reported in 2008 2 AILJ 456, (Para 34 to 38)
2. Rajeev Kumar Jauhari & ors. Vs St. of U.P. & ors. reported in 2006 10 ADJ 729, (Para 31, 33, 34)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. We have heard learned counsel appearing on behalf of the petitioner, learned counsel appearing on behalf of the respondent No.2, being the Uttar Pradesh Power Corporation Limited and learned Standing Counsel for the State respondents.

2. In the present writ petition, the petitioner has prayed for the following reliefs:-

“(a) issue a writ, order or direction in the nature of certiorari calling for the record of the matter and quashing the order dated 19.07.2024 passed by the respondent no.2.

(b) issue a writ, order or direction in the nature of mandamus commanding the respondent no.3 to exempt the petitioner from furnishing performance security pursuant to Offer (Letter of Intent) dated 15.05.2024 for supply of super enameled Aluminium winding wire manufactured by the petitioner in the light of provisions contained in para 9.17 of the U.P. Procurement Manual, 2016.

(c) issue a writ, order or direction in the nature of mandamus commanding the respondent no.3 to issue amended Offer (Letter of Intent) dated 15.05.2024 as per provisions contained in para 9.17 of the U.P. Procurement Manual, 2016.

(d) issue any other or further order which this Hon’ble Court may deem fit and proper in the circumstances of the case.

(e) Award the cost of writ petition to the petitioner.”

3. The crux of the issue in this writ petition relates to a condition in the tender document issued by the respondent No.3 for procurement of super enameled aluminium winding wire wherein a performance guarantee at the rate of 10% of the contract value is required to be furnished by the person, who is awarded the tender.

FACTS

4. The facts of the case, in nutshell, are as under:-

(a) The tender was opened on 26.12.2023 and the petitioner applied for the same on 1.1.2024. Subsequent to the tender being filed by the petitioner, the petitioner raised an objection on 3.1.2024 with regard to the 10% performance security deposit on the ground that the said clause is in violation of the provisions of the Uttar Pradesh Procurement Manual, 2016 (hereinafter referred to as ‘the Manual’). Thereafter, several such letters were written by the petitioner to the respondents. Furthermore, the Special Secretary, Government of U.P., Lucknow also issued several letters to the respondent No.2, being the U.P. Power Corporation Limited, asking it to consider the performance guarantee and reduce the same from 10% to 1% in favour of the petitioner.

(b) It is to be noted that the petitioner was granted tender and Letter of Intent was issued on 15.5.2024. It is to be further noted that the petitioner had come to this Court in an earlier round of litigation and the U.P. Power Corporation Limited was directed to decide the issue with regard to the performance guarantee by an order of the coordinate Bench of this Court dated 4.6.2024. The respondent in furtherance of the above order, has passed an order on 19.7.2024 which is the impugned order in the present writ petition.

ARGUMENTS OF THE PETITIONER

5. Mr. Nikhil Kumar, learned counsel appearing on behalf of the petitioner has raised the following submissions:-

(i) Mr. Kumar has placed Clause 9.17 of the Manual to emphasise that since the petitioner is a micro and small enterprise, it is exempted from furnishing performance security/guarantee against contract for supply of goods manufactured by it. The relevant paragraph of aforesaid clause of the Manual is provided below for better reference:-

“9.17 Micro and Small Enterprises and Industrial Co-operatives within State, which have been registered as such with the Commissioner and Director of Industries, on furnishing proof of such registration are exempted from furnishing performance security against contracts for supply of goods manufactured by them.”

(ii) Mr. Kumar has further relied on Paragraph 38 of a judgment of the coordinate Bench of this High Court in **Maa Vind Vasini Industries Vs. Purvanchal Vidut Vitran Nigam Ltd.** reported in **2008 2 AILLJ 456** to buttress his argument that even if the respondent Nos.2 and 3 are independent companies, they are

required to follow the statutory provisions especially one issued by the State Government. The relevant paragraph is provided below:-

“38. Thus it is evident that once independent companies have come into existence, rights, property and obligations have also vested therein separately, they are all totally separate and individual bodies and have to function in an autonomous manner without any influence from any third party except to the extent the statutory provisions otherwise require. We have not been shown any provision under which an officer of UPPCL can issue binding orders to other companies like various Discerns including the respondent No. 1. It appears to us that though the UPSEB has been disbanded and its entire functions and obligations etc. have been decentralised in various companies yet the authorities of erstwhile UPSEB who have now been transferred and absorbed in newly incorporated companies are yet working in the same old atmosphere as if the hierarchy as it was existing in the erstwhile UPSEB is still continuing. I he respondents, it appears, have not been able to

accept and adopt the legal changes which have taken place in the last 6 or 7 years. The issuance of letter dated 24.07.2007 by Chief Engineer (Commercial). UPPCL to various Discoms is an illustration of the aforesaid continuing understating of the respondents. It cannot be disputed that even shareholders of company cannot interfere in the day to day functioning of the company which has to be managed by the Board of Directors of that company. In these circumstances, the officials of UPPCL, in our view, neither in any law nor under the provisions of Article of Association nor otherwise can have any power or authority to issue any direction to various other companies like respondent No. 1 to act and function in a particular manner. Issue No. 4 is answered accordingly.”

(iii) Mr. Kumar has also placed before this Court, Clause 1.2 of the Manual which relates to scope and applicability of the Manual. The said clause is provided below:-

“1.2 These rules are applicable to the procurement of goods by the procuring entities

of all Government departments, their attached and subordinate offices. Provided that the provisions of this manual, in so far as they are inconsistent with the procedure specified in respect of the schemes/projects funded by the Central Government, International Financial Agencies or schemes/projects covered under International Agreements, shall not apply to procurement of goods for such schemes/projects.”

(iv) Mr. Kumar has submitted that even though the respondent Nos.2 and 3 are independent companies under the Companies Act, 1956, the provisions of the Manual would apply to the same as the Government is 100% share holder in these companies. He has further submitted that the proviso to Clause 1.2 assists his arguments as the said proviso reads that unless the provisions in the Manual are inconsistent with the procedure prescribed in respect of schemes/projects funded by the Central Government, International Financial Agencies or

schemes/projects covered under the International agreements, they shall not apply to procurement of goods for such scheme/projects. He argued that since there is no specific direction/decision taken by the Board of Directors of the respondent Nos.2 and 3 with regard to non-exemption of the micro and small enterprises, the provisions in the Manual especially Clause 9.17 would apply.

ARGUMENTS OF THE RESPONDENTS

6. Mr. Krishna Agrawal, learned counsel appearing on behalf of the respondent No.2 has raised the following submissions:-

(i) Firstly, Mr. Agrawal relies on a letter written by the Managing Director of Uttar Pradesh Power Corporation Limited to all the distribution companies informing them of the tender that is being floated and the conditions attached to the same. In the particular letter, Clause 3 of the standard bidding documents for e-tender specifically mentions a contract performance guarantee for an amount of 10% of the contract value is to be furnished by the successful bidder. He, thereafter, relies on Clause 1.2 of the Manual and submits that by no stretch of imagination can the Uttar Pradesh Power Corporation Limited and the respondent No.3 be termed as Government departments or ancillaries thereof. Mr. Agrawal thereafter relies on two coordinate Bench judgments of this Court in

the case of **Rajeev Kumar Jauhari and others Vs. State of U.P. and others** reported in **2006 10 ADJ 729** and **Maa Vind Vasini Industries (supra)**. He places reliance on the extract of the judgment in **Rajeev Kumar Jauhari (supra)** that is provided below:-

“31. ... Merely for the reason that the State Government is 100% share holder of the company does not identify the company itself with the State Government. In Shrikant v. Vasant Rao , the Court held in para 24 that in the matter of a company where the entire share capital is held by the State Government, yet it cannot be identified with the State Government and is always entitled to act and proceed in a manner a company function. This principle was recognized as long back as in 1970 also by a Constitution Bench in R.C. Cooper v. Union of India , and at page 584, the Apex Court held- "A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Article of Association measured by a sum of money for the purpose of liability, and by a share in the profit.

33. The aforesaid view was reiterated in Heavy Engineering Mazdoor Union v. State of Bihar and Ors., Andhra Pradesh State

Road Transport Corporation v. Income Tax Officer , Western Coalfields Ltd. v. Special Area Development Authority . A Constitution Bench of the Apex Court in Electronics Corporation of India Ltd. v. Secretary, Revenue Department, Government of A.P. , in Para-15 of the judgment held as under:

“A clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares.”

34. Thus we hold that a Company can determine terms and conditions of its employees as provided under Article of Association but since the Article of Association of a Company is neither a Rule nor Regulation and has no statutory force the conditions determined thereunder would also be not statutory. The UPRVUNL thus have the power to determine terms and conditions of its employees by making provisions in exercise of powers under provisions of Article of Association read with Companies Act.”

*(ii) Mr. Agrawal relies on paragraphs 34, 35, 36, 37 and 38 of the judgment in **Maa Vind Vasini Industries (supra)**, which are provided below:-*

“34. Another interesting aspect has been raised, inasmuch

*as UPPCL and various Discoms are admittedly, independent companies incorporated under the Companies Act, 1956. Though 100% share holding of UPPCL is owned by State Government and various Discoms and supplier i.e. respondent No. 1 are subsidiary companies of UPPCL but the fact remains that each company is an independent juristic personality having its own independent identity. That being so, whether an official of one company can issue an order to other companies having binding effect and, if so, in what capacity, is an incidental question needs to be answered to consider the validity and authority of the letter dated 24.02.2007 issued by the Chief Engineer (Commercial), UPPCL. The concept of subsidiary company only implies that the newly incorporated company which is a subsidiary company has its share holding owned by the promoting company but neither it dilutes, in any manner the concept of conferment of legal personality nor the independence of the companies is effected. The distinction between the company and its share holder has been pointed out by the Apex Court in *R.C. Cooper v. Union of India* the Apex Court held as under:*

A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Article of Association measured by a sum

of money for the purpose of liability, and by a share in the profit.

35. *The aforesaid view was reiterated in Heavy Engineering Mazdoor Union v. State of Bihar and Ors. , Andhra Pradesh State Road Transport Corporation v. Income Tax Officer , Western Coalfields Ltd. v. Special Area Development Authority . A Constitution Bench of the Apex Court in Electronics Corporation of India Ltd. v. Secretary, Revenue Department, Government of A.P. of the judgment held as under:*

A clear distinction must be drawn between a company and its shareholder; even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares.

36. *The company where shareholding is owned by the Government can never be treated to be a department of the Government and it has a separate legal existence for all purposes, and, has to function in accordance with the Article of Association and the provision of the Companies Act.*

37. *In (Praga Tools Corporation v. C.V. Imanual) it was held though 80% of the capital of the said company was subscribed by the Union Government and State Government, even then it cannot be regarded as equivalent to government department, since, it is registered under the companies act. It has a separate legal existence*

and could not be a government concern run by or under the authority of the Union Government.

38. *Thus it is evident that once independent companies have come into existence, rights, property and obligations have also vested therein separately, they are all totally separate and individual bodies and have to function in an autonomous manner without any influence from any third party except to the extent the statutory provisions otherwise require. We have not been shown any provision under which an officer of UPPCL can issue binding orders to other companies like various Discerns including the respondent No. 1. It appears to us that though the UPSEB has been disbanded and its entire functions and obligations etc. have been decentralised in various companies yet the authorities of erstwhile UPSEB who have now been transferred and absorbed in newly incorporated companies are yet working in the same old atmosphere as if the hierarchy as it was existing in the erstwhile UPSEB is still continuing. I he respondents, it appears, have not been able to accept and adopt the legal changes which have taken place in the last 6 or 7 years. The issuance of letter dated 24.07.2007 by Chief Engineer (Commercial). UPPCL to various Discoms is an illustration of the aforesaid continuing understating of the respondents. It cannot be disputed that even shareholders of company cannot interfere in the day to day functioning of the company which has to be managed by the Board of*

Directors of that company. In these circumstances, the officials of UPPCL, in our view, neither in any law nor under the provisions of Article of Association nor otherwise can have any power or authority to issue any direction to various other companies like respondent No. 1 to act and function in a particular manner. Issue No. 4 is answered accordingly.”

ANALYSIS

7. Upon perusal of the materials on record and after hearing learned counsel appearing on behalf of the parties, it is clear that the only issue in the present writ petition relates to whether the petitioner is required to pay the 10% performance security guarantee as per the tender documents. The argument of the petitioner that it being a micro and small enterprise, Clause 9.17 of the Manual shall apply in the present tender bid appears to be far fetched. In our view, the scope and applicability of the Manual has been clearly culled out in Clause 1.2 that specifically states that the provisions of the Manual is to apply to Government departments and its ancillaries. As seen in both the judgments cited by learned counsel appearing on behalf of the respondents, one cannot in any manner treat companies enacted under the Electricity Act, 2003 and governed by the Companies Act, 1956 to be a part of the Government departments. In fact paragraph 36 of the judgment in

Maa Vind Vasini Industries (supra) categorically states that even though 100% share holding is owned by the State Government, the company can never be treated as a department of the Government as the company has a separate legal existence for all intents and purposes. In the present case, we find that the tender was issued after the Board of Directors finalised the same. The conditions in the tender have been decided in the Board meeting, and thereafter, letter was issued on 25.8.2019 by the U.P. Power Corporation Limited to the other distribution companies. As the U.P. Power Corporation Limited and the respondent No.3 are not part of the any Government department, the person who participated in the tender issued by the above companies cannot seek to take the benefits of the provisions of the Manual. In fact, it is clear that the petitioner first applied for the tender and thereafter raised the objection with regard to the performance security deposit.

8. In any case, we are of the view that contracts given for supply of materials by infrastructure companies such as the respondent Nos.2 and 3, that are independent companies, cannot be subject to any of the conditions in the Manual unless the companies themselves agree to the same.

9. In light of the above findings and the judgments cited, we do not find any merit in the arguments raised by the petitioner.

10. This Court thanks both counsel appearing on behalf of the parties for their ingenious arguments made before this Court.

11. With the above observations, this writ petition is dismissed.

(2024) 12 ILRA 721
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2024

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ -C No. 28403 of 2024

M/S Kingswood Hotel Pvt. Ltd. & Anr.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Shiv Sagar Singh

Counsel for the Respondents:

C.S.C.

(A) Civil Law - Stamp Duty & Registration - Registration of Correction Deed - Indian Stamp Act, 1899 - Article 34-A of Schedule 1-B - Sections 2(10), 2(16)- Section 4- Several instruments used in single transaction of sale, mortgage or settlement, Registration Act, 1908 - Section 17 - Compulsory registration of documents - Constitution of India - Article 12 -Noida as well as the stamp authorities are the instrumentality of the State - State instrumentality cannot speak in two voices - By the correction deed, no fresh stamp duty can be levied treating it to be a new conveyance or instrument liable for stamp duty - Correction deed cannot be treated as a fresh deed, if there is no transfer of right - If no right is created, then it has to be stamped as correction deed and not a fresh deed.(Para -29,32)

(B) Indian Stamp Act, 1899 - Section 4 - when multiple instruments are executed to complete a transaction, only the principal instrument should attract full duty, while the subsequent instrument should be charged nominal duty - In order to complete the transaction between the parties, section 4 of the Stamp Act will come into play and subsequent correction deed will not be chargeable to stamp duty as a fresh deed, but only charged as per the provision of section 4 of the Stamp Act. (Para - 36, 39)

Commercial plot was allotted to a consortium under a NOIDA scheme - lease deed was to be executed in favor of a Special Purpose Company (SPC) - inadvertent clerical error by NOIDA - lease was executed in favor of another entity - Years later, NOIDA admitted mistake and executed correction deed - Stamp Authorities refused to register it under Article 34-A - demanded full stamp duty under Articles 23 & 35 - treated as a new transfer deed - hence petition - seeking a mandamus for registration of correction deed with nominal stamp duty . (Para - 2 to 10)

HELD: - Respondents were **directed to register the correction deed** upon presentation by the parties **within 10 days** without treating it as a fresh conveyance deed for stamp duty purposes. Correction deed falls within the purview of Article 34-A of Schedule 1-B of the Indian Stamp Act, 1899 and must be registered accordingly. (Para - 42)

Petition allowed. (E-7)

List of Cases cited:

1. C.W.C. Vs Adani Ports & S.E.Z. Ltd. & ors., (2022) 15 SCC 110
2. Jayalakshmi COELHO Vs Oswald Joseph COELHO,(2001) 4 SCC 181
3. Srihari (Dead) through L.R. Ch. Niveditha Reddy Vs Syed Maqdoom Shah & ors., (2015) 1 SCC 607
4. Kishore Singh Ravinder Dev & ors. Vs St. of Raj.,(1981) 1 SCC 503

5. St. of U.P. Vs M/s SJP Infracon Ltd. & anr.,
Special Appeal Defective No. 27 of 202

6. M/s Logix Infomedia (P) Ltd. Vs St. of U.P. &
ors., Writ C No. 18969/2021

7. Srihari (Dead) Vs Syed Maqdoom Shah &
ors.,(2015) 1 SCC 607

8. Jayalakshmi Coelho Vs Oswald Joseph
Coelho,(2001) 4 SCC 181

9. Smt. Sooraj Devi Vs Pyare Lal & anr., (1981)
1 SCC 500

10. Jang Bahadur Vs St. of U.P. & ors., Writ C
No. 14472/2021

11. Anjali Sahkari Avas Samiti Ltd. Vs St. of U.P.
& ors., 2014 (6) ADJ 594

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Shri Tarun Agrawal, along with Shri Shiv Sagar Singh, learned counsel for the petitioners and Shri Rishi Kumar, learned ACSC for the State - respondents.

2. The instant writ petition has been filed for issuing mandamus directing the respondent no. 2 to register the correction deed dated 15.07.2015 in the name of the petitioner no. 1 as per the provision of Article 34-A of Schedule 1-B of the Indian Stamp Act. The petitioners have further prayed for a direction upon the respondents to ensure registration of the correction deed without any further delay.

3. Learned counsel for the petitioner submits that on 01.03.2010, the New Okhla Industrial Development Authority (hereinafter referred to as, '**the Noida**') came out with a Scheme for commercial plots for builders/developers in Noida.

4. He further submits that the scheme, which opened on 01.03.2010, specifically contemplates a condition in paragraph nos. 8(a), 8(d) & 8(e) providing that in case the land is allotted, then special purpose company shall be formed, which shall carry out all their responsibility as allottee and the execution of the lease deed will be made in favour of the special purpose company, which should be a registered firm or an incorporated company.

5. The petitioner no. 1, being consortium lead Member having shareholding of 90% and other Members, participated in the said Scheme vide application dated 20.03.2010. Thereafter, vide letter dated 26.03.2010, the petitioner was allotted the plot in question. After depositing the requisite amount of 10%, the petitioner approached the Noida to execute the lease deed as per the terms of the Scheme. Thereafter, on 31.03.2010, the lease deed was executed. Vide letter dated 10.10.2011, the petitioner informed the Noida to an error on their part in execution of the lease deed dated 31.03.2010.

6. He further submits that in absence of lease deed having been registered in favour of the petitioner (special purpose company), the land could not be used for the required purpose. Further, the petitioner would not be able to commence its project as none of the bankers and financial institutions were willing to extend any credit facility to the petitioners. After great persuasion and various correspondence took place between the petitioners and the Noida, after a lapse of five years & 4 months, the Noida realized its mistake and agreed to enter into a correction deed and admitted the same as an inadvertent mistake on the part of Noida

and executed the correction deed dated 15.07.2015.

7. He further submits that thereafter, the petitioners presented the correction deed to be registered as per the provisions of Article 34-A of Scheduled 1-B of the Stamp Act. The respondent, vide letter dated 21.07.2016, informed the petitioners that the correction deed is to be executed with full stamp duty. Thereafter, vide order dated 25.11.2020, the Noida cancelled the allotment of the plot in question and proceeded to take possession vide letter dated 27.11.2020, against which the petitioner preferred Writ C No. 2219/2021, in which vide interim order dated 18.02.2021, this Court has directed the Noida not to create any third party interest, which is still operating.

8. Learned counsel for the petitioner further submits that due to non-registration of the name of the petitioner as SPC in the records of the Registrar, the petitioner is not able to enjoy and use the plot in question for the past 14 years, even after deposit of a substantial amount towards the total premium and paying the stamp duty. He further submits that the correction deed was executed purely on account of clerical error, inadvertent mistake, accidental slip on the part of the Noida, which is duly admitted by it, but the respondents (stamp authorities) are not willing to admit the same and is treating the correction deed as a separate instrument for the purpose of stamp duty contrary to the provisions of Article 34-A of Schedule 1-B of the Stamp Act. He further submits that the Noida being a State under Article 12 of the Constitution, executed the correction deed admitting that it was an inadvertent mistake, accidental slip at its end; whereas, the Office of the Commissioner, Stamp &

Registration is taking a different view treating as if it was not a clerical mistake and imposed the stamp duty on the petitioner as per Article 23 of Schedule 1-B of the Stamp Act, instead of Article 34-A of Schedule 1-B of the Act.

9. In support of his submissions, Shri Agrawal has placed reliance on the judgements of the Apex Court in *Central Warehousing Corporation Vs. Adani Ports & Special Economic Zone Limited & Others* [(2022) 15 SCC 110], *Jayalakshmi COELHO Vs. Oswald Joseph COELHO* [(2001) 4 SCC 181], *Srihari (Dead) through L.R. Ch. Niveditha Reddy Vs. Syed Maqdoom Shah & Others* [(2015) 1 SCC 607] and *Kishore Singh Ravinder Dev & Others Vs. State of Rajasthan* [(1981) 1 SCC 503].

10. Per contra, learned ACSC submits that the correction deed is a fresh transfer deed under the provisions of section 2(10) of the Indian Stamp Act. The instrument executed by the parties on 15.07.2015 named 'correction deed', by which immovable property transferred by one legal personality to an other legal personality and therefore, the instrument in question is chargeable with proper stamp duty as per Articles 23 & 35 of Schedule 1-B of the Stamp Act on the date of its execution. He further submits that on perusal of the letter dated 04.08.2015, it is clear that the inadvertent mistake was on the part of the petitioner in the execution of the lease deed dated 31.03.2010.

11. After hearing learned counsel for the parties, the Court has perused the record.

12. The record reveals that a scheme dated 01.03.2010 was floated by

the Noida for allotment of commercial plots to builders/developers, in which clauses 8(a), 8(d) & 8(e) read as under:-

8. In case if bidders have formed a consortium:

a) Members of consortium will have to specify one Lead Member who alone shall be authorized to correspond with authority. Lead Member should be the single largest share holder having at lease 26% share in the consortium. The shareholding of the Lead Member in the consortium shall remain at least 26% till the temporary occupancy/completion certificate of at least one phase of the project is obtained from the Noida. Each member of the consortium with equity stake of at least 10% will be considered as "Relevant Member". The Lead Member of the consortium must necessarily be Firm/Company registered in India with the appropriate statutory authority.

b)

c)

d) The members shall submit a registered/notarized Memorandum of Agreement (MOA) conveying their intent to jointly apply for the scheme, and in case the plot is allotted to them to form a 'Special Purpose Company', hereinafter called SPS, that will subsequently carry out all their responsibilities as the allottee (s). The registered MOA must specify the equity shareholding of each member of consortium in the proposed SPC. The SPC must necessarily be a company

registered in India with the appropriate statutory Authority.

e) Execution of the lease deed will be made in favour of either relevant members or special purpose company (SPC), which should be a registered firm or an incorporated company. However, the area of each of such sub-divided plots purposed for execution if lease deed, as described above, should not be less than 20,000 sq. mtr. and the said sub-division should be in accordance with the planning norms of NOIDA. The lead member of the consortium shall have to retain at least 26% of the shareholding as per MOA, till the temporary occupancy/completion certificate at least one phase of the project is obtained from the NOIDA.

13. The said clauses contemplate that if the land is allotted, then a special purpose company is to be incorporated and the lease deed must be in its favour to carry out development work. In the event the lease deed is not executed in the name of special purpose company, the project cannot be commenced.

14. Admittedly, the land was allotted to the petitioner no. 2 and the lease deed was executed on 31.03.2010, but due to inadvertent mistake on the part of the Noida, the lease deed was not executed in the name of special purpose company, i.e., the petitioner no. 1. The said fact was pointed out to the Noida, but at the first instance, it was not accepted, to which various correspondence were made as annexed along with the writ petition. The Noida realized its mistake and executed a

correction deed on 15.07.2015. According to the correction deed, it clarifies its mistake and incorporates/corrects the name of the of M/s Kingswood Hotels Private Limited (SPC of M/s Madhvilata Granite Indian Limited consortium). The other terms & conditions, including the original tenure, remained unchanged.

15. The record further shows that the correction deed did not affect, alter, amend or modify any of the terms contained in the lease deed dated 31.03.2010. The Noida corresponded with the stamp authority for registration of the correction deed. By letter dated 30.05.2016 (Annexure No. 8), the stamp authority refused to treat the correction deed as an instrument referred to Article 34-A of Schedule 1-B of the Stamp Act. The record further shows that the Noida, by executing a correction deed dated 15.07.2015, admits its mistake. Once the State Government, i.e., Noida, admits its mistake and executed the correction deed correcting the name of the petitioner no. 1 as a special purpose company, the respondents (stamp authorities) have no good reason for imposing stamp duty again by giving a nomenclature of a transfer deed.

16. Under the Stamp Act, lease and conveyance are separately and independently defined in sections 2(10) & 2(16) of the said Act. The record shows that no where the lessor has ever stated that the instrument dated 31.03.2010 or correction deed dated 15.07.2015 is a conveyance and not a lease. The lessor continues to be the owner of the property under the lease deed dated 31.03.2010 and correction deed dated 15.07.2015. The petitioner has no right to enjoy and use the property in question in absence of registration of correction deed and possession.

17. The Division Bench of this Court in ***State of U.P. Vs. M/s SJP Infracon Limited & Another*** [Special Appeal Defective No. 27 of 2021, decided on 25.06.2021] has held as under:-

5. Sri Sanjay Goswami, appearing on behalf of the State (appellant), submitted that the Stamp Act is a taxing statute. Being a taxing statute, equitable considerations are relegated to the background. What is to be considered is whether the stamp duty imposed on the instrument is valid. If so, whether, under the provisions of the Stamp Act, there could be a refund of stamp duty to the first respondent. According to him, by Section 3 of the Stamp Act stamp duty is chargeable on the instrument at the rate specified in the Schedule. In the State of Uttar Pradesh, vide section 3 (aa) of the Stamp Act, on an instrument of lease, stamp duty chargeable is as specified in Article 35 of Schedule I-B. Article 35 (b) of Schedule I-B of the Stamp Act becomes applicable where the lease is granted for a fine or premium or for money advanced and where no rent is reserved; and Article 35 (c) of Schedule I-B becomes applicable where the lease is granted for a fine or premium or for money advanced in addition to rent reserved. On instruments contemplated under Article 35 (b) or Article 35 (c) of Schedule I-B, the stamp duty is payable as on a deed of conveyance under Article 23 (a) of Schedule I-B either on the premium set forth in the lease or on the market value of the subject of the lease. The

*original lease instrument dated 15.11.2010 between GNIDA and the first respondent specified the premium as Rs.228,94,57,090/- and stamp duty was paid accordingly. The rectification deed dated 07.02.2013 between GNIDA and the first respondent though reduces the area leased out from 198135.62 square meter to 126302 square meter but does not amend the premium set forth in the original lease instrument. Thus, no excess stamp duty has been paid. Otherwise also, there is no challenge by the writ petitioner (first respondent herein) as to the correctness of the stamp duty charged on the instrument of lease dated 15.11.2010 or the deed of rectification dated 07.02.2013. Under these circumstances, the claim for refund of excess stamp duty paid is misconceived. In so far as the claim for allowances in respect of alleged spoiled stamps is concerned, the same is not maintainable because the provisions relating to such allowances are not attracted. According to him, the provisions of Section 49 (d) (1) & (2) of the Stamp Act are not applicable as the instrument of lease is not completely void from the beginning nor it has been rendered unfit for the purpose originally intended as the demise made by it continues to operate albeit for a reduced area. He submitted that the Apex Court's judgment in *Libra Buildtech* case (*supra*) is not applicable on the facts of this case as that was a case where the instrument chargeable to stamp duty was executed under*

*orders of the court and it was cancelled by order of the court. Thus, there the instrument was rendered unfit for the purpose originally intended. Whereas here the instrument of lease remains operable. He submitted that even if it is assumed that the Principal Secretary had no power to review, the earlier order passed by the Joint Secretary was *ex facie* illegal and, therefore, the writ court ought not to have issued a direction to enforce the order which had no sanctity in law. He, thus, prayed that the judgment and order of the learned Single Judge being not legally sustainable be set aside. In the alternative, it was urged by him that if the petitioner had suffered any loss on account of the conduct of GNIDA it could proceed against it, as per law, but claim for refund against the State is not sustainable.*

6. In support of his submissions, Sri Goswami cited following authorities:

(i) (2009) 13 SCC 301 : *S N Mathur Vs. Board of Revenue and others* -- In this decision, the apex court with respect to the scheme of the Stamp Act observed as follows: (a) that the object of the Stamp Act is generation of revenue, it is therefore a fiscal enactment and has to be interpreted accordingly; (b) that stamp duty is levied with reference to the instrument and not in regard to the transaction, unless otherwise specifically provided in the Act; (c) that stamp duty is determined with reference to the substance of the transaction as embodied in the instrument and not with reference

to the title, caption or nomenclature of the instrument; (d) that for classification of an instrument, that is to determine whether an instrument comes within a particular description in an article in the Schedule to the Act, the instrument should be read and construed as whole; (e) where an instrument falls under two or more descriptions in the Schedule to the Act, instrument shall be chargeable with only one duty, that is the highest of the duties applicable to different description. But where an instrument relates to several distinct matters, it shall be chargeable with the aggregate amount of duties to which separate instruments would be chargeable.

(ii) AIR 1959 Allahabad 583 (SB): Mohd. Mustafa Ali Khan Vs. Raj Rajeshwari Devi -- In this decision, a Special Bench of this Court, comprising three judges, inter alia, reiterated the legal principle that the stamp duty payable upon an instrument must be determined by referring to the terms of the instrument, and that the Court is not entitled to take into consideration evidence de hors the instrument itself.

(iii) AIR 1961 Supreme Court 1047, Commissioner of Sales Tax, U.P. Vs. Modi Sugar Mills Limited. -- In this case a Constitution Bench of the Apex Court, comprising five judges, inter alia, held that: in interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look

squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.

(iv) (2011) 7 SCC 493 : ITC LTD. Vs. State of U.P. and others. -- In this case, the Apex Court upon finding that NOIDA had charged less towards premium for lease, to save the demise, even after execution and registration of the lease instrument, gave opportunity to the allottee (lessee) to make good the deficiency within a specified period. In the alternative, it was directed that if the allottee was not interested in retaining the lease by making good the deficient amount, it was entitled to receive back the money already paid by it, including stamp duty paid on the instrument of lease, from NOIDA. This decision has been cited to demonstrate that the court had not fastened liability on the State, but on NOIDA, to refund the stamp duty.

9. Before we dwell on the issues framed by us, it would be apposite to examine the nature of the Stamp Act and the rules of interpretation that would apply to have a clear understanding of its provisions. With regard to the nature of the Stamp Act, there is no shadow of doubt that it is a fiscal / taxing statute framed under Entry 44 of List III (Concurrent List) of the Seventh Schedule of the Constitution of India {vide S.N. Mathur versus Board of Revenue &

others, (supra)}. Stamp Duty is nothing but a form of tax, the object of which is to generate revenue. In *Government of Andhra Pradesh & Others versus P. Laxmi Devi (Smt).*, (2008) 4 SCC 720, the Apex Court in paragraph 19 of its judgment observed: "It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide *CIT v. V.M R P Firm Muar*, AIR 1965 SC 1216. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence, the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998."

10. When a statute levies a tax it does so by inserting a charging section by which liability is created or fixed and then proceeds to provide the machinery to make liability effective. It, therefore, provides the machinery for assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. The components which enter into the concept of a tax are: (1) the character of the imposition known by its nature which prescribes the taxable event attracting the levy; (2) a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax; (3)

the rate at which the tax is imposed; (4) the measure or value to which the rate will be applied for computing the tax liability (vide *Govind Saran Ganga Saran V. CST*, 1985 Supp SCC 205, para 6). In the context of the Stamp Act (vide charging Section 3), the taxable event is the execution of an instrument specified in the Schedules. Stamp duty is levied with reference to the instrument and not the transaction, unless otherwise specifically provided. The stamp duty is levied at the rate specified in the Schedules and the person who is liable to pay the stamp duty is specified in Section 29 of the Stamp Act.

12. From the law noticed above, the legal position that emerges is as follows: (i) Stamp Act is a taxing statute; (ii) in construing taxing statutes equity and hardship are not relevant, one has to strictly look at the words/ language used and there is no room for searching intendment or of drawing any presumption while construing the provisions of a taxing statute; (iii) in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject / assessee, but in case of ambiguity in an exemption provision, the benefit of ambiguity must be strictly interpreted in favour of the Revenue/ State. However, if, by a strict construction of the exemption clause, the ambiguity is resolved and the subject falls within the exemption clause then to give full play to the exemption clause a liberal construction may be made.

15. A plain reading of the extracted charging provision would reflect that the stamp duty is payable as per the value of the premium or advance set forth in the lease instrument. There is no dispute inter se parties that the stamp duty paid on the lease instrument is as per the value of the premium set forth in the lease instrument. Importantly, the correction deed, dated 7th February 2013, which has been brought on record as Annexure 5 to the writ petition, though reduces the area of land leased out, also does not make any indication with regard to reduction of the premium payable. Rather, at page 179 of the paper-book of the appeal, the correction deed, after making a declaration with regard to reduction in the area of land leased out, declares that "except as hereinafter varied/ modified the original lease deed dated 15.11.2010 which was duly registered in the office of Sub-Registrar Gautam Budh Nagar registered on 16.11.2010 Bahi No.1, Gild No.7558 Page No.77 to 110 on Sl No.23383 shall continue to have full force and effect. Plot number, location and boundaries are same. Consequently credibility of stamp duty is remains unaffected." Once this is the position, the submission of Sri Goswami that the stamp duty paid on the lease instrument read with the deed of correction was as per the provisions of the Stamp Act, and it was not over paid, appears correct, particularly, when, according to the charging

provision, stamp duty is payable on value of premium set forth in the lease instrument. Under these circumstances, even if by a subsequent letter GNIDA had reduced the premium, as is the case of the first respondent, there would be no impact on the stamp duty leviable as that would be on the premium set forth in the lease instrument, which remained unchanged. It is thus held that the stamp duty paid by the writ petitioner was not in excess than what was payable on the lease instrument as per the charging section. That takes us to issue no.(ii) formulated above.

16. While addressing issue no. (ii), we have to determine whether in view of reduction of the demised area and the developments that took place after execution of the lease instrument, by virtue of the provisions of the Stamp Act contained in Section 49 (d) (1) (2) and (5), the first respondent is entitled to refund of the stamp duty which it had paid for lease of that portion of the land which it had to surrender. As we have already noticed that in a taxing statute equity has no place, the Court has to find out whether upon construction of the provisions of the Stamp Act a case for making allowance for impressed stamps spoiled in making the lease instrument of that excess area is made out or not.

18. Further, the Division Bench of this Court in **M/s Logix Infomedia (P) Ltd. Vs. State of U.P. & Others** [Writ C No.

18969/2021, decided on 01.09.2021] has held as under:-

8. *Countering this, the learned counsel for the petitioner has urged that in the impugned notice, dated 27.5.2021, given by the respondent-Authority, the time period of one year has been counted from 28.7.2020, that is from the date on which the U.P. Act No. 25 of 2020 came into force. It is contended that that action of the NOIDA Authority is patently arbitrary and is in the teeth of the second part of the proviso to Section 7 of the 1976 Act. He contends that the second part of the proviso to Section 7 clearly provides that where the period provided in first part for utilization of the land has already lapsed before the commencement of the amending Act, the Authority is to give a notice to the allottee to use the land for the purpose it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, it is then that the allotment and lease deed would stand automatically cancelled. In support of the above contention, the petitioner has relied upon a judgement of this Court dated 2.2.2021 passed in Writ-C No. 2238 of 2021 (M/s. J.M. Housing Limited Vs. State of U.P. and others), copy of which has been enclosed as Annexure- 37 to this petition.*

10. *Dealing with the second submission of the learned counsel for the petitioner first, which is based on the so-called supplementary lease deed dated*

7.1.2013, it is observed that it is not a supplementary lease deed but a correction deed that corrects the area of the plot mentioned in the original lease deed so as to be read as 8100 sq. meters in place of 5184 sq. meters. Similarly, it incorporates necessary corrections regarding the premium, lease rent, etc.. In this correction deed of 7.1.2013 it is specifically mentioned that all other terms and conditions of the original lease deed and allotment letter shall remain unchanged and applicable as well as binding upon the lessee. Therefore, no further benefit in respect of extension of time can enure to the petitioner on the basis of the deed executed on 7.1.2013.

11. *As regards the first submission of the learned counsel for the petitioner regarding the impugned notice/order dated 27.5.2021 being arbitrary and in the teeth of the true import of the second part of the proviso to Section 7 of the 1976 Act, on perusal of the record and consideration of the submissions of the respective parties, it appears to us that this contention of the learned counsel for the petitioner has force. It be noticed that to Section 7 of the 1976 Act a proviso was inserted by U.P. Act No. 25 of 2020. The published Statement of Objects and Reasons of U.P. Act No.25 of 2020 is extracted below:*

"The Uttar Pradesh Industrial Area Development Act, 1976 (U.P. Act No.6 of 1976) has been enacted to provide for the constitution of an Authority for the development of certain areas in the

State into industrial and urban township and for the matters connected therewith. In order to accelerate industrialisation in the State, it was felt necessary to increase the land bank. Hence it was decided that if the industrial unit is not established within a period of five years from the date of possession, or within the period fixed for such utilisation, whichever is longer, the lease deed will stand automatically canceled and the land shall vest with the Industrial Development Authority. Where the aforesaid period has lapsed before the commencement of this Act, the Authority shall give notice to the allottee and if the allottee does not use the land within the period of one year mentioned above, the allotment and lease deed shall be deemed to have been automatically cancelled. In view of the above, it had been decided to amend aforesaid Act.

Since the State legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Industrial Area Development (Amendment) Ordinance, 2020 (U.P. Ordinance No.16 of 2020) was promulgated by the Governor on July 28, 2020.

The Bill is introduced to replace the aforesaid Ordinance."

12. The amended Section 7 of 1976 Act, after insertion of the proviso by U.P. Act No.25 of 2020, reads as follows:

"7. Power to the Authority in respect of transfer of land. - The Authority may sell, lease or otherwise transfer whether by

auction, allotment or otherwise any land or building belonging to the Authority in the industrial development area, on such terms and conditions as it may, subject to any rules that may be made under this Act, think fit to impose.

Provided that where any land so allotted is not utilised for the purpose for which it was allotted within the period of five years from the date of possession or within the period fixed for such utilisation in the conditions of allotment, whichever is longer, the lease deed will stand cancelled and the land shall vest with the Authority. Provided further where the aforesaid period has already lapsed before the commencement of this Act, the Authority shall give a notice to the allottee to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed shall stand automatically cancelled."

13. A coordinate Bench of this Court in its judgment dated 2.2.2021 in M/s. J.M. Housing Limited (supra) has observed as follows:

"5. The 1st part of the proviso provides that where any land so allotted is not utilized for the purpose for which it was allotted within a period of 5 years from the date of possession or within the period fixed for such utilization in the conditions of allotment, whichever is longer, the lease deed will stand cancelled and the land shall vest with the

Authority. The 2nd part of the proviso provides that where the aforesaid period has already lapsed i.e. where the allotted land is not utilized within 5 years from the date of possession or within the specified period in the terms of allotment and the said period has expired before the commencement of the Amending Act, the authority is obliged to give a notice to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed shall stand automatically cancelled.

6. Thus, the condition precedent for applicability of the 2nd part of the proviso is that the period for utilization should have expired before the commencement of the Amending Act i.e. 28.7.2020 and the Authority before cancelling the allotment / lease had given a notice to the allottee to utilize the land within a year. Sri Singh, on instructions, does not dispute that no notice as contemplated in the 2nd part of the proviso to Section 7 of the Act was ever issued to the petitioner which is also authenticated in the impugned order as the same does not refer to issuance of any such notice, rendering the order dated 7.1.2021 vulnerable in law."

14. The inter play of the two parts of the proviso inserted to Section 7 of the 1976 Act by the amending Act (U.P. Act No.25 of 2020), as interpreted by a coordinate Bench of this Court (noticed above), is in sync with the

statement of objects and reasons of the amending Act and, therefore, we are in respectful agreement with the view taken therein. To put it simply, under the first part of the proviso the lease deed stands cancelled where the land allotted is not utilized for the purpose for which it was allotted within the period of five years from the date of possession or within the period fixed for such utilisation in the conditions of allotment, whichever is longer. But where that period has expired before the commencement of the amending Act, that is before 28.07.2020, the second part of the proviso comes into play. Under which, the Authority is to give a notice to the allottee to use the land for the purpose for which it was allotted within a period of one year and if within the above period of one year the allottee does not use the land, then the allotment and lease deed stand automatically cancelled.

19. Similar view has been taken by the Apex Court in **Srihari (Dead) Vs. Syed Maqdoom Shah & Others** [(2015) 1 SCC 607] and **Jayalakshmi Coelho Vs. Oswald Joseph Coelho** [(2001) 4 SCC 181].

20. The registration of the correction deed was compulsory as per section 17 of the Registration Act, 1908 and the property in question could not be used and enjoyed by the petitioner on account of the inadvertent mistake on the part of the Noida in the first place and takes on account of non-registration of the correction deed are undisputable.

21. Further, a mistake is apparent on the face of record as it is a purely

clerical error in the instrument. Since inadvertent mistake has been committed by the Noida, the same can be rectified in view of the judgement of the Apex Court in **Smt. Sooraj Devi Vs. Pyare Lal & Another** [(1981) 1 SCC 500].

22. In **Smt. Sooraj Devi Vs. Pyare Lal & Another** [(1981) 1 SCC 500], the Apex Court has held as under:-

“4. The sole question before us is whether the High Court was right in refusing to entertain Criminal Miscellaneous Application No. 5127 of 1978 on the ground that it had no power to review its order dated 1st September, 1970. Section 362 of the Code of Criminal Procedure declares : "Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error". It is apparent that what the appellant seeks by the application is not the correction of a clerical or arithmetical error. What she desires is a declaration that the High Court order dated 1st September, 1970 does not affect her rights in the house property and that the direction to restore possession to Pyare Lal is confined to that portion only of the house property respecting which the offence of trespass was committed so that she is not evicted from the portion in her possession. The appellant, in fact, asks for an adjudication that the right to possession alleged by

her remains unaffected by the order dated 1st September, 1970. Pyare Lal disputes that the order is not binding on her and that she is entitled to the right in the property claimed by her. Having considered the matter, we are not satisfied that the controversy can be brought within the description "clerical or arithmetical error". A clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in writing or typing. Master Construction Co. (P) Ltd. v. State of Orissa and Another.”

23. Record further shows that an unintentional mistake of Noida, which occurred due to accidental slip, can be rectified. The Noida, at the first instance, executed the lease deed not in favour of the Special Purpose Company, i.e., the petitioner no. 1, but in favour of the petitioner no. 2, and realizing the said mistake, which crept up due to accidental slip, has now corrected its mistake by way of executing a correction deed dated 15.07.2015.

24. The Apex Court in the case of **Jayalakshmi Coelho Vs. Oswald Joseph Coelho** [(2001) 4 SCC 181] has held as under:-

“14. As a matter of fact such inherent powers would

generally be available to all courts and authorities irrespective of the fact whether the provisions contained under Section 152 C.P.C. may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits some thing which was intended to be otherwise that is to say while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed.. There should not be re-consideration of merits of the matter to come to a conclusion that

it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Courts inherent powers as contained under Section 152 C.P.C. It is to be confined to something initially intended but left out or added against such intention.

15. So far the legal proposition relied upon by the learned Single Judge and the Honble Division Bench deciding the matter in its LPA jurisdiction, ***we are totally in agreement with the same i.e. an unintentional mistake which occurred due to accidental slip has to be rectified. The question however which requires consideration is as to whether on the facts of the present case and the principles indicated above, it could be said that there was any clerical or arithmetical error or accidental slip on the part of the Court or not.***

25. The case in hand is a clear example of an accidental omission, which crept up on account of Noida, which has been rectified by executing the correction deed 15.07.2015. The brochure of the Noida clearly provides that after allotment of land, the lease is to be executed in favour of the Special Purpose Company. In the case in hand, the petitioner no. 1 is undoubtedly a Special Purpose Company incorporated after allotment of plot, to which a land was allotted and therefore, the lease deed was required to be registered in

the name of the petitioner no. 1. Therefore, the correction has rightly been made by executing the correction deed dated 15.07.2015 in favour of petitioner no. 1. The correction also includes clerical, arithmetical or accidental omission.

26. The Apex Court in the case of **Srihari (Dead) Vs. Syed Maqdoom Shah & Others** [(2015) SCC 607] has held as under:-

“14. Now we have to examine whether by the impugned order, the High Court has only corrected the clerical, arithmetical or accidental omission in the decree passed or not. To appreciate the same, first we think it necessary to mention as to what the word “expression accidental omission” means. In Master Construction Co. (P) Ltd. Vs. State of Orissa and Another AIR 1966 SC 1047, expression – accidental slip or omission has been explained as an error due to a careless mistake or omission unintentionally made. It is further observed in the said case that there is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, elaborate arguments on questions of fact or law.”

27. The record further shows that the terms of the lease are intact and the petitioner will have to only enjoy the property for the remaining period of lease. Therefore, it cannot be said to be a fresh deed liable for full stamp duty.

28. The case in hand is a clear example of error, which is not dependent upon any elaborate argument on questions of fact. As record shows that the land was allotted to the consortium, which was required to be registered in the name of Special Purpose Company, i.e., the petitioner no. 1, but by mistake of Noida, got registered in the name of petitioner no. 2. By correction deed dated 15.07.2015, the same was rectified.

29. Further, this Court in **Jang Bahadur Vs. State of U.P. & 2 Others** [Writ C No. 14472/2021, decided on 27.09.2024] has held as under:-

“10. By the correction deed, no fresh stamp duty can be levied treating it to be a new conveyance or instrument liable for stamp duty. The authorities below have failed to bring on record any cogent material or documents showing otherwise, i.e., by the correction deed the area or the boundaries or any right has been created over the land in question. In absence thereof, the impugned orders cannot be sustained in the eyes of law.

11. The Division Bench of this Court in Basdeo Singh Vs. State of U.P. & Others [2004 (96) RD 612] had an occasion to consider the controversy with respect to correction of a clerical or arithmetical error; where the Division Bench held that where there is a mistake requiring elaborate arguments on question of fact or law cannot be categorized as clerical or arithmetical mistake, but if the new right is created, then it cannot be said to be an error as

error cannot be attributed as clerical or arithmetical error. Similarly, in the case of Vineeta Agarwal Vs. Additional Commissioner (Administration) & Others [2013 (119) RD 745], the Division Bench of this Court has held that a clerical mistake in the sale deed already registered would not liable for payment of stamp duty as fresh sale deed and would be stamped only as a correction deed. Similarly, in the case of Ilam Chand Vs. State of U.P. & Others [Writ C No. 5797 of 2006], it has been held that where there is change of road number and no plot number is changed, then also it has to be stamped only as a correction deed.

12. This Court, in the case of Smt. Meetu Pathak Vs. the Revisional Authority/Dy. Commissioner Stamp & Others [Writ C No. 6879 of 2017, decided on 17.04.2017], has held that correction deed cannot be treated as a fresh deed, if there is no transfer of right. Recently, this Court, in the case of Sushila Verma Vs. State of U.P. & Others [Writ C No. 18410 of 2019, decided on 29.07.2024], has held that if no right is created, then it has to be stamped as correction deed and not a fresh deed.

12. In view of the aforesaid facts & circumstances of the case as well as the law laid down by this Court as above, the impugned order dated 06.04.2021 passed by the respondent no. 2 in Stamp Appeal No. 128/2016 as well as the impugned order dated 10.03.2016 passed in Review Application of the

petitioner by the respondent no. 3 cannot be sustained. The same are hereby quashed.”

30. The record shows that the correction deed dated 15.07.2015 is an instrument, which cannot be read in isolation and is to be jointly read with the lease deed dated 31.03.2010.

31. The record further shows that the respondents, nowhere, disputed that the correction deed was executed due to an inadvertent error on account of the Noida.

32. Since the Noida as well as the stamp authorities are the instrumentality of the State, they have to speak in one voice and not in two voices. In other words, the State instrumentality cannot speak in two voices. More precisely, the Noida, admitting its mistake in lease deed dated 31.03.2010 and therefore, executed a correction deed on 15.07.2015 correctly mentioning the name of the petitioner no. 1, but on the contrary, a different view has been taken by the stamp authorities treating it as a fresh conveyance.

33. The Apex Court in **Central Warehousing Corporation Vs. Adani Ports & Special Economic Zone Limited (APSEZL) & Others** [(2022) 15 SCC 110] as held as under:

“57. We are of the considered view that it does not augur well for the Union of India to speak in two contradictory voices. The two departments of the Union of India cannot be permitted to take stands which are diagonally opposite. We may gainfully refer to the following observations made by a three-Judges Bench of this Court

in the case of Lloyd Electric and Engineering Limited v. State of Himachal Pradesh and Others:

“14. The State Government cannot speak in two voices. Once the Cabinet takes a policy decision to extend its 2004 Industrial Policy in the matter of CST concession to the eligible units beyond 31-3-2009, up to 31-3-2013, and the Notification dated 29-5-2009, accordingly, having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. The Government shall speak only in one voice. It has only one policy. The departments are to implement the government policy and not their own policy.....”

34. The State, in its written submission, for the first time, has taken objection that Noida is an essential party, but the same has not been arrayed as respondent. There is no pleading in the counter affidavit, nor at the time of hearing the matter, the said plea was raised. The record shows that no relief has been claimed against the Noida in the present writ petition. The record further shows that no writ of mandamus is sought for registration of correction deed without any fresh copy of stamp duty. Therefore, plea raised in the written submission, for the first time about not making Noida as party in the present proceeding, cannot be accepted and the same is hereby rejected.

35. Therefore, the judgements cited in the written submissions are of no

aid to the State in the peculiar facts and circumstances of the case in hand.

36. Section 4 of the Indian Stamp Act provides for completing the transactions, several instruments can be executed, to which the principal instrument only shall be charged with the duty prescribed in Schedule I-B of the Stamp Act and each other subsequent instrument shall be charged with a duty of Rs. 5/-, instead of full duty, if any, prescribed for it in that Schedule.

37. In the case in hand, the lease deed was executed on 31.03.2010. After realizing its mistake, a correction deed was executed by the Noida in favour of petitioner no. 1 on 15.07.2015, so as to complete the transaction between the parties. In view of the provisions contained in section 4 of the Stamp Act, the subsequent correction deed can, at best, be charged with a stamp of Rs. 5/- only in order to complete the transaction between the petitioners and the Noida.

38. This Court in the case of **Anjali Sahkari Avas Samiti Limited Vs. State of U.P. & Others** [2014 (6) ADJ 594] has held as under:-

“34. As is clear from the record that the principal sale deeds were executed by co-sharers of five plots having total area of 6 Bigha 10 Bishwa. There is no dispute with regard to two registered sale deeds dated 3.3.1989 and 6.2.1989 executed by two co-sharers namely Ram Chand and Smt. Ram Katori, who had transferred their share of five plots in favour of Rangji Sahkari Avas Samiti Ltd. So far as the present deed in question is

concerned, the same is only with reference to the third sale deed executed on 6.2.1989 by the attorney Rajendra Singh for share of Goma Devi and her three sons. Thus in result, the principal sale deed was the deed dated 6.2.1989 and the document in question can at best be said to be a supplementary deed whereby the mistakes occurred in the principal deed were corrected so as to complete the transaction between the parties.

35. Considering the said aspect, Section 4 of the Act will come into play and the principal instrument i.e. sale deed dated 6.2.1989 only shall be chargeable with duty prescribed in Schedule I and the document in question i.e. the supplementary deed shall be chargeable as per the provision of Section 4 of the Act. This court does not find any Article in Schedule I of the Act which exactly covers the deed / document in question.

39. From the perusal of the aforesaid judgement, it clearly held that in order to complete the transaction between the parties, section 4 of the Stamp Act will come into play and subsequent correction deed will not be chargeable to stamp duty as a fresh deed, but only charged as per the provision of section 4 of the Stamp Act.

40. The record shows that the property in question could not be used or enjoyed by the petitioner on account of inadvertent mistake on the part of the Noida.

41. Once the mistake has been admitted by the Noida in executing the correction deed dated 15.07.2015 in favour of the petitioner no. 1, the said correction deed, at best, can be treated as completion of the transaction between the parties.

42. Keeping in view, the peculiar facts and circumstances of the present case as noted above, after perusal of the available records and considering the points of law, the writ petition is allowed. A writ of mandamus is issued to the respondents to register the correction deed upon presentation by the parties within 10 days as per Article 34-A of Schedule 1-B of the Indian Stamp Act, 1899.

(2024) 12 ILRA 738

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.12.2024

BEFORE

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

Writ -C No. 35402 of 2024

Bhura & Ors.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Deep Chandra Joshi, Deepak Kumar Kulshrestha

Counsel for the Respondents:

Anuj Kumar Gupta, Arun Kumar Pandey, C.S.C.,
Pankaj Kumar Gupta

(A) Constitutional Law - Panchayat Raj / Land Allotment - Validity of Gaon Sabha Land Allotment - The Uttar Pradesh Panchayat Raj Act, 1947 - Section 28-C - Members and officers not to acquire interest in contract etc., with Bhumi Prabandhak Samiti - An allotment of Gaon Sabha land in favour of a blood relative of an office bearer of the Panchayat or the

Land Management Committee must be presumed to be an acquisition by such member and within mischief of the words 'through a partner or otherwise', occurring in sub-Section (1) of Section 28-C of the Act of 1947. (Para -4)

(B) The Uttar Pradesh Panchayat Raj Act, 1947 - Section 28-C - embargo against acquisition of interest in land of the Gaon Sabha extends to acquisition of interest or share in a licence or lease, etc., relating to Gaon Sabha land by the office bearer 'through a partner or otherwise'. (Para 3)

Allotment of Gaon Sabha land to four brothers of Village Pradhan - made by resolution of L.M.C. - received approval of S.D.M - allotment was made in contravention of Section 28-C - which prohibits a member or office bearer of Gram Panchayat or L.M.C. - from acquiring interest in Gaon Sabha land without the Collector's permission in writing - very suspicious record of minutes of the L.M.C. signed by Pradhan alone, place the proceedings under an unignorable cloud of doubt. (Para - 2 to 4 ,5)

HELD: - Allotment of Gaon Sabha land to the petitioners was not valid as it was made when their brother was the Village Pradhan, and the record of minutes of the L.M.C. was suspicious. Not a fit case for interference by the Court under Article 226 of the Constitution. (Para -5,6)

Petition dismissed. (E-7)

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

1. Heard Mr. Deepak Kumar Kulshrestha, learned Counsel for the petitioner in support of the motion to admit this petition to hearing at length, Mr. Anuj Kumar Gupta, learned Counsel appearing on behalf of the non-party caveator under Chapter XXII Rule 5A of the Rules of Court, 1952 and Mr. Amresh Kumar Tiwari, learned Standing Counsel appearing on behalf of respondents Nos. 1, 2 and 3.

No one appears on behalf of respondents Nos. 4 and 5.

2. Plots of land comprised in Gata No.419, admeasuring a total of 0.9790 hectare, situate in Village Asharpur, Tehsil and District Sambhal were allotted in the year 2000 in favour of four brothers, to wit, Bhura, Akhtar, Munna and Tahir, all sons of Ishtiaq Hussain. Bhura was allotted Gata No.419/1, admeasuring 0.2460 hectare, Akhtar Gata No.419/2, admeasuring 0.2460 hectare, Munna Gata No.419/3, admeasuring 0.2440 hectare and Tahir Gata No.419/4, admeasuring 0.2430 hectare. They were granted agricultural patta by a resolution of the Land Management Committee, Village Asharpur dated 15.01.2000. The resolution received the approval of the Sub-Divisional Magistrate, Sambhal on 27.02.2000. There is nothing objectionable to the said settlement, but for one fact that renders it invalid and utterly vitiated. All the allotments when made on 15.01.2000 by the Land Management Committee, the Gram Pradhan was Kallu son of Ishtiaq Hussain, the fifth brother of these allottees. Section 28-C of the Uttar Pradesh Panchayat Raj Act, 1947 (for short, 'the Act of 1947') reads:

“28-C. Members and officers not to acquire interest in contract etc., with Bhumi Prabandhak Samiti.— (1) No member of office bearer of [Gram Panchayat] or Bhumi Prabandhak Samiti shall, otherwise than with the permission in writing of the Collector, knowingly acquire or attempt to acquire or stipulate for or agree to receive or continue to have himself or through a partner or otherwise any share or interest in any licence, lease, sale exchange,

contract or employment with, by or on behalf of the Samiti concerned;

Provided that a person shall not be deemed to acquire or attempt to acquire or continue to have or stipulate for or agree to receive any share or interest in any contract or employment by reason only of his –

(a) having acquired any interest before he became a member or office bearer;

(b) having a share in a joint stock company which makes the contract; and

(c) having a share or interest in the occasional sale through the Samiti concerned of an article in which he regularly trades upto a value not exceeding Rs. 50 in any one year.

(2) No court or other authority shall enforce at the instance of any person a claim based upon a transaction in contravention of the provisions of subsection (1).”

3. A reading of the orders impugned passed by the two Authorities below, that is to say, the Collector, Sambhal dated 06.09.2023 and the revisional order passed by the Additional Commissioner-II, Moradabad Region, Moradabad dated 26.09.2023, show that they are categorical in their findings that the allotment was made in the petitioners' favour, when their brother was the Village Pradhan. It is true that the embargo under Section 28-C against acquisition of interest in land of the Gaon Sabha is upon a member or an office bearer of the Gram Panchayat or the Land Management Committee without the Collector's permission in writing and not upon members of his family as such.

However, the provision does stipulate very clearly that the embargo upon the office bearer would extend to acquisition of interest or share in a licence or lease etc., relating to Gaon Sabha land by the office bearer 'through a partner or otherwise'.

4. The sudden and odd allotment of Gaon Sabha land to four brothers of the Village Pradhan raises a presumption, given the prevalent social conditions and the rather poor moral values that the allotment after all was an acquisition by the Pradhan himself, though in the name of his brothers. It is too much of a coincident to be accepted for truth that all the four brothers of the Pradhan were found suitable for allotment of the agricultural pattas in issue, assuming that they were all eligible. Section 28-C is a provision brought to curtail the mischief of nepotism and annexation of public property by the elected office bearers of the Panchayat or the Land Management Committee, in whose trust it is placed. The provision, therefore, has not to be interpreted literally, but very purposively. A pedantic approach that mathematically reads the statute to mean that it would place an embargo upon the right of a member or office bearer alone to acquire interest in Gaon Sabha land, without prior permission of the Collector, would ultimately defeat its purpose. An allotment of Gaon Sabha land in favour of a blood relative of an office bearer of the Panchayat or the Land Management Committee must be presumed to be an acquisition by such member and within mischief of the words 'through a partner or otherwise', occurring in sub-Section (1) of Section 28-C of the Act of 1947. If this presumption of fact, which of course would be rebuttable, is not raised, the very purpose of Section 28-C of the Act of 1947 would stand defeated.

5. In this case, matters become all the more suspicious because on a perusal of record, the Collector has returned a finding to the effect that the allotment papers show that the minute book of the Gaon Sabha of the day does not carry the signatures or thumb impressions of members of the Land Management Committee and at the end of the resolution, the Gram Pradhan alone has signed it. In the same manner, the agenda too is signed by the Pradhan alone and not by the other members of the Land Management Committee or the Lekhpal. The allotment being in favour of the four brothers of the Pradhan, the very suspicious record of minutes of the Land Management Committee, signed by the Pradhan alone, place the proceedings under an unignorable cloud of doubt.

6. I do not find it to be a fit case for interference by this Court under Article 226 of the Constitution.

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

(2024) 12 ILRA 741

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 16.12.2024

BEFORE

**THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.**

Writ -C No. 39926 of 2024

**Nagar Palika Parishad ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents**

Counsel for the Petitioner:
Rakesh Kumar Singh, Umesh Vats

Counsel for the Respondents:
C.S.C., J.N. Maurya

(A) Environmental Law - Writ Jurisdiction - Competence of the Uttar Pradesh Pollution Control Board (U.P. P.C.B.) to impose environmental compensation - Constitution of India - Article 226, The Uttar Pradesh Municipalities Act, 1916 - Section 3 - Municipality, National Green Tribunal Act, 2010 - Section 15 - Relief, compensation and restitution, Section 22 - Appeal before Supreme court, Solid Waste Management Rules, 2016 - National Green Tribunal has adjudicatory powers and cannot be delegated to an administrative authorities - Any challenge to an environmental compensation order issued in compliance with N.G.T. directions must be raised before the N.G.T. or Supreme Court under Section 22 of the N.G.T. Act, 2010 - Writ court cannot stay or interfere with an order passed in furtherance of N.G.T. directives.(Para -21)

Nagar Palika Parishad was directed by U.P. P.C.B. to pay an environmental compensation - for improper waste management and dumping garbage in residential areas - assessment was based on the directions of the N.G.T - taken suo motu cognizance of a complaint regarding environmental violations - petitioner challenged the demand - only the N.G.T. has the authority to assess and impose such penalties. **(Para - 2 to 9)**

HELD: - Writ petition challenging environmental compensation assessed in compliance with National Green Tribunal (NGT) orders cannot be maintained in writ jurisdiction. Petitioner has an alternative remedy available before the NGT or the Supreme Court under Section 22 of the NGT Act, 2010. Granting relief would interfere with NGT orders, which is not permissible. No interim or final relief can be granted. (Para - 20 to 22)

Petition dismissed. (E-7)

List of Cases cited:

Kantha Vibhag Yuva Koli Samaj Parivartan Appellants Trust & ors. Vs St. of Guj. & ors., 2022 Supreme (SC) 772

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

1. Heard Shri Umesh Vats learned counsel for the petitioner, Shri Aditya Shanker, holding brief of Shri Mehul Khare, learned counsel appearing for respondent Nos. 2, 3 and 4 and learned Standing Counsel appearing on behalf of respondent Nos. 1, 5, and 6.

2. The petitioner-Nagar Palika Parishad, Khoda Makanpur, district Ghaziabad has invoked writ jurisdiction of this Court under Article 226 of Constitution of India challenging the order dated 30.07.2024, whereby the Chief Environment Officer, Region-I, Uttar Pradesh Pollution Control Board, T.C.-12th, Vibhuti Khand, Gomti Nagar, Lucknow has asked the petitioner to deposit a sum of Rs.91,25,000/- (rupees ninety one lac twenty five thousand) as environmental compensation. A consequential recovery citation issued by the Tehsil Authorities on 27.10.2024 has also been challenged. A further direction has been sought commanding the respondents not to proceed with recovery against the petitioner.

3. Brief facts of the case are that the petitioner is a Municipality defined under Section 3 of the Uttar Pradesh Municipalities Act, 1916 and it was handed over a land for establishment of wastage processing and solid waste plant on 21.12.2021 in village Nidhauri, Pargana Dasna, Tehsil Ghaziabad. It is alleged that funds were received by the petitioner under Swachchh Bharat Mission and wastage processing and solid waste plant of 90 TPD capacity has been developed and processing machines have also been established. Certain aspects are not to be

elaborated here as the issue involved before us is as to whether the Uttar Pradesh Pollution Control Board (herein-after referred to as "U.P. P.C.B.") was having any authority or competence to raise demand of environmental compensation, inasmuch as the foundation of the writ petition and challenge made to the impugned demand is on the ground of "lack of competence/jurisdiction".

4. Assailing the impugned order and recovery citation, learned counsel for the petitioner urged that the Ministry of Environment, Forest and Climate Change, Government of India, vide notification dated 08.04.2016, notified the **Solid Waste Management Rules, 2016** (herein-after referred to as the "Rules of 2016") and no law empowers the U.P. P.C.B. to assess or demand environmental compensation. Submission is that only the National Green Tribunal (N.G.T.) established under the provisions of National Green Tribunal Act, 2010 is competent to assess environmental compensation.

5. Shri Umesh Vats, elaborating his submissions, urged that the impugned order dated 30th July 2024 refers to some orders passed by the N.G.T., New Delhi in **Original Application No. 70 of 2024 (Deepak Joshi vs. State of U.P)** and is said to have been issued in compliance of the said orders, whereas no such direction was issued by the N.G.T. nor is there any order passed by the N.G.T. determining or quantifying the environmental compensation and, hence, the order impugned is not sustainable.

6. In support of his submissions, learned counsel has placed reliance upon the judgement of the Supreme Court in **Kantha Vibhag Yuva Koli Samaj**

Parivartan Appellants Trust and others vs. State of Gujarat and others, 2022 Supreme (SC) 772, as well as certain interim orders passed by Co-ordinate Benches of this Court in **Writ C No. 4816 of 2024** (Suez India Pvt. Ltd., through its Authorized Signatory, Rajesh Chandra Mathpal vs. Uttar Pradesh Pollution Control Board, through its Chairman and 6 others), **Writ C No. 7543 of 2024** (M/s Pind Balluchi (Unit of Excellence Hospitality) through Partner Smarity Sindhu and Monu Mishra vs. State of U.P. through Principal Secretary, Forest, Environment and Climate Change and others), and **Writ C No. 8463 of 2024** (Jaypee Infratech Limited through Authorized Representative Apurva Pragya vs. State of U.P. through Additional Chief Secretary, Environment Forest and Climate Change LKO and others).

7. Submission is that since Co-ordinate Benches have granted interim orders staying the action of U.P. P.C.B. levying environmental compensation, this Court may also pass an interim order on identical lines.

8. Per contra, learned counsel for the respondents submits that the impugned action is in furtherance and in compliance of various orders passed by the N.G.T., Delhi in the case of **Deepak Joshi** (supra) and, therefore, once the petitioner has a remedy to challenge the orders passed by the N.G.T., Delhi before Hon'ble Supreme Court, challenge made to mere consequential demand is not sustainable.

9. Having heard the learned counsel for the parties, this Court finds that N.G.T., Delhi took suo moto cognizance of a letter dated 10.08.2023 sent by Deepak Joshi, Adhyaksh, Khoda Residence

Association alleging that the Nagar Palika Parishad, Khoda Makanpur (i.e. the petitioner) was dumping garbage in the residential area in violation of the provisions of Rules of 2016. The N.G.T. passed an order dated 07.03.2024 constituting a joint committee comprising of District Magistrate, Ghaziabad and U.P. P.C.B. with the District Magistrate as Nodal Agency for cooperation and compliance. The N.G.T. also issued a direction to the committee to visit the site and collect relevant information and submit a report. Copy of the order was forwarded to the District Magistrate and U.P. P.C.B. for compliance. Thereafter, when the Committee constituted by N.G.T. submitted a detailed report before it, another order was passed on 19.04.2024 calling for the response from State of U.P. through District Magistrate, Ghaziabad, Executive Officer, Nagar Palika Parishad, Khoda Makanpur (i.e. the petitioner) and U.P. P.C.B. impleading them as respondents. The matter was fixed for 05.07.2024. On the said date, N.G.T. found that Pollution Control Board had issued a show cause notice proposing environmental compensation at the rate of Rs.10,000/- per day. The N.G.T., not being satisfied with the basis for imposition at such rate, called for a reply from the respondents before the N.G.T. asking U.P. P.C.B. to inform as to on what basis quantum of environmental compensation had been proposed at such rate. It also directed personal appearance of the Executive Officer of the petitioner Parishad on the next date. It is in furtherance of the said order dated 05.07.2024 that the impugned order has been passed by the U.P. P.C.B. on 30.07.2024 raising a demand of Rs. 5,000/- per day instead of Rs.10,000/- per day as environmental compensation, total amount of demand being Rs. 91,25,000/-.

10. We may observe here that Section 22 of the **National Green Tribunal Act, 2010** contains provision for appeal before the Supreme Court. It is reproduced as under:-

“22. Appeal to Supreme Court.-Any person aggrieved by any award, decision or order of the tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of the 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 Supreme Court may entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.”

11. If we examine the bone of contention of Shri Vats that the order impugned is without jurisdiction and it is only N.G.T. that has competence to determine and levy the environmental compensation, Section 15 of the **National Green Tribunal Act, 2010** needs reproduction. The same is quoted as under:

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“15. Relief, compensation and restitution. (1) The Tribunal may, by an order, provide,-

(a) relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I (including accident occurring while handling any hazardous substance);

(b) for restitution of property damaged;

(c) for restitution of the environment for such area or areas, as the Tribunal may think fit.

(2) The relief and compensation and restitution of property and environment referred to in clauses (a), (b) and (c) of sub-section (1) shall be in addition to the relief paid or payable under the Public Liability Insurance Act, 1991.

(3) No application for grant of any compensation or relief or restitution of property or environment under this section shall be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such compensation or relief first arose:

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.

(4) The Tribunal may, having regard to the damage to public health, property and environment, divide the compensation or relief payable under separate heads specified in Schedule II so as to provide compensation or relief to the claimants and for restitution of the damaged property or environment, as it may think fit.

(5) Every claimant of the compensation or relief under this Act shall intimate to the Tribunal about the application filed to, or, as the case may be, compensation or

relief received from, any other court or authority.

12. The aforesaid provision was dealt with by the Supreme Court in *Kantha Vibhag Yuva Koli Samaj Parivartan Appellants Trust* (supra) and though, placing strong reliance upon the said judgment, it was urged by Shri Vats that the Supreme Court turned down action of the N.G.T., whereby it had delegated its functions upon some committee, after carefully examining the facts of *Kantha Vibhag Yuva Koli Samaj Parivartan Appellants Trust* (supra), we find that the appellants before the Supreme Court were certain environmental organizations and individuals directly affected by the degradation of the enforcement in the area in question. Therefore, their status was that of “complainants” and the following directions were sought by them from the N.G.T.:-

- (i) restraining the dumping of MSW at the landfill site;
- (ii) restoration of the environment in the surrounding areas;
- (iii) restitution of the landfill site to its original condition;
- (iv) compensation to all those affected in the nearby villages upon determination of damages by a committee set up to assess the landfill site; and
- (v) implementation of the Solid Waste Management Rules 2016.

13. After holding certain proceedings, N.G.T. disposed of the matter observing that since in another case, N.G.T. had constituted Apex, Regional and State

Level Committees to monitor the implementation of the Rules of 2016, liberty was granted to the appellants/complainants to represent the case and ventilate all grievances before the appropriate committee. Following is the relevant portion of the order passed by the N.G.T.:-

“As this OA relates to implementation of Solid Waste Management Rules, 2016, we are of the considered opinion that it is covered by the order passed by the larger Bench of the Tribunal dated 20th August, 2018 in OA No 606 of 2018.

The Applicant would be at liberty to represent its case and ventilate all grievance before the Committee which shall look into it and finally decide the same.

Consequently, OA No 81 of 2014 stands disposed of. There shall be no order as to cost.

M.A. No. 1392 of 2018 and 1393 of 2018

These Applications do not survive for consideration as the main Application has been decided and are accordingly dismissed.”

14. The Supreme Court, while examining the challenge to the order passed by the N.G.T., held that N.G.T. could not abdicate its jurisdiction by entrusting the core adjudicatory functions to administrative expert committees. In paragraph Nos. 16 and 17 of the judgment, it was observed as under:-

“16. Section 15 empowers the NGT to award compensation to the victims of pollution and for

environmental damage, to provide for restitution of property which has been damaged and for the restitution of the environment. The NGT cannot abdicate its jurisdiction by entrusting these core adjudicatory functions to administrative expert committees. **Expert committees may be appointed to assist the NGT in the performance of its task and as an adjunct to its fact-finding role.** But adjudication under the statute is entrusted to the NGT and cannot be delegated to administrative authorities. Adjudicatory functions assigned to courts and tribunals cannot be hived off to administrative committees. In *Sanghar Zuber Ismail v. Ministry of Environment, Forests and Climate Change and Another*, 2021 SCC OnLine SC 669, a three-Judge Bench of this Court noted that the NGT cannot refuse to hear a challenge to an Environmental Clearance under Section 16(h) of the NGT Act and delegate the process of adjudicating on compliance to an expert committee.

17. The NGT has in the present case abdicated its jurisdiction and entrusted judicial functions to an administrative expert committee. **An expert committee may be able to assist the NGT, for instance, by carrying out a fact-finding exercise, but the adjudication has to be by the NGT.** This is not a delegable function. Thus, the order impugned in the appeal cannot be sustained. The consequence of the impugned order is to efface the

meticulous exercise which was carried out by the earlier Benches. Valuable time has been lost in the meantime and crucial issues pertaining to the environment in the present case have been placed on the back-burner.”

15. From perusal of the aforequoted portions of the decision in *Kantha Vibhag Yuva Koli Samaj Parivartan Appellants Trust* (supra), it is apparent that the Supreme Court never questioned the competence of the **expert committees in the matter of assessment of environmental compensation, rather it specifically observed that expert committees may be appointed to assist the N.G.T. in performance of its task and as an adjunct to its fact finding role**, but adjudication under the statute is entrusted to the N.G.T. and cannot be delegated to administrative authorities.

16. We are of the view that though Section 15 of the Act empowers the N.G.T. to pass an order providing relief and compensation to the victims of the pollution and other environmental damage, in order to adjudicate the issue, assistance of expert committees was never restricted, rather, in so many words, it was permitted by the Supreme Court in the judgment cited by the petitioner itself. It is the same judgment which has been relied upon by the Co-ordinate Bench in the aforesaid writ petitions where interim orders have been passed but in different set of facts where some of the petitioners were operators and some complainants.

17. In the facts of the case, the Court finds that U.P. P.C.B. has not imposed environmental compensation. Rather, it is a case where joint committee

constituted by N.G.T. by order dated 22.07.2024 comprising of District Magistrate, Ghaziabad and U.P. P.C.B. was directed to visit the site, collect relevant information and submit factual report. A detailed report supported by various annexures disclosing the area where the garbage is being dumped, density of population, the other quantitative and qualitative factors and certain computations is also on record. When the said report was placed before the N.G.T., the show cause notice issued to the petitioner asking to deposit environmental compensation at the rate of Rs.10,000/- per day was found to be without basis. Thereafter, the order impugned has been passed relying upon a report of C.P.C.B, In House Committee on Methodology for Assessing Environmental Compensation and Action Plan to Utilise the Fund.

18. We also find that N.G.T. passed further order on 17.09.2024 on non-compliance of the order dated 05.07.2024. Then, on 04.10.2024, following order was passed by it:-

“1. It is pointed out to us that for non-handling and management of solid waste effectively and in accordance with Solid Waste Management Rules, 2016, UP Pollution Control Board by order dated 03.07.2024 has imposed Environmental Compensation of Rs. 91,25,000/- upon Nagar Palika Parishad, Khoda but same has not been deposited by it till date.

2. Learned Counsel appearing for Nagar Palika Parishad, Khoda also stated that till date large quantity of legacy waste is lying at site, though steps are

being taken for its clearance. It is further said that so far as daily generation of solid waste is concerned, which is to the extent of about 105 MT per day, same is being regularly handled and processed and is not being dumped anywhere.

3. Let this fact be verified by UPPCB and submit a report within three weeks.

4. We also direct UPPCB to take effective steps for recovery of Environmental Compensation from Nagar Palika Parishad, Khoda by taking coercive measures and submit compliance report.

5 Further, for violation of environmental laws, criminal prosecution may also be initiated by UPPCB against responsible officers of Nagar Palika Parishad, Khoda, and compliance report be submitted.

6. List on 05.11.2024.”

19. It is, therefore, apparent on record that the petitioner not only being party to the proceedings before the N.G.T., it has been directed by the N.G.T. to take effective steps for recovery of environmental compensation assessed by the order impugned, by all coercive measures and submit compliance report. The N.G.T. has also issued direction for criminal prosecution of the officers of the petitioner and submission of compliance report.

20. In view of above, we are of the view that if the petitioner is aggrieved by the assessment of damages/environmental compensation, either by the committee or by the U.P. P.C.B., the same having been

done in furtherance of various directions issued by the N.G.T., it has remedy either to make its say before the N.G.T. with appropriate submissions and prayers or if it feels that the N.G.T. had no competence to entrust any action upon joint committee or U.P. P.C.B. or that any order passed by the N.G.T. is not otherwise in accordance with law, it has a remedy to file an appeal before the Supreme Court under Section 22 of the Act of 2010. The writ jurisdiction does not come in the way at all.

21. In view of above discussion, we find that challenge made to the orders passed in furtherance of the orders issued by the N.G.T. and as a consequence thereof, cannot sustain in writ jurisdiction and any relief granted to the petitioner against the impugned demand would have an effect of expressly or impliedly staying or setting aside orders passed by the N.G.T. This being impermissible in view of appellate forum being Supreme Court as per Section 22 of the Act of 2010, we are of the view that the reliefs claimed in the instant writ petition, either interim or final, cannot be granted.

22. The writ petition is, accordingly, **dismissed**, however, without prejudice to the rights of the petitioner to approach N.G.T. or Supreme Court for redressal of its grievance.

(2024) 12 ILRA 748

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VINOD DIWAKAR, J.

Writ -C No. 43025 of 2018
with

Writ-C Nos 5671 of 2023 & 9440 of 2019

Charan Singh **...Petitioner**
Versus
The State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Vishal Khandelwal

Counsel for the Respondents:
C.S.C., Sri Manu Singh

Civil Law- Reference- Revenue Law — U.P. Revenue Code, 2006 — Sections 230 & 231 — Repeal and saving of rights — Suit instituted under U.P. Zamindari Abolition and Land Reforms Act, 1950 — Maintainability of revision or appeal under repealed Act after enforcement of 2006 Code — Held, right to appeal or revision is a substantive and vested right — Such right continues unless expressly or impliedly taken away by the new enactment — Section 230(2)(d) saves the remedy of revision/appeal — Section 231 clarifies that pending cases shall be decided under old law-reference answered accordingly. (Paras 14, 15, and 16)

HELD:

Having heard learned counsel for the parties and having gone through the record, we are of the view that the learned Single Judge, who had made the reference, had not considered the provisions of Section 230(2)(d) of the U.P. Revenue Code, 2006, in its right perspective, and therefore, while only considering the provision of Section 231 of the U.P. Revenue Code, 2006 the reference was made. Had the court been shown the provisions of Section 230(2)(d) of the U.P. Revenue Code, 2006 then it would have become clear that such remedies as were available to the party which had filed any lis before the commencement of the new Act then all the remedies would have continued as were available to the litigant at the time of the filing of the Suit. All remedies upon the filing of the Suit namely the filing of Appeals, Second Appeals, Revisions etc. are really but steps in a series of proceedings connected by an intrinsic unity and are to be treated to be as a one legal proceeding. The Right of Appeal is not a matter of procedure but is a substantive Right. The

institution of a Suit carries with it the implication that all remedies in force at the time of the filing of the Suit were to be preserved to the parties till the rest of the career of the Suit. The Appeal or a remedy to go to higher Court accrues to a litigant on the very date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the Suit. In the instant case, since all remedies available at the time of the notification of the U.P. Revenue Code, 2006, had to continue, the remedy of Revision would also continue, even if it was not an inherent right which had accrued to the litigant as would be the case with an appeal. (Para 14)

Any repealing law which repeals an earlier law shall not affect the remedies available to a party which were available to the party on the date when the suit was filed. It would continue to be in existence for the litigant just as it was available to him or her on the date of the filing the lis. A vested right to go to a higher Court can be taken away by a subsequent enactment if the latter expressly provides or a bare reading of it shows that the right of going to a higher Court as per the earlier law had been by a necessary intendment taken away. (Para 15)

In the case at hand, we find that not only by the repealing act the remedies of going to a higher Court had not been taken away but in fact they had been continued by the provisions of the U.P. Revenue Code, 2006, as is contained under section 230(2)(d) of the U.P. Revenue Code, 2006. The section 231 of the U.P. Revenue Code, 2006 only St.s that all the cases pending before the Revenue Courts immediately before the commencement of the U.P. Revenue Code, 2006 whether any case, Appeal, Revision or otherwise shall be decided in accordance with the provisions of appropriate law which would have been applicable, as if the U.P. Revenue Code, 2006 had not been passed. Hence, section 231 of the U.P. Revenue Code, 2006, was a provision which only clarifies that a remedy which was available at the time when the lis was filed and had been availed would be decided by the

provisions of the Old Act. There is no provision in the new Act which after repealing the U.P. Z.A. & L.R. Act, 1950, snatches from a litigant the right of further remedies as were provided under the U.P. Z.A. & L.R. Act, 1950, and hence we are answering the reference by observing that the Revision which was filed by the petitioner could have been filed and there was no provision in the U.P. Revenue Code, 2006, which had expressly taken away the vested right of having a remedy to go to a higher Court by means of a Revision. (Para 16)

Reference answered accordingly. (E-14)

List of Cases cited:

1. Anand Kumar Singh & anr. Vs St. of U.P. Thru. Seyc. Revenue U.P. Civil Sectt. & ors. reported in 2017 (135) RD 642
2. Garikapati Veeraya Vs N. Subbiah Choudhry & ors., AIR 1957 SC 540
3. ECGC Ltd. Vs Mokul Shriram EPC JV, (2022) 6 SCC 704
4. M/s Martin and Harris Pvt. Ltd. & anr. Vs Rajendra Metha & ors., (2022) 8 SCC 527

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Vinod Diwakar, J.)

1. Heard Shri Vishal Khandelwal, Shri Harsh Vikram, Shri Gaurav Singh and Shri Bhuvnesh Kumar Singh, learned counsel for the petitioners in all the connected writ petitions and Shri Neelabh Srivastava, Shri Sudhanshu Pandey, Shri Mohd. Zaid, learned counsel for the private respondents in all the connected writ petitions, Shri S.N. Srivastava learned Additional Chief Standing Counsel and Shri Krishna Kant Singh, learned counsel for the Gaon Sabha.

2. The instant reference to the following effect has been placed before us

by Hon'ble the Chief Justice. The issue raised in the reference is reproduced herein below for the sake of clarity:

“Whether when Section 231 of the Code specifically states that only such proceedings which were pending before the commencement of the Code would be decided in accordance with provisions of the law under which those proceedings were filed then would an Appeal or Revision against the orders/judgments/ decrees which would be passed in those proceedings be governed by the previous enactment i.e. the U.P. Zamindari Abolition and Land Reforms Act, 1950 or by the provisions of the U.P. Revenue Code, 2006.”

3. In the instant petition, the order under challenge was passed in a revision filed by the applicants against the judgment and decree dated 19.8.2014 passed in a suit filed under section 229B of the U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as ‘the U.P. Z.A. & L.R. Act, 1950’) and on specific query by the Court from the petitioners’ counsel about the maintainability of the revision on in contrast to the remedy of appeal available under section 207 of the U.P. Revenue Code, 2006 wherein a party aggrieved by the final decree passed in any suit specified in Column-II of the 3rd-Schedule appended with the U.P. Revenue Code, 2006 could have filed, the learned counsel had taken recourse to the provisions of section 333 of the U.P. Z.A. & L.R. Act, 1950.

4. Therefore, the learned Single Judge referred the matter for reference to

Hon'ble the Chief Justice of this Court and that is how the instant reference petition is placed before this Court.

5. In response to the issue raised in reference, learned counsel for the petitioners submits that (i) since there is already a judgement of this Court passed in **Misc. Single No.8354 of 2014**¹ laying down the law that after the enactment of the U.P. Revenue Code, 2006, which enforced w.e.f. 11.2.2016, the remedy as was available in the U.P. Z.A. & L.R. Act shall continue to remain in force for the petitioners as the suit was filed prior to 11.2.2016 and the provisions of U.P. Revenue Code, 2006 would be applicable only on the suits filed post 11.2.2016, (ii) as per the judgement and order dated 20.4.2017 passed in **Anand Kumar Singh & Another case (supra)**, a Revision shall be maintainable in the instant case as per the provisions of U.P. Z.A. & L.R. Act, 1950, (iii) the Supreme Court in **Garikapati Veeraya v. N. Subbiah Choudhry and others**² has held that the legal pursuit of a remedy, suit, appeal and second appeal are really steps in a series of proceedings all connected by an intrinsic unity and ought to be regarded as one legal proceedings. The institutions of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit, and (iv) such legal remedy of appeal as was available to a litigant on the date of the filing of the suit, in fact, is a substantive right and right to file an appeal or revision is not a mere matter of procedure but it is a right, which accrues to a litigant from the date when the lis commenced. Even though that right could be exercised when an adverse judgement would be pronounced, the law with regard to the filing of appeal or revision shall be

governed by the law prevailing on the date of the institution of the suit or proceeding and not by the law that would prevail on the date of the decision. For clarity, the relevant portion of **Garikapati Veeraya case (supra)** is extracted herein below:

“23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”

6. Learned counsel for the petitioner next submits that despite the remedy as provided in Section 230(2) of the U.P. Revenue Code, 2006, and repeal of U.P. Z.A. & L.R. Act, the substantive right to file a revision under the U.P. Z.A. & L.R. Act arises out of a judgment and decree passed in a suit filed prior to the enactment and subsequently enforcement of U.P. Revenue Code, 2006 could not take away by the new Act. Therefore, since the right to file a Revision was a remedy recognized as a substantive right under the U.P. Z.A. & L.R. Act could not be taken away by the subsequent enactment of the U.P. Revenue Code, 2006 in the instant case.

7. Learned counsel for the petitioner since has relied upon Section 230 of the U.P. Revenue Code, 2006, the same is being reproduced here as under for better understanding:

“230. Repeal. - (1) The enactments specified in the First Schedule are hereby repealed.

(2) Notwithstanding anything contained in sub-section (1), the repeal of such enactments shall not affect-

(a) the continuance in force of any such enactment in the State of Uttarakhand;

(b) the previous operation of any such enactment or anything duly done or suffered there under; or

(c) any other enactment in which such enactment has been applied, incorporated or referred to; or

(d) the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title or obligation or liability

*already acquired, accrued or incurred (including, in particular, the vesting in the State of all estates and the cessation of all rights, title and interest of all the intermediaries therein), or any **remedy** or **proceeding** in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted or the proof of any past act or thing; or*

(e) any principle or rule of law or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction, exemption, office or appointment:

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.”

8. Learned counsel for the petitioners next submits that as per Section 230(2)(d) of U.P. Revenue Code, 2006, **any remedy or proceeding** in respect of any

order passed in the proceedings which initiated under the earlier Act, has been saved by Section 230 of the U.P. Revenue Code, 2006. He next submits that Section 231 of the U.P. Revenue Code, 2006, is only a section which states that all cases pending before the revenue court immediately before the commencement of the U.P. Revenue Code, 2006, whether in appeal, revision, review or otherwise, would be decided in accordance with the provisions of the appropriate law, and appropriate law means the law which was prevailing at the time of institution of the suit and not otherwise.

9. Learned counsel for the petitioners next submits that the reference, inasmuch as, it questions as to whether by virtue of Section 231 of the U.P. Revenue Code, 2006, remedies as were available to a litigant at the time of filing of the suit under the U.P. Z.A. & L.R. Act, 1950, would still be available after the commencement of the U.P. Revenue Code, 2006, and the same shall not be governed by the provisions of Section 231 of the U.P. Revenue Code, 2006, but shall accordingly be decided while taking the assistance of Section 230(2)(d) of the U.P. Revenue Code, 2006. He, therefore, submits that when the remedy of filing of a revision as was available to the petitioners by virtue of Section 333 of the U.P. Z.A. & L.R. Act, 1950, the same shall be preserved to the parties till the rest of the career of the suit.

10. Learned counsel for the petitioners further submits that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides, expressly or by necessary intendment and not otherwise. He has also relied upon Section 6 of the U.P. General Clauses Act, 1904, and specifically referred to Section 6

(c) and, therefore, the same is being reproduced here as under:

“6. (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;”

11. To substantiate the aforesaid arguments, learned counsel for the petitioners has relied upon the ratio culled out in judgments referred herein by the Supreme Court in **ECGC Ltd. v. Mokul Shriram EPC JV**³ and **M/s Martin and Harris Private Limited and another v. Rajendra Metha & Others**⁴, and concluded with the submissions that the applications or suits or other proceedings which had been filed under old act (Repealed Act) pending on the date of commencement of the new act shall be continued or disposed of in accordance with the provisions of the old act (Repealed Act) as if the old act had continued and was still in force.

12. Shri Satendra Nath Srivastava, learned Additional Chief Standing Counsel for the State-respondents also appeared and assisted the Court in deciding the case and submitted that, in fact, on 3.11.2020, the Government had also issued a Government Order elaborating that the earlier remedies as were available under the U.P. Z.A. & L.R. Act, 1950, and under the U.P. Land Revenue Act, 1901, shall continue to exist for such a litigant which had filed their lis before the commencement of the U.P. Revenue Code, 2006.

13. Learned counsel appearing for the respondents in few of the cases, namely, Shri Neelabh Srivastava who appeared for the respondent no.4 in Writ-C No.14682 of 2021 and Shri Krishna Kant Singh, learned counsel appearing for the Gaon Sabha have

opposed the writ petition and submitted that under provision of Section 231 of the U.P. Revenue Code, 2006, there was a clear averment that all cases, Appeals, Revisions, Reviews or otherwise shall be decided in accordance with the provisions of the appropriate law which would have been applicable to them, had the U.P. Revenue Code, 2006, not been in existence would mean that the cases, Appeals, Revisions or Applications alone had to be decided by the court which was seized of those proceedings. The new Code had not saved the remedies as were available to the litigant at the time of the filing of the Suit, Appeal or Revision.

14. Having heard learned counsel for the parties and having gone through the record, we are of the view that the learned Single Judge, who had made the reference, had not considered the provisions of Section 230(2)(d) of the U.P. Revenue Code, 2006, in its right perspective, and therefore, while only considering the provision of Section 231 of the U.P. Revenue Code, 2006 the reference was made. Had the court been shown the provisions of Section 230(2)(d) of the U.P. Revenue Code, 2006 then it would have become clear that such remedies as were available to the party which had filed any lis before the commencement of the new Act then all the remedies would have continued as were available to the litigant at the time of the filing of the Suit. All remedies upon the filing of the Suit namely the filing of Appeals, Second Appeals, Revisions etc. are really but steps in a series of proceedings connected by an intrinsic unity and are to be treated to be as a one legal proceeding. The Right of Appeal is not a matter of procedure but is a substantive Right. The institution of a Suit carries with it the implication that all

remedies in force at the time of the filing of the Suit were to be preserved to the parties till the rest of the career of the Suit. The Appeal or a remedy to go to higher Court accrues to a litigant on the very date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the Suit. In the instant case, since all remedies available at the time of the notification of the U.P. Revenue Code, 2006, had to continue, the remedy of Revision would also continue, even if it was not an inherent right which had accrued to the litigant as would be the case with an appeal.

15. Any repealing law which repeals an earlier law shall not affect the remedies available to a party which were available to the party on the date when the suit was filed. It would continue to be in existence for the litigant just as it was available to him or her on the date of the filing the lis. A vested right to go to a higher Court can be taken away by a subsequent enactment if the latter expressly provides or a bare reading of it shows that the right of going to a higher Court as per the earlier law had been by a necessary intendment taken away.

16. In the case at hand, we find that not only by the repealing act the remedies of going to a higher Court had not been taken away but in fact they had been continued by the provisions of the U.P. Revenue Code, 2006, as is contained under section 230(2)(d) of the U.P. Revenue Code, 2006. The section 231 of the U.P. Revenue Code, 2006 only states that all the cases pending before the Revenue Courts immediately before the commencement of the U.P. Revenue Code, 2006 whether any case, Appeal, Revision or otherwise shall be decided in accordance with the provisions of appropriate law which would

have been applicable, as if the U.P. Revenue Code, 2006 had not been passed. Hence, section 231 of the U.P. Revenue Code, 2006, was a provision which only clarifies that a remedy which was available at the time when the lis was filed and had been availed would be decided by the provisions of the Old Act. There is no provision in the new Act which after repealing the U.P. Z.A. & L.R. Act, 1950, snatches from a litigant the right of further **remedies** as were provided under the U.P. Z.A. & L.R. Act, 1950, and hence we are answering the reference by observing that the Revision which was filed by the petitioner could have been filed and there was no provision in the U.P. Revenue Code, 2006, which had expressly taken away the vested right of having a remedy to go to a higher Court by means of a Revision.

17. The reference is accordingly, answered. It may be placed before Court which is now seized with the various petitions in which the reference was made.

18. The interim order however, granted earlier, shall continue till the petitions are decided.

(2024) 12 ILRA 754
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2024

BEFORE
THE HON'BLE ALOK MATHUR, J.

Writ -C No. 1000394 of 2004

Girija Prasad Ojha **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 S.M. Waseem, Diwakar Pratap Pandey, I.M. Pandey, Ist, Kripa Shankar Shukla, Rameshwar

Tiwari, S.M. Waseem, Smt. Usha Tiwari, Vidya Bhushan Pandey

Counsel for the Respondents:

C.S.C., A. Kumar, Mayank Pathak, Ravi Shanker Mishra, S.N. Goshwami, Sharad Bhatnagar

A. Civil Law-Constitution of India,1950-Article 226- Zamindari Abolition Rules – Section 285(1)-Transfer of Property Act-Section 60The petitioner took a loan , due to non-repayment the bank issued a recovery certificate-later the bank proceeded with an auction of the petitioner's mortgaged agricultural land , the land was auctioned for Rs. 52000/-the petitioner objected to the auction u/s 285(1) of the Zamindari Abolition Rules before the divisional commissioner-the petitioner was granted multiple opportunities but failed to deposit the full amount within stipulated time-the auction was conducted lawfully and the sale deed was executed in favor of respondent no.5-right of redemption exists until the sale deed is executed-the court held that since the sale deed had already been executed in favour of respondent no 5 the petitioner lost his right to redeem the property.(Para 1 to 23)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Surendra Pal Singh Vs Vijaya Bank, Civil Appeal No. 6843 of 2023

2. Narandas Karsondas Vs S.A. Kamtam (1976) CJ SC 287

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

C. M. Application dated 17.12.2024 for correction of order dated 30.1.2024.

1. Heard learned counsel for the parties.

2. The cause shown is sufficient. The application is allowed.

3. Order dated 30.1.2024 is corrected. The corrected order is as under:-

1. Heard Sri I. M. Pandey, learned counsel for the petitioner, learned Standing counsel for respondent No.s 1, 3 and 4 and Sri Mayank Pathak for respondent No.2-Bank.

2. By means of the present writ petition the petitioner has challenged the auction proceedings which has culminated into confirmation of the auction by the order of Sub Divisional Magistrate, Tehsil Milkpur, Faizabad.

3. The facts in brief are that the petitioner is a proprietor of a business firm, namely Rahul Fertilizers. He had taken a loan of Rs.10,000/- on 31.10.1985 from Punjab National Bank, Branch, Kumarganj, District Faizabad for the purpose of fertilizer business . The said loan was enhanced to Rs.20,000/- on 23.9.1987. The petitioner could not repay the said loan and consequently the respondent-bank initiated recovery proceedings against the petitioner by issuance of recovery certificate on 7.3.1994. Despite issuance of the recovery certificate the outstanding amount of loan was not repaid consequently the bank proceeded to auction the mortgaged property by sale proclamation on 23.2.1999 against the petitioner of the agricultural loan exiting on khata No.342, gata No.s 219 A/0-18-02, 98/1/0-9-10, 207/0-13-0, 219 Ba/1-10-14, 272 Kha/1-12-0, 280/0-17-5, 281/0-1-10 and 288/0-7-0 which land was mortgaged to secure the loan obtained by the petitioner. The auction proceedings were held on 22.3.1999 and the agricultural land of the petitioner was auctioned for an amount of Rs.52,000/- in favour of respondent No.5.

4. Bring aggrieved by the auction the petitioner preferred objections under

Sections 285 (1) of Z.A. Rules before the Divisional Commissioner, Faizabad on 5.4.1999. The Divisional Commissioner on receiving the said objections also considered the fact that the petitioners was ready and willing to repay the said loan gave him time by means of order dated 7.5.2003 to deposit the entire outstanding amount of loan with the bank and informed the petitioner that in case he deposits the said amount with the bank, the said auctions proceedings would not be confirmed and the auction will be set aside.

5. It seems that the petitioner could not deposit the said amount by the date fixed i.e. 7.6.2003 but in the meantime the petitioner moved another application for extension of time for depositing the outstanding amount of loan. The application of the petitioner was favorably considered by learned Commissioner who by means of his order dated 5.6.2003 gave further thirty days' time to the petitioner to deposit the said amount by 7.7.2003. Even during the extended time period the outstanding amount was not deposited by the petitioner and in these circumstances the petitioner approached this Court by filing writ petition bearing writ petition No.2127 (M/S) of 2003. This Court by means of order dated 4.7.2003 had disposed of the said writ petition recording that the petitioner had filed his objections under Section 285 (1) of Z.A. Rules and he was granted time to deposit the outstanding amount of loan by 7.6.2003. It was further observed that the petitioner could not deposit the said amount due to financial constraints but is ready and willing to deposit the entire amount and consequently the order of the Commissioner, Faizabad Division, Faizabad dated 7.5.2003 was modified to the extent that the petitioner may deposit Rs.20,000/- with the bank

before 31.7.2003 and the remaining amount before 30th September, 2003.

6. It is in compliance of the order of this Court dated 4.7.2003 which had modified the order of the Commissioner dated 7.5.2003 the petitioner deposited an amount of Rs.20,000/- on 30.7.2003 but it seems that he could not deposit the remaining amount and as per the impugned order a report was called from the bank which also confirmed that the petitioner had not deposited the remaining amount as directed by the High Court in their letter dated 30.10.2003. The respondent on being made aware of the fact that even the order of High Court had not been complied and the petitioner had not deposited the remaining amount, proceeded to confirm the auction.

7. After confirmation of the auction, a sale certificate was issued in favour of respondent No.5 on 30.1.2004 and the property was also registered in favour of respondent No.5 on 7.1.2004 as per the averments made by the petitioner himself in the writ petition. It is in aforesaid circumstances that present writ petition has been filed assailing the order dated 31.12.2003 passed by Commissioner, Faizabad Mandal, Faizabad confirming the auction. The petitioner has also prayed for a direction to the respondents not to give effect to the auction proceedings and not to mutate the said land in favour of respondent No.5.

8. Learned counsel for the petitioner while assailing the order dated 31.12.2003 has submitted that the petitioner has full right for redeeming the mortgage and even High Court had recognized the right of redemption in as much as this Court had directed the bank to accept

Rs.20,000/- by 31.7.2003 and the remaining amount before 30.9.2003 and consequently the auction proceedings could not have been confirmed in case the petitioner had complied with the directions of this Court. He has further submitted that in pursuance of the directions of this court admittedly he had deposited Rs.20,000/- on 30.7.2003. He has further submitted that he had further deposited Rs.2500/- with the respondent bank. It is only subsequently that he was made aware of the fact that the cheque was dishonored on account of insufficiency of funds and on coming to know about the dishonoring of the cheque he had deposited Rs.9500/- in cash on 30.10.2003. He has further submitted that this is admitted fact that the petitioner on being aware of dishonoring of the cheque had deposited the remaining amount in cash and, therefore, it is submitted that the benefit of the same should be given to the petitioner and accordingly submits that his right of redemption was not extinguished on non compliance of the directions of this Court dated 4.7.2003. Lastly, he has also taken a plea that the said loan was commercial loan and the proceedings for recovery of the commercial loan could not have been made as arrears of land revenue as the said proceedings could be taken only with regard to agricultural loan and submits that accordingly the entire recovery proceedings are without jurisdiction and is liable to be set aside.

9. It is noticed that the said plea has neither been taken before any of the authorities below nor in the writ petition and only averment has been made in para 9 of the supplementary affidavit filed by the petitioner on 23.1.2024. Learned counsel for the bank has, on the other hand, submitted that according to the recovery certificate the loan has been shown to be

agricultural loan and in any view of the matter this issue has not been raised before any authority and consequently cannot be permitted to raise the same by oral submissions for the first time in writ proceedings.

10. In support of his submissions, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the case of ***Surendra Pal Singh Vs. Vijaya Bank*** passed in Civil Appeal No.6843 of 2023 as well as ***Narandas Karsondas Vs. S.A. Kamtam, 1976 CJ (SC) 287*** to canvass his plea that his right to redemption of the mortgaged property existed even subsequent to confirmation of the auction and consequently he may be permitted to deposit the outstanding amount of loan and the impugned orders may be set aside directing the respondents to hand over the property back to the petitioner.

11. Learned counsel for the respondents, on the other hand, have vehemently opposed the writ petition. It has been submitted that the recovery proceedings were initiated against the petitioner after he failed to repay the loan in terms of the agreement entered into between the petitioner and the respondent. It was stated that repeated opportunities were given to the petitioner to repay the outstanding amount of loan but despite the said notice the loan was not repaid and consequently the mortgaged property was auctioned by the respondent-bank. It has been submitted that the petitioner was fully aware of the auction proceedings in as much as ZA Form 74A was issued to the petitioner and according to the said provisions the petitioner was fully aware of the auction proceedings. The auction proceedings settled in favour of respondent

No.5 who was the highest bidder for an amount of Rs.52,000/-.

12. There is no dispute with regard to the fact that the entire amount of auction money has been tendered by respondent No.5. Prior to confirmation of the sale the petitioner had submitted his objections. It is stated that it is only after considering the objections filed by the petitioner that he was further granted time to redeem the said mortgage and to repay the entire amount of loan by 7.6.2003. At the behest of the petitioner the said period was extended till 7.7.2003 and despite expiry of the time period the said loan was not repaid. Even after that time was extended by this Court and even the directions of this Court was not complied by the petitioner.

13. It is stated that even the directions of this Court have not been complied and the Commissioner in these circumstances had no other option but to confirm the auction and even it has been stated that after confirmation of the auction the sale certificate was issued and the property has been registered in favour of respondent No.5. It has further been stated that this fact has been mentioned by the petitioner himself that the sale certificate has been issued in favour of respondent No.5 and the property has also been registered in his favour on 7.1.2004 i.e. much prior to filing of the present petition and still the petitioner has failed to assail the sale certificate as well as sale deed issued in favour of respondent No.5.

14. It is stated that the present writ petition has been rendered infructuous from the start in as much as proper prayer has not been made for setting aside the sale certificate and sale deed and setting aside the impugned orders will not have any effect upon the

validity of the sale deed issued in favour of respondent No.5. Accordingly, he submits that proper prayer has not been made by the petitioner and accordingly the relief as sought by him cannot be granted.

15. I have heard learned counsel for the petitioner and perused the records.

16. In light of the aforesaid narration of facts the question which arises for determination by this Court was as to whether right of redemption existing in favour of the petitioner, who had mortgages his property to secure the agricultural loan subsists even after the confirmation of the auction and after the sale deed has been registered in favour of successful bidder/auction purchaser i.e. respondent No.5.

17. According to Section 60 of the Transfer of Properties Act, right of redemption exists with the mortgagee till such time the mortgage has been extinguished by the act of either of the parties. In the present case, in exercise of his right to redemption the Commissioner, Faizabad Division, at the outset, before confirming the said auction had given time to the petitioner till 7.6.2003 to repay the said loan. Undoubtedly there is no dispute with regard to the fact that even subsequent to the auction which was settled in favour of respondent No.5 existence of the right of redemption in favour of the petitioner was duly recognized by the confirming authority. Even at the behest of the petitioner the said time period was extended by one month and he was further given time till 3.7.2003 to repay the outstanding amount of loan.

18. This right vested in the petitioner of redemption was further recognized by this Court when this Court had passed order on 4.7.2003 where the

petitioner was further granted till 30th September, 2003. This Court while passing the order dated 4.7.2003 had given the petitioner time till 30.7.2003 to deposit the amount of Rs.20,000/- and again granted time till 30.9.2003. Accordingly undoubtedly the petitioner even in the extended time provided by this Court till 30th September to repay the said loan. There is no dispute that till 30.9.2003 the amount of outstanding loan was not deposited by the petitioner. Considering the arguments raised by the petitioner that he had deposited Rs.20,000/- on 30.7.2003 i.e. within the time provided by this Court. While remaining amount of Rs.12500/- was deposited by the petitioner through cheque which had bounced. The reason for bouncing of cheque is insufficiency of funds. Considering the fact that till conclusion of auction the full outstanding amount of loan was not credited in the bank account and the bouncing of the cheque on account of insufficiency of funds cannot be taken as an act of redemption of the loan by the petitioner. Even subsequently against the outstanding amount of Rs.12500/- the petitioner had deposited only Rs.9500/- on 30.10.2003.

19. This Court has noticed that even the amount do not match with the amount of cheque deposited previously by the petitioner i.e. 30.10.2003 but according to the time prescribed by this Court even if the petitioner had come to know about bouncing of the cheque subsequent to 30.10.2003 then he could have moved appropriate application before this Court in writ petition No.2127 (M/S) of 2003 seeking time for depositing the outstanding amount in peculiar circumstances of the present case and could also demonstrate before this Court that the petitioner had no knowledge that the cheque had bounced.

Unfortunately, no such application was made by the petitioner and the directions of this Court for depositing the outstanding loan till 30.10.2003 remained unchanged and unaltered. It is in these circumstances, this Court is of the considered opinion that the outstanding loan amount was not repaid by the petitioner within the time prescribed despite the fact that repeated extensions were given by the authorities themselves and also by this Court. Accordingly, the auction concluded and the property was duly registered in the name of respondent No.5-the auction purchaser. The act of registration of the property in favour of respondent No.5 had extinguished the right vested with the petitioner to redeem the said loan.

20. We have also considered the judgments relied upon by the petitioner. In the case of **Surinder Pal Singh Vs. Vijaya Bank and others**, passed in Civil Appeal No.6843 of 20023 the question that was considered was of provisions of Section 13 (8) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (in short SARFAESI Act) with regard to repayment of loan taken by the borrower from the banks and the unamended provisions of Section 13 (8) vested the right with the borrower to redeem the loan prior to issuance of the sale certificate but subsequently amendment of Section 13(8) of SARFAESI Act right of redemption was limited till the date of issuance of advertisement for the said auction. In light of the above, Supreme Court has held that right of redemption in a matter where the SARFAESI Act is applicable right of redemption has been extinguished on the issuance of advertisement for auction. The said judgment concerns the SARFAESI Act which are not applicable in the facts of the

present case and consequently does not apply in the present case.

21. In the case of *Narandas Karsondas Vs. SSA Kamta, 1976 CJ (SC) 287*, Supreme Court while explaining the provisions of Section 60 of Transfer of Properties Act have held in paragraphs 34 and 35 as under:-

"34. The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been extinguished by the Act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor's right to redeem will survive until there

has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption."

22. In the aforesaid judgment Supreme Court has held that right of redemption would only exist till the date when sale is complete. In the present case as we have already noticed the sale deed was registered in favour of respondent No.5 on 7.1.2004 and consequently even as per the judgment of Supreme Court the right of redemption if any in favour of the petitioner stand extinguished on the date of the said auction. There is no law or rule which has been demonstrated by the petitioner to indicate that right of redemption vested even after execution of sale deed and also considering the fact that neither the sale deed nor the sale certificate issued in favour of respondent No.5 has been challenged in the present proceedings accordingly there is no infirmity in the order passed by Commissioner confirming the auction in favour of respondent No.5.

23. For the aforesaid reasons, there is no merit in the writ petition which is accordingly **dismissed**.

(2024) 12 ILRA 761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 2370 of 2023

Ghanshyam Das Agarwal **...Petitioner**
Versus
Anoop Kumar & Ors. **...Respondents**

Counsel for the Petitioners:
Kaushalendra Nath Singh, Tarun Varma

Counsel for the Respondents:
Bhanu Pratap Singh, Surendra Singh

Civil Law-The Code of Civil Procedure, 1980-Order 1 Rule 8---Filing of written St.ment after a period of 90 days- Limitation under Order 8 Rule 1 CPC cannot be extended in routine manner and shall only be done in exceptional case and further in such cases, it is required on the part of Court to give reasons for condoning the delay--- Once, it is undisputed that publication has been made and application has been filed before the Trial Court, in all eventuality, notice is deemed to be served after 90 days from the date of submission of application along with publication before the Trial Court. Therefore, notice is sufficient--- Impugned orders set aside.

Petition allowed. (E-15)

List of Cases cited:

1. Ramesh Flowers Pvt. Ltd.Vs Mr. Sumit Srimal; C.R.P. (MD) Nos. 1853 & 1854 of 2024
2. Atcom Technologies Ltd. Vs Y.A. Chunawala & Co.; (2018) 6 Supreme Court Cases 639
3. Desh Raj Vs Balkishan (dead) Through Proposed Legal Representative Ms. Rohini; (2020) 2 Supreme Court Cases 708.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Tarun Varma along with Sri Ridham Gupta, learned counsel for the petitioner and Sri Ashok Malviya, advocate holding brief of Sri Bhanu Pratap Singh, learned counsel for the respondents.

2. Present petition has been filed with following prayer;

“Issue writ, order or direction in the nature calling for the record of the case and quashing the orders dated 13.09.2022 and 17.01.2023.”

3. Learned counsel for the petitioner submitted that petitioner has filed Suit No. 363 of 2007 impleading the respondent nos. 1, 2, 3, 4, 5, 6 & 7 as defendant nos. 1, 2, 3, 4, 5, 6 & 7 respectively. In the said suit, notice was issued on 17.01.2018. Defendant no. 3 i.e. respondent no. 7, who is brother of other respondents after receiving notice, has filed written submission along with delay and considering the same in accordance with under Order 8 Rule 1 CPC, Court vide order dated 10.09.2021 has rejected the same.

4. He next submitted that notices were not served upon defendant nos. 2, 4, 5, 6 & 7, therefore, petitioner/plaintiff has moved application 17Ga/18Ga for publication of summon in newspaper, which was allowed vide order dated 23.01.2018. Pursuant to that publication was made in newspaper on 07.02.2018 and submitted copy of newspaper along with application 19Ka2 before the Trial Court on 25.01.2018. After publication, for the first time, defendant nos. 2, 4, 5, 6 & 7 have filed application No. 47C dated 2.7.2022 along with affidavit on the ground that application 19Ka2 of the

petitioner has not been disposed off, there is no order of Court about service of summon, only after perusal of order sheet, he could know about the facts and filed application with written submission. The said application was allowed by Civil Judge (Senior Division), Gorakhpur vide order dated 13.09.2022. Against that petitioner has filed Civil Revision No. 89 of 2022 and revisional Court has affirmed the finding of Trial Court vide order dated 17.01.2023. He next submitted that Trial Court has passed the order dated 23.01.2018 for publication, which was immediately complied with and news paper was submitted before the Trial Court along with application 19Ka2. Therefore, it is duty upon the Court to dispose off the application and in case, same is not decided, petitioner is not responsible for that. In support of his contention, he has placed reliance upon the judgment of Madras High Court in the matter of ***Ramesh Flowers Private Limited Vs. Mr. Sumit Srimal; C.R.P. (MD) Nos. 1853 & 1854 of 2024.***

5. He next submitted that along with application No. 47C dated 2.7.2022, no delay condonation application has been filed, even then, delay of more than one year has been condoned treating the written submission within time. He next submitted that in non commercial matter, provisions of Order 8 Rule 1 CPC is not mandatory, but in regular suit, if written submission has been accepted beyond limitation, reasons must have been assigned by the Court. He also pointed out that Case of defendant no. 3 is identical to the case of defendant nos. 2, 4, 5, 6 & 7 whose written submissions have been rejected on the ground of delay. Therefore, this application may not having treated in time and be rejected. He next submitted that finding of

the Trial Court is absolutely perverse and Court relying upon some judgments has held that those are related to Commercial dispute. He next submitted that petitioner is not treating any parity with commercial case and his case is undisputedly not a commercial case. Even that in case, if written submission is accepted beyond the limitation provided under Order 8 Rule 1 CPC, reasons must have been recorded, which is absolutely missing in the impugned order dated 13.09.2022. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matters of ***Atcom Technologies Ltd. Vs. Y.A. Chunawala & Co.; (2018) 6 Supreme Court Cases 639 & Desh Raj Vs. Balkishan (dead) Through Proposed Legal Representative Ms. Rohini; (2020) 2 Supreme Court Cases 708.***

6. Per contra, learned counsel for the respondents has vehemently opposed the submission made by learned counsel for the petitioner and submitted that case of the respondents is not a commercial case, therefore, written submission may be accepted even after 90 days as provided under Order 8 Rule 1 CPC. He next submitted that Court has not passed the order upon the application 19Ka2 about service of summon, therefore, it is open for the defendants to file written submission before the Trial Court for disposal of suit and that would have been treated in time. He next submitted that his case may not be compared with defendant no. 3 as both are standing on entirely different footing. Trial Court has decided the issue after considering the various judgment. He also pointed out that suit is still pending and in case objection is rejected, defendants would suffer irreparable loss.

7. In rejoinder argument, learned counsel for the petitioner submitted that defendant nos. 2, 4, 5, 6 & 7 have not come with clean hands before the Court. He pointed out that all the defendants are brothers residing in the same premises i.e. address of defendant no. 3. Even, in counter affidavit filed before this Court, he had written same address. In fact, they were having full knowledge of pendency of suit and one of their brother has made an attempt to file written submission and same was rejected, but they have not turned up and not disclosed any reason as to how they went to Court and obtained information about pendency of Suit.

8. I have considered the rival submissions advanced by learned counsel for the parties and perused the record as well as judgments relied upon.

9. Undisputedly, Suit No. 363 of 2007 was filed against the real brothers, residing in the same premises and out of them, defendant no. 3 has received the notice. Ultimately, he has filed written submission with delay, which was rejected vide order dated 10.09.2021.

10. Further, as the notice was not served upon defendant nos. 2, 4, 5, 6 & 7, petitioner has moved application for publication in newspaper, which was allowed vide order dated 23.01.2018. Pursuant to that, publication was made on 07.02.2018 and application 19Ka2 along with news paper also been filed before the Trial Court. Upon which, Trial Court has not passed any order for disposal. Defendant nos. 2, 4, 5, 6 & 7 has filed application dated 2.7.2022 along with affidavit for filing written submission only on the ground that application 19Ka2 has not been disposed of. Thereafter, written

submission was treated in time application was allowed by the impugned order dated 13.09.2022 and affirmed by the revisional court vide order dated 17.01.2023.

11. Learned counsel for the petitioner has rightly pointed out that order of publication is complied with and application along with publication has been submitted before the Trial Court. In case, order of disposal has not been passed upon the said application, petitioner is not responsible for the same and for that, he should not be put to any disadvantageous position. In the impugned order, it is observed that publication was made and application 19Ka2 has been filed, which has not been disposed of by the Trial Court. It is very surprising that on one hand, it is accepted by the Trial Court that application along with news paper has been filed, but the same was not disposed of, which is inaction on the part of Court itself and on the other hand, benefit of same is given to the defendants, which cannot be accepted. The similar issue was before the Madras High Court in the matter **Ramesh Flowers Private Limited (supra)** and Court has taken very same view. Relevant paragraphs are being quoted below;

“9. I am not able to agree with the contention of the learned counsel appearing for the respondent. No doubt, the mistake of the court should not harm a party. But, no party can take advantage of the lapse committed by the court particularly when it is contrary to the statute. It was held in Athiappa Gounder v. Athiappa Pandaram (1967) 1 MLJ 392(FB) that the maxim could be invoked and applied in individual cases to a party who has done all he should do under the statute and is prejudiced solely by the delay or mistake of the court. When the statute has

prescribed a certain time line, it was incumbent on the part of the defendant to adhere to the same. If he is unable to do so, he must offer a proper explanation and seek condonation. Without doing so, the defendant cannot ride piggy back on the mechanical endorsements made by the trial court. I hold that the defendant cannot take advantage of the aforesaid maxim."

12. Now other arguments of learned counsel for the parties are concerned, Order 8 Rule 1 CPC shall only be mandatory in case of commercial matters and not in non commercial matters. For ready reference, Order 8 Rule 1 CPC is quoted below;

"1. Written statement.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

13. In the application, petitioner himself stated that it is a non commercial case, therefore, Order 8 Rule 1 CPC is not mandatory and in an exceptional case, written submission may also be accepted beyond the time i.e. 90 days, but for that, reasons are required to be stated. Trial Court while deciding the issue relied on the pretext that Order 8 Rule 1 CPC is mandatory only for the commercial case and as the present case is not commercial. There is no dispute on the point that Order 8 Rule 1 CPC is not mandatory in non commercial case, but even though in an

exceptional case, it is required on the part of Court to record findings for accepting the written submission beyond limitation, which is absolutely missing in this matter. Therefore, such finding is absolutely perverse.

14. It is also undisputed that along with written submission, no application for condoning the delay along with reasons have been filed, but Trial Court without considering the mandate of Order 8 Rule 1 CPC, interpreted by the Courts from time to time, has straightway allowed the application absolutely on different facts. It is mandatory requirement to record reasons for accepting the written submission, if filed beyond limitation given in Order 8 Rule 1 CPC even if, the matter is non commercial in nature. In impugned orders, no reasons have been assigned by the Court as to why written submission is accepted beyond limitation without accompanied with delay condonation application. Therefore, orders are absolutely bad.

15. The Apex Court in the matter of **Atcom Technologies Ltd. (supra)** has taken the very strict view that onus upon the defendant is of a higher degree to plead and satisfactory demonstrate a valid reason for not filing the written statement. Relevant paragraphs are being quoted below;

"18. We shall proceed on the basis that summons in Suit No. 4870 of 1999 were served only in the year 2009. In this behalf, it may be stated that in this suit, unconditional leave to defend was granted by the learned Single Judge on March 16, 2002. By the same order, all three suits were directed to be tried together. Therefore, Vakalatnama in the suit was also filed and on the dates fixed before the Court, respondents were appearing having

knowledge about the Suit No. 4870 of 1999 as well. Obviously, this leave to defend was granted after the respondents had put in appearance and filed application for grant of leave to defend. Thus, summons in the suit were served upon the respondents, albeit, in Form 4 of Appendix B, as stipulated in Rule 2 of Order 37 of Civil Procedure Code, 1908. May be, thereafter, Writ of Summons were not served again upon the respondents. However, in any case, these summons were served in the year 2009. Therefore, it was incumbent upon the respondents to show as to in what manner they were prevented from filing the written statement.

19. It has to be borne in mind that as per the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908, the defendant is obligated to present a written statement of his defence within thirty days from the date of service of summons. Proviso thereto enables the Court to extend the period upto ninety days from the date of service of summons for sufficient reasons. Order 8 Rule 1 of the Code of Civil Procedure, 1908 reads as under:

“1. Written statement.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

20. This provision has come up for interpretation before this Court in number of cases. No doubt, the words ‘shall not be later than ninety days’ do not take away the power of the Court to accept

written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from Salem Advocate Bar Association, v. Union of India, (2005) 6 SCC 344:

“21. ...There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to “make such order in relation to the suit as it thinks fit”. Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.”

21. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that Writ of Summons were not served till 2009?

22. We fail to persuade ourselves with this kind of reasoning given by the High Court in condoning the delay, thereby disregarding the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 and the spirit behind it. This reason of

the High Court that delay was condoned 'by balancing the rights and equities' is far-fetched and, in the process, abnormal delay in filing the written statement is condoned without addressing the relevant factor, viz. whether the respondents had furnished proper and satisfactory explanation for such a delay. The approach of the High Court is clearly erroneous in law and cannot be countenanced. No doubt, the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 are procedural in nature and, therefore, hand maid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically."

16. Again the similar issue was before the Apex Court in the matter of **Desh Raj (supra)**. Relevant paragraphs are being quoted below;

"13. As regard the timeline for filing of written statement in a non-commercial dispute, the observations of this Court in a catena of decisions, most recently in Atcom Technologies Ltd. v. Y.A. Chunawal and Co. holds the field. Unamended Order VIII Rule I, CPC continues to be directory and does not do away with the inherent discretion of Courts to condone certain delays.

14. Let us, therefore, consider whether the appellant has made out a case of exercising such discretionary jurisdiction? The present civil suit had been filed by the respondent for a decree of specific performance of an agreement to sell one floor of an ancestral property located in Devli Village, Delhi and permanent injunction against alienation of the same by petitioner to third parties.

Counsel for respondent has not contested the non-commercial nature of the dispute, and even independently we are satisfied that the dispute does not fall within the parameters specified under Section 2(c) of the Commercial Courts Act, 2015 and in particular sub-clause (vii), as the immovable property here is not of a nature which is "used exclusively in trade or commerce". Hence, the appellant is correct in contending that the High Court overlooked the nature of the dispute and mistakenly applied the ratio of a case rendered in light of a modified version of the Code of Civil Procedure, which would only be applicable to commercial disputes.

15. However, it would be gainsaid that although the unamended Order 8 Rule 1 of CPC is directory, it cannot be interpreted to bestow a free hand to on any litigant or lawyer to file written statement at their own sweet-will and/or to prolong the lis. The legislative objective behind prescription of timelines under CPC must be given due weightage so that the disputes are resolved in a time-bound manner. Inherent discretion of Courts, like the ability to condone delays under Order VIII Rule 1 is a fairly defined concept and its contours have been shaped through judicial decisions over the ages. Illustratively, extreme hardship or delays occurring due to factors beyond control of parties despite proactive diligence, may be just and equitable instances for condonation of delay.

16. However, it is clear from the facts on record that numerous opportunities had been accorded to the appellant. He was served on 01.05.2017 and entered appearance through counsel on 15.05.2017. As per Order 8 Rule 1 of CPC, the appellant ideally ought to have filed his written statement by 31.05.2017; and at the very latest by 30.07.2017. In

addition to two separate deadlines for filing of the written statement within the 90-day time-frame prescribed by the 'original' Order VIII Rule 1, the Civil Court even post expiry of the 90-day period again gave one last and final opportunity on 18.09.2017 subject to payment of costs of Rs 3,000. None of these deadlines were complied with. Even on 11.10.2017, when the Court finally closed the appellant's ability to file written statement and struck-off his defence from the record, no attempt was made to comply with the process of law.

17. It was only on 02.11.2017, after a delay of 95 days post the maximum extendable period under the Proviso of Order VIII Rule 1, CPC that the appellant claimed to have filed his written statement. Curiously however, even by the next hearing on 03.11.2017, the appellant had failed to provide a copy of the written statement to the respondent as had been noted by the Civil Court.

18. The only defence taken to these repeated and blatant lapses is that the appellant's counsel was not turning up. No attempt has been made to even proffer a reasoned justification or explanation, and it is clear that appellant is seeking condonation in a casual manner. This ought not to be permitted or encouraged. Courts must act stringently to ensure that all proceedings are decided within reasonable time, and it is but the duty of the judicial system to cultivate a culture of respecting deadlines and time of the Court, its officers as well as of adversaries.

19. Routine condonations and cavalier attitudes towards the process of law affects the administration of justice. It affects docket management of Courts and causes avoidable delays, cost escalations and chaos. The effect of this is borne not

only by the litigants, but also commerce in the country and the public-in-general who spend decades mired in technical processes.

20. It is obvious from the record that nothing prevented the appellant from filing the written statement through counsel or in person. He has, thus, failed to give any cogent reason for the delay and is unable to satisfy due diligence on his part though he is right in his submission that the High Court erroneously relied upon the ratio of Oku Tech."

17. Therefore, in light of Order 8 Rule 1 CPC along with interpretation made by the Court, it is absolutely clear that limitation under Order 8 Rule 1 CPC cannot be extended in routine manner and shall only be done in exceptional case and further in such cases, it is required on the part of Court to give reasons for condoning the delay.

18. It is very surprising that application filed by the defendants for filing written submission is based upon only one ground that application 19Ka2 has not been disposed of and contrary to that, application was allowed distinguishing the case of defendant nos. 2, 4, 5, 6 & 7 with defendant no. 3.

19. Once, there is no such pleading in the application, Court cannot impose its own finding beyond the pleading, therefore, this finding is also absolutely perverse. Therefore this cannot be a ground for allowing the application filed by defendant nos. 2, 4, 5, 6 & 7. In fact, neither in application nor in pleading, no such parity has been claimed from defendant no. 3 itself and Court has imposed its own finding beyond pleading.

20. In fact, it is required on the part of Trial Court to decide the application 19Ka2, which was not decided, but Trial Court has given benefit of its own inaction to the defendant nos. 2, 3, 4, 5, 6 & 7 which is not permissible in law.

21. Now, coming to the consequences of non disposal of application 19Ka2. Once, it is undisputed that publication has been made and application has been filed before the Trial Court, in all eventuality, notice is deemed to be served after 90 days from the date of submission of application along with publication before the Trial Court. Therefore, notice is sufficient.

22. In view of the facts and law discussed hereinabove, orders dated 13.09.2022 & 17.01.2023 are set aside and writ petition is **allowed**.

23. No order as to costs.

(2024) 12 ILRA 768
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

S.C.C. Revision No. 97 of 2024
 Connected With
 S.C.C. Revision No. 5 of 2024

Om Prakash & Anr. ...Revisionists
Versus
Bn Public School & Ors. ...Opposite Parties

Counsel for the Revisionists:
 Arvind Srivastava

Counsel for the Opposite Parties:
 Arun Kumar

Civil Law - Code of Civil Procedure, 1908-Order IX R 13 - Section 151-Petitioner -tenant of the landlord respondent-subject to an eviction suit for recovery of arrears of rent-the suit proceeded ex parte against the Petitioner-petitioner moved an application initially under Section 151 CPC registered as Misc. Case No. 1 of 2016 for recall of the ex parte judgment and decree. This application dated 30.03.2016 ultimately came to be rejected by the court on 04.04.2016 recording this fact that neither-the compliance of the provision under Section 17 of the Provincial Small Causes Court Act was made, nor application was filed under Order IX Rule 13 CPC. The Court also observed that the application in these circumstances filed under Section 151 CPC was not maintainable-rejected - revision being filed-the same was withdrawn without any further liberty - the second recall application before the court under Order IX Rule 13 was clearly not maintainable.

Revision dismissed. (E-9)

List of Cases cited:

1. Order on C.M. Delay Condonation Application NO.138010 of 2016
2. Shakti Tubes Ltd. Vs St. of Bihar & ors.(2009) 1 Supreme Court Cases 786
3. Pankajbhai Rameshbhai Zalavadia Vs Jethabhai Kalabhai Zalavadia (Deceased) through LRs & ors.2018 0 AIR (SC) 490/ 2017 0 Supreme (SC) 963

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

1. Heard Shri Arvind Srivastava, learned Advocate appearing for revision applicant and Shri Ved Byas Mishra, learned Advocate appearing for landlord respondents.

2. By means of this revision application instituted under Section 25 of the Provincial Small Causes Courts Act,

1887 revision applicant has challenged the order passed by the Judge Small Causes rejecting his application filed under Order IX Rule 13 CPC to set aside the ex parte judgment and decree dated 27.10.2015 decreeing the SCC suit No. 07 of 2014.

3. Briefly stated the facts of the case are that petitioner admittedly being a tenant of the landlord respondent was subject to an eviction suit for recovery of arrears of rent vide SCC Case No. 07 of 2014. Petitioner sought to contest the matter on the plea that he was not the tenant of the landlord respondent but was the owner of the property in question and that the municipal records carried his name in the column of title of the property but ultimately for his non-appearance in the suit, the suit proceeded ex parte and got finally decreed vide judgment and decree dated 27.10.2015. Instead of challenging the same before the higher court, petitioner moved an application initially under Section 151 CPC registered as Misc. Case No. 1 of 2016 for recall of the ex parte judgment and decree. This application dated 30.03.2016 ultimately came to be rejected by the court on 04.04.2016 recording this fact that neither the compliance of the provision under Section 17 of the Provincial Small Causes Court Act was made, nor application was filed under Order IX Rule 13 CPC. The Court also observed that the application in these circumstances filed under Section 151 CPC was not maintainable.

4. This order was further challenged before this Court by means of petition filed under Article 227 of the Constitution bearing No. 2726 of 2016, however, the Court observed that the order was revisable and, therefore, liberty was granted to file revision and further certified copy was

directed to be returned to the petitioner after obtaining photocopy thereof on record. Petitioner was also directed to serve a copy to Shri Pravin Kumar Giri, the then counsel representing the landlord in the event revision was filed. The order dated 22.04.2016 is reproduced hereunder:

"The petitioners have an alternative remedy of revision under Section 25 of Provincial Small Cause Courts Act, 1887. The petition is dismissed on the ground of alternative remedy.

Office is directed to return the certified copies of the orders to the counsel for the petitioners after taking photostat copies of the same.

When the revision is filed notice of revision will be given to Sri Praveen Kumar Giri, who has filed caveat in the matter."

5. After this above order was passed, instead of pursuing the remedy of revision against the order rejecting the application for recall, petitioner filed a composite revision petition being SCC petition (Defective) No. 98 of 2016 both against the order rejecting the Misc. Recall Application dated 04.04.2016 and also ex parte judgment and decree dated 27.10.2015. However, before the court could proceed to hear the matter on merits, the counsel appearing on behalf of petitioner made a statement before the court that revision-applicant was giving up challenge to the order dated 04.04.2016 rejecting the recall application. It is after this statement came to be made that the Court recorded this statement in its order and ultimately dismissed the delay condonation application for there being no genuine explanation offered for delay in filing the revision petition in respect of ex parte judgment and decree. The order

passed by this Court rejecting the revision application and recording the statement made on behalf of petitioner giving up his challenge to the order dated 04.04.2016 even though revision was directed against that order also, is reproduced hereunder:

"Counsel for the revisionists states that he is giving up the challenge to order dated 4.4.2016 rejecting the recall application. He further states that he is confining the instant revision in so far as it seeks to challenge the exparte judgement and decree dated 27.10.2015 in SCC Suit No.7 of 2014.

Order on C.M. Delay Condonation Application NO.138010 of 2016

Heard counsel for the parties.

The revision in view of statement made above stands confined to order dated 27.10.2015, whereby SCC Suit No.7 of 2014 was decreed by the trial court for recovery of arrears of rent and for eviction of the defendants.

Indisputably, initially the revisionists filed an application under Section 151 CPC for recall of judgement and decree dated 27.10.2015 alleging that it is exparte against them. The application was rejected by the court below by order dated 4.4.2016 on the ground that the revisionists have not complied with Section 17 of the Provincial Small Cause Courts Act, 1887 (for short 'the Act'). The application filed under Section 151 CPC was also held to be not maintainable in view of there being a specific remedy available by way of Section 17 of the Act. It is an admitted fact that the revisionists thereafter filed a petition under Article 227 of the Constitution challenging the judgement dated 27.10.2015 and order dated 4.4.2016, but which was rejected by

this Court on the ground of availability of alternative remedy.

The revision is reported to be beyond time by 152 days.

From the facts narrated above, it is clear that the revisionists sought recall of judgement by filing a recall application without depositing the decreetal amount as required by Section 17 of the Act. When the said application was rejected on the ground of non-compliance of Section 17, they approached this Court by way of a petition under Article 227 of the Constitution in which also they could not get any success. Thereafter, the instant revision has been filed challenging the order dated 4.4.2016 rejecting the recall application and also the judgement dated 27.10.2015. To escape from the liability to deposit the decreetal amount as required under Section 17, they have chosen to give up challenge to the order dated 4.4.2016, though revision against the said order is within limitation.

The affidavit filed in support of the delay condonation application does not offer any explanation whatsoever for not seeking remedy by way of revision before this Court against the judgement passed in the suit within limitation prescribed by law. It is more than clear that the revisionists in order to avoid depositing of decreetal amount in compliance of Section 17 of the Act have chosen to challenge the exparte judgement and decree much after the limitation has expired, without offering any explanation for the delay.

Consequently, the delay condonation application is rejected. As a result, the revision also stands dismissed."

(Emphasis added)

6. It appears that after the revision was dismissed, may be on the ground of delay,

the petitioner moved another application, this time under order IX rule 13 CPC which was registered as Misc. Case No. 81 of 2016 against which petitioner separately also moved an application for compliance of Section 17 of Provincial Small Causes Court Act making a plea that his request to deposit security against the decretal amount may be accepted and he may be permitted to furnish the security bond. While these applications came up for orders before the court, the court rejected the same vide order dated 11.12.2023 rejecting the plea that petitioner was in any manner entitled to benefit of Section 14 of the Indian Limitation Act, 1963. The reason assigned in the order impugned is that since the application under Section 151 was moved before the Court having jurisdiction, therefore, principles of Section 14 would not be attracted. It is this order dated 11.12.2023 which is assailed before this Court.

7. Shri Arvind Srivastava, learned Advocate appearing for revision applicant has submitted that the court fell in manifest error of law in rejecting the application on the ground that Section 14 of the Limitation Act, 1963 would not be attracted. In support of his submission, learned counsel for petitioner has placed before the Court relevant provision of Section 14 of the Limitation Act 1963, which is reproduced hereunder:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction:- (I) *In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the*

proceedings relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) *In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceedings is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

(3) *Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908) the provisions of sub-section (I) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fall by reason of a defect in the jurisdiction of the court or other cause of a like nature.*

Explanation - For the purposes of this section-

(a) *in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted.*

(b) *a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.*

(c) *misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction".*

8. Mr. Srivastava, argued that the word and expression "jurisdiction or other cause

of a like nature” needs interpretation. The cause of a like nature would be akin to jurisdiction or in a matter where entertainability of an application is questioned, may be not maintainable. In the instant case, it is submitted, though an application under Section 151 CPC was made before the same court which had the jurisdiction, and technically speaking it could not have been held maintainable as it was not entertainable only because there was an alternative provision available to the petitioner to move an application under Order IX Rule 13 CPC with compliance made under Section 17 of the Provincial Small Causes Court Act. Mr. Srivstava, argued that whether the an application is not maintainable or not entertainable would amount to same and, therefore, even if the application made was not competent and not entertainable then benefit under Section 14 would be attracted in the event a maintainable application was subsequently filed. Thus, according to him, the period spent in the remedy being pursued by way of Section 151 CPC application and consequential petitions filed against the order rejecting the same, would be taken as previous period spent in pursuing a wrong remedy in good faith and as such condonable under Section 14 of the Act.

9. In support of his submission, learned counsel appearing for petitioner has relied upon the judgment in the case of ***Shakti Tubes Ltd. v. State of Bihar and others (2009) 1 Supreme Court Cases 786.***

10. Per contra, it is argued by Shri Mishra, that it is a settled legal position that if a court has jurisdiction to entertain an application or a suit/ case then merely because wrong provision has been quoted in an application or a suit, it will not render the court as coram non iudice and,

therefore, proper course for the petitioner was to pursue the remedy of revision that he had filed after the liberty stood granted by this Court on 22.04.2016 in a matter filed under Article 227 No. 2726 of 2016. It is submitted that since the petitioner himself had withdrawn the challenge laid to the order passed by the Court rejecting application for recall may be under Section 151 CPC, and did not seek any liberty from this Court while this Court dismissed the revision against the ex parte judgment and decree on 18.01.2019 quoting the statement of the petitioner, it was not open for the petitioner to file any fresh application under Order IX Rule 13 CPC.

11. In support of his submission learned counsel for landlord respondent has relied upon judgment of Supreme Court in the Case of ***Pankajbhai Rameshbhai Zalavadia v. Jethabhai Kalabhai Zalavadia (Deceased) through LRs and others 2018 0 AIR (SC) 490/ 2017 0 Supreme (SC) 963*** he has placed before the Court paragraph-14 of the judgment, which is reproduced hereunder:

"14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 of the CPC, in order to do justice between the parties. Merely because of the non- mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the

application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression 'to settle all questions involved' used in Order 1 Rule 10 (2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., defendant no.7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment

was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.

As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing

substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice."

12. Having heard learned counsel appearing for respective parties and having perused the records, two points arise for consideration of the Court: (i) if a petition challenging the order rejecting the recall application under Section 151 CPC instead of Order IX Rule 13 was got dismissed with the liberty to challenge the order in revision and upon revision being filed, the same was withdrawn and that too without any further liberty, was it still open for such a party to file a miscellaneous application for recall of ex parte judgment taking recourse to Order IX Rule 13 CPC; and (ii) whether in a revision petition filed against the order passed upon a recall application filed under Section 151 CPC and the ex parte judgment, if against the former, revision is got dismissed as withdrawn without any further liberty and in respect of later revision is dismissed being barred by time, would it still entitle revision applicant to question the ex parte judgment by means of a fresh recall application under Order IX Rule 13 CPC. Both the above questions are inter-related and, hence, are being addressed and answered together.

13. While it is true that the judgment in limine or order dismissing the the matter in default may not amount to a judgment on merits to attract the principles of res judicata but at the same time it is a settled legal proposition that an application if filed before a competent court under a wrong provision of law and decided holding it to be not maintainable, it being an incorrect view of law, it could have been challenged. This order passed under Section 151 CPC

was challenged by petitioner by means of a petition filed under Article 227 of the Constitution bearing No. 2726 of 2016 which was disposed of with a liberty to file revision only. The revision was very much filed by the petitioner but he got the same dismissed, meaning thereby he got recall application dismissed may be on a wrong premise by competent court of law as withdrawn but without there being any further liberty. In my considered view the Court having the jurisdiction to hear and decide an application for recall under Order IX Rule 13 would be a competent court and merely because a wrong provision was mentioned in the application, the application could not have been rejected as not maintainable. This was a sound ground available to petitioner to question the order in revision and rightly so an opportunity was afforded to him but for the reasons best known to him, he got it dismissed as withdrawn and then again the revision qua judgment and decree was dismissed on the ground of delay. The application under Section 5 was dismissed for there being lack of proper explanation offered for delay in approaching the Court, inasmuch as the Court observed that petitioner was avoiding deposits that were to be made under Section 17 of the Act.

14. These above observations that have come up to be made by the Court makes it absolutely clear that Misc. Application for recall under Section 151 CPC was deliberately filed to avoid deposit of decretal amount under Section 17 which was a mandatory statutory requirement. Petitioner could have taken permission of the court to correct the provision mentioned in recall application because court hearing it had the jurisdiction to entertain application under Order IX Rule 13 as well. Further, he had equally an opportunity to

correct this error while he had questioned the order rejecting recall in revision before this Court but he deliberately withdrew it for the reason that the court might have expressed the view that for non-deposit made under Section 17 no application for recall could have been made and I find that court recorded very categorically that present petitioner was avoiding compliance of Section 17 of Provincial Small Cause Courts Act, 1887.

15. It is thus, clear that Misc. Application for recall was filed before the competent court having jurisdiction may be mentioning a wrong provision of law and this itself could not have invalidated the application. The court could have tried it provided the petitioner had made deposit under Section 17 of the Act to press it on merits. The court of course, rejected the application on the ground that it was not maintainable but the petitioner had the opportunity to question it in revision but instead of questioning it in revision on merits, he chose to withdraw the same and that too without any liberty to move any application afresh. Thus, for the observations that have come up to be made by a Co-ordinate Bench of this Court while deciding his revision petition filed against the ex parte judgment under its order dated 18.01.2019, and there being no liberty further availed by petitioner, the second recall application before the court under Order IX Rule 13 was clearly not maintainable.

16. Still further, I do not find there to be any averment coming up in the entire petition regarding any deposit made of the decretal amount under Section 17 of the Provincial Small Cause Courts Act, 1887. Petitioner's revision has also been dismissed, may be on the ground of delay,

confirming the order passed by the Judge Small Causes for eviction.

17. Thus, the challenge laid to the ex parte judgment and decree dated 11.12.2023 is also over. It is not stated that this order of the High Court was further challenged.

18. In such above view of the matter, therefore, I do not find any justification to interfere with the order passed by the court rejecting application filed under Order IX Rule 13 CPC.

19. Revision application is devoid of merits and is accordingly, rejected. However, it is clarified that this order will not come in the way qua title of property between the parties if being contested before competent court of law/ forum.

20. For the reasons recorded and discussed together above, the review petition No. 5 of 2024 is also dismissed.

21. Cost made easy.

(2024) 12 ILRA 775
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Special Appeal No. 973 of 2024

Ram Kishor Dixit ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Gyanesh Kumar, Manoj Kumar Singh

Counsel for the Respondents:
C.S.C.

(A) Service Law - Claims for arrears in pay scales and promotion benefits - Doctrine of Delay and Laches - intra court appeal - Claims based on a continuing wrong are not barred by delay but are subject to the doctrine of laches and limitation - Relief for monetary arrears in 'recurring wrongs' is generally limited to three years prior to the filing of a writ or application. (Para - 29)

(B) Service Law - Distinction between Continuing wrong and Completed Wrong - continuing wrong' arises from a wrongful act that creates a continuous source of injury -wrongdoer remains liable as long as the injury continues - 'completed wrong' results in a one-time injury, even if its effects persist - Pension claims are treated as 'recurring wrongs', with a fresh cause of action arising each month - Relief for 'continuing wrongs' in service-related claims may be granted despite delay, provided it does not disturb settled rights - In cases of 'completed wrongs, delay or laches often bars monetary claims, especially arrears - A 'completed wrong' is a one-time act or omission with persistent effect and does not qualify as a 'continuing wrong'. (Para - 29)

(C) Service Law - Distinction between Delay, Laches, and Acquiescence - Laches involves unreasonable delay or negligence in pursuing a claim, causing prejudice to the other party - Two essential factors - length of delay and the nature of acts done during the interval - Acquiescence means tacit or passive acceptance, implying reluctant consent to an act - presupposes knowledge and passive acceptance, leading to a new implied agreement between parties. (Para -28)

Appellant, employed as an Assistant Teacher in CT Grade - claim for arrears due to the merger of CT Grade into LT Grade - promotional pay scale benefits - claims were raised for the first time in 2023, years after his retirement in 2009

- opposed by the State - citing delay and laches - Single Judge dismissed writ petition - ground - unexplained delay – held - claim was barred by laches – hence appeal. (Para - 3 to 117)

HELD: - Claim for arrears due to the merger of CT Grade into LT Grade and promotional pay scale was time-barred and lacked merit. No patent error or illegality in the order passed by learned Single Judge dismissing the writ petition on the ground of delay/laches. (Para - 30 to 32)

Appeal dismissed. (E-7)

List of Cases cited:

1. U.O.I.& ors.Vs Tarsem Singh, (2008) 8 SCC 648
2. Balakrishna Savalram Pujari Waghmare Vs Shree Dhyaneswar Maharaj Sansthan, AIR 1959 SC 798
3. M.R. Gupta Vs U.O.I., (1995) 5 SCC 628
4. Shiv Dass Vs U.O.I.& ors., (2007) 9 SCC 274
5. State of Bihar Vs Deokaran Nenshi, (1972) 2 SCC 890
6. Commissioner of Wealth Tax, Amritsar Vs Suresh Seth, (1981) 2 SCC 790
7. UP Jal Nigam and another Vs Jaswant Singh and another, (2006) 11 SCC 464
8. State of MP & ors.Vs Yogendra Shrivastava, (2010) 12 SCC 538
9. Prahlad Rout Vs All India Institute of Medical Sciences, (2021) 14 SCC 472
10. U.O.I. Vs N. Murugesan, (2022) 2 SCC 25

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

1. Heard Sri Manoj Kumar Singh, learned counsel for the appellant and Sri Ankit Gaur, learned Standing Counsel appearing for the State-respondent.

2. The present *intra* court appeal is directed against the judgment and order 23.08.2024 passed by the learned Single Judge in Writ-A No.12140 of 2024 (Ram Kishor Dixit Vs. State of UP and others), in terms of which the writ petition has been dismissed on the ground of the delay.

3. The records of the case indicate that the writ petition had been filed with the assertion that the petitioner was initially appointed as Assistant Teacher in the CT Grade in a recognized and aided educational institution on 01.09.1973, and was regularized by an order dated 30.06.1975. He was awarded revised pay scale vide order dated 03.06.1989 and the benefit of selection grade after 10 years' service in the LT Grade.

4. It is stated that the petitioner was subsequently promoted as Lecturer (Sociology) on a vacant post in the institution by the Committee of Management with the approval of the District Inspector of Schools by an order dated 20.11.1997. The petitioner subsequently superannuated on 30.06.2009.

5. Certain representations by the petitioner raising claims for arrears of salary from CT Grade to LT Grade and promotional pay scale were said to have been submitted.

6. The petitioner thereafter preferred a writ petition being Writ-A No.12140 of 2024 seeking a direction to the Director, Secondary Education, UP, Allahabad to take appropriate action for payment of arrears due to him from CT Grade to LT Grade and promotional pay scale together with interest, and to decide the representations stated to be pending in this regard.

7. The writ petition was opposed by the counsel appearing for the State-respondents on the ground of the same was barred by delay and laches.

8. The writ Court, upon examining the facts of the case, particularly that the petitioner had superannuated in the year 2009, held that his claim for payment of arrears from CT Grade to LT Grade and also promotional pay scale, could not be entertained, particularly as he had been given the LT Grade in the year 1989, and the promotional pay scale in the year 1996.

9. The learned Single Judge upon taking note of the fact that the petitioner had not raised the issue for the last 35 years, and the writ petition having been filed without explaining laches, proceeded to dismiss the writ petition on the ground of delay.

10. Counsel appearing for the appellant has pressed the appeal by arguing that the relief sought being with regard to arrears of salary, pertains to a recurring cause of action arising from month to month, and therefore the same could have been rejected on the ground of delay. It has been further urged that reliance placed by the learned Single Judge on the decision in the case of **Union of India and others Vs. Tarsem Singh**, is misplaced, and the said judgment would not be applicable in the facts of the case.

11. Learned Standing Counsel appearing for the State-respondents has supported the reasoning given by the learned Single Judge, and has contended that the claim which had been sought to be raised by the appellant-petitioner was highly time barred and that the same has rightly been rejected.

12. Counsel appearing for the appellant, despite specific queries made by the Court, could not point out from the records the basis on which the claim was being made for arrears from CT Grade to LT Grade and the promotional pay scale. The averments in the writ petition and the documents which have been annexed alongwith the same also are not very clear in this regard.

13. There is no specific mention in the pleadings of the writ petition regarding the date on which the benefit of LT Grade was granted to the petitioner and also the period for which the arrears in this regard has been sought to be claimed. The only mention in this regard is in a representation dated 25.05.2023 said to have been submitted by the appellant, wherein it is sought to be asserted that the petitioner was placed in the LT Grade on 01.01.1986. In the representation also, no details have been mentioned regarding the period for which arrears were sought to be claimed.

14. It is the own case of the petitioner that he was substantively appointed against the post of Assistant Teacher in the CT Grade and that consequent to the decision of the State Government declaring CT Grade to be the dying cadre, his services stood merged in the LT Grade.

15. The order dated 19.11.1997, a copy whereof is on record as annexure no.2 to the writ petition, and in terms of which the petitioner was given ad hoc promotion against the vacant post of Lecturer in the institution, is also indicative that the petitioner had been holding the substantive post in the CT Grade.

16. There is no material on record which may suggest that upon merger of the

CT Grade into LT Grade, any arrears in regard to the same became due to the petitioner, and that the same had remained unpaid. There is also no material available on record which may suggest that any arrears were due to the petitioner in regard to the promotional pay scale.

17. The petitioner raised his claim for the first time, upon attaining the age of superannuation, by a representation stated to have been submitted on 25.05.2023 and thereafter sought to agitate his claim by preferring a writ petition in the year 2024. The significant delay raises concerns as to whether the claims would be barred by laches.

18. In the judgment in the case of **Union of India Vs. Tarsem Singh (supra)**, which has been relied upon by the writ Court, and upon which counsel for the appellant has also sought to place reliance, it was held that claims based on 'continuing wrong' would not be barred by delay, but in respect of relief for recovery of arrears for a past period, the principles relating to 'recurring/successive wrongs' would apply.

19. The position in this regard was summarized as follows:-

"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the

continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

(emphasis supplied)

20. The principle underlying 'continuing wrongs' was explained in an earlier decision in the case of **Balakrishna Savalram Pujari Waghmare Vs. Shree Dhyaneshwar Maharaj Sansthan**, wherein it was observed as follows:-

"31. In other words, did the cause of action arise de die in diem as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance

of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked."

(emphasis supplied)

21. The distinction between a claim with regard to monthly salary and a claim for recovery of arrears for a past period, was considered in the case of **M.R. Gupta Vs. Union of India**, and it was held that as long as the person concerned is in service, fresh cause of action arises every month when he is paid his salary on the basis of a wrong computation made contrary to the rules whereas in respect of a claim for recovery of arrears for a past period, the question of limitation would arise. It was further held that any claim for recovery of arrears calculated on the basis of difference in pay which has become time barred would not be recoverable. The observations made in this regard are as follows:-

"So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the

appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action."

(emphasis supplied)

22. The question of delay or laches in approaching the High Court under Article 226 of the Constitution of India was examined in **Shiv Dass Vs. Union of India and others**, and it was held that in a case of pension though the cause of action continues from month to month, the same cannot be a ground to overlook delay in filing the petition. It was stated thus:-

"6. Normally, in the case of belated approach writ petition has to be dismissed. Delay or laches is one of the factors to be borne in mind by the High Courts when they exercise their discretionary powers under Article 226 of the Constitution of India. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the

opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in *Durga Prashad v. Chief Controller of Imports and Exports* [(1969) 1 SCC 185 : AIR 1970 SC 769] . Of course, the discretion has to be exercised judicially and reasonably.

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit the appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."

23. The concept of what would constitute 'continuing wrong' has been evolved through legal pronouncements, based on the factual context of the cases. In **State of Bihar Vs. Deokaran Nenshi**, the distinction between an '**act or omission which constitutes an offence once and for all**' and an '**act or omission which continues, and therefore constitutes a fresh offence every time**', was pointed out and it was observed as follows:-

"5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the

rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and re-occurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues."

(emphasis supplied)

24. The distinction between a 'continuing wrong' and a 'wrong or default which is complete when it is committed', was again pointed out in the case of **Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth**, in the following words:-

"11. ...The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.

17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act..."

(Emphasis supplied)

25. The basis of the doctrine of laches and the factors which are to be considered where delay and laches would be sufficient to deny relief to the petitioner, were examined in **UP Jal Nigam and another Vs. Jaswant Singh and another** and

referring to the statement of law in **Halsbury's Laws of England**, para 911, p. 395, it was stated thus:-

"12. The statement of law has also been summarised in Halsbury's Laws of England, para 911, p. 395 as follows:

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

26. The differential treatment between a continuing wrong and an accrued wrong was subject matter of consideration in **State of MP and others Vs. Yogendra Shrivastava**, and it was held that in regard to claim for higher allowances prospectively from the date of application, the bar of limitation or the principle of delay or laches would not be applicable since denial of benefit of higher allowance is a continuing wrong and cause of action arises every month at time of payment of salary; however, for consequential relief of payment of arrears for past period,

principle of successive or recurring wrong would apply and arrears would not be granted for any period beyond three years prior to the date of original application. The observations made in this regard in the aforesaid decision are as follows:-

“18. ...Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong. Though the lesser payment may be a consequence of the error that was committed at the time of appointment, the claim for a higher allowance in accordance with the Rules (prospectively from the date of application) cannot be rejected merely because it arises from a wrong fixation made several years prior to the claim for correct payment. But in respect of grant of consequential relief of recovery of arrears for the past period, the principle relating to recurring and successive wrongs would apply. Therefore the consequential relief of payment of arrears will have to be restricted to a period of three years prior to the date of the original application. (See M.R. Gupta v. Union of India [(1995) 5 SCC 628] and Union of India v. Tarsem Singh, [(2008) 8 SCC 648]”

(emphasis supplied)

27. The proposition of law laid down in the case of **Union of India Vs. Tarsem Singh (supra)** was examined in **Prahlad Rout Vs. All India Institute of Medical Sciences**, and the same was held to be unexceptionable. It was reiterated that where there is a ‘continuing wrong’ in relation to a service related claim, relief may be granted notwithstanding delay, provided the granting of the relief does not

unsettle matters settled and affect third parties. It was further observed that where the cause of action is not a continuing one, the Court may refuse monetary claim on the ground of delay, specially in respect of arrears. The observations made in this regard are being reproduced below:-

“28. The proposition of law laid down by this Court in Union of India v. Tarsem Singh, (2008) 8 SCC 648 is unexceptionable. It is well settled that where there is a continuing wrong in relation to a service related claim, relief may be granted notwithstanding delay, provided the granting of the relief does not unsettle matters settled and affect third parties. The judgment was, however, rendered in the context of discretionary relief in proceedings under Article 226 of the Constitution of India, for which there is no limitation prescribed. Where the cause of action is not a continuing one the High Courts refuse monetary claim on the ground of delay, specially arrears. In this context it would be pertinent to refer to the concluding part of paras 7 and 8 of the judgment of this Court in Tarsem Singh.”

(emphasis supplied)

28. The principles relating to the effect of discretion under Article 226 of the Constitution to interfere in cases of the undue delay, laches and acquiescence were summarised in **Union of India Vs. N. Murugesan** and the following observations were made:-

“Delay, laches and acquiescence

20. The principles governing delay, laches, and acquiescence are overlapping and interconnected on many occasions. However, they have their distinct characters and distinct elements. One can say that delay is the genus to

which laches and acquiescence are species. Similarly, laches might be called a genus to a species by name acquiescence. However, there may be a case where acquiescence is involved, but not laches. These principles are common law principles, and perhaps one could identify that these principles find place in various statutes which restrict the period of limitation and create non-consideration of condonation in certain circumstances. They are bound to be applied by way of practice requiring prudence of the court than of a strict application of law. The underlying principle governing these concepts would be one of estoppel. The question of prejudice is also an important issue to be taken note of by the court.

Laches

21. The word “laches” is derived from the French language meaning “remissness and slackness”. It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy.

22. Two essential factors to be seen are the length of the delay and the nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party approaching the court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy on a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the court. Thus, a man responsible for his conduct on

equity is not expected to be allowed to avail a remedy.

23. A defence of laches can only be allowed when there is no statutory bar. The question as to whether there exists a clear case of laches on the part of a person seeking a remedy is one of fact and so also that of prejudice. The said principle may not have any application when the existence of fraud is pleaded and proved by the other side. To determine the difference between the concept of laches and acquiescence is that, in a case involving mere laches, the principle of estoppel would apply to all the defences that are available to a party. Therefore, a defendant can succeed on the various grounds raised by the plaintiff, while an issue concerned alone would be amenable to acquiescence.

Acquiescence

24. We have already discussed the relationship between acquiescence on the one hand and delay and laches on the other.

25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the

parties. We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis.”

29. Having regard to the foregoing discussion, the legal position that emerges, may be summarised as follows:

29.1. A ‘*continuing wrong*’ arises from a wrongful act that creates a continuous source of injury. The wrongdoer remains liable as long as the injury continues. A ‘*completed wrong*’ results in a one-time injury, even if its effects persist.

29.2. Claims based on a ‘*continuing wrong*’ (e.g, incorrect pay fixation or pension) are not barred by delay if they involve ongoing injury. Relief for monetary arrears in ‘*recurring wrongs*’ is generally limited to three years prior to the filing of a writ or application, and Courts would refuse relief where granting it disturbs settled rights or impacts third parties.

29.3. **Recurring cause of action** or fresh cause of action arises each month when an employee receives a salary based on wrongful pay computation. Relief for pay fixation can be sought at any time while in service whereas recovery of arrears is subject to the limitation period and does not extend beyond three years.

29.4. Pension claims are treated as ‘*recurring wrongs*’, with a fresh cause of action arising each month. Courts limit retrospective relief to three years before filing the claim unless the delay significantly prejudices the opposite party or public interest.

29.5. Relief for ‘*continuing wrongs*’ in service-related claims may be

granted despite delay, provided it does not disturb settled rights. In cases of ‘**completed wrongs**’, delay or laches often bars monetary claims, especially arrears.

29.6. A ‘*continuing wrong*’ arises out of failure to comply with a rule, leading to ongoing liability until compliance and fresh periods of limitation arise as long as the wrongful act or breach persists, provided there is a positive duty to perform an act. A ‘**completed wrong**’ is a one-time act or omission with persistent effect and does not qualify as a ‘*continuing wrong*’.

30. In the instant case, as we have already noted above, no material has been placed before us to substantiate the basis of the claim for arrears on account of the merger of CT Grade into LT Grade, as also on account of the benefit of promotional pay scale which had been granted to the petitioner subsequently.

31. Even otherwise, the arrears on account of the petitioner having been placed in the LT Grade, as also on account of the benefit of the promotional pay scale, would have become due on the dates when the aforesaid benefits had been granted i.e. in the year 1986 and the year 1996 respectively. Any cause of action in regard to the same could be said to have arisen on the said dates, and would constitute a ‘**one-time cause of action**’ and not a ‘*recurring cause of action*’.

32. The claim in regard to the aforesaid arrears having not been agitated by the petitioner while being in service and the same having raised by submitting a representation in the year 2023 and thereafter filing a writ petition in the year 2024, much after the petitioner had superannuated in the year 2009, we do not

find any patent error or illegality in the order passed by the learned Single Judge dismissing the writ petition on the ground of delay/laches.

33. The appeal lacks merit and is accordingly **dismissed**.

(2024) 12 ILRA 785
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 17588 of 2024

Chhedi Ram Pandey (Deceased) & Ors.
...Petitioners
Versus
Smt. Malti Bajpai (Deceased) & Ors
...Respondents

Counsel for the Petitioners:
Ravi Anand Agarwal, Shreya Gupta

Counsel for the Respondents:
Prakash Chandra Dwivedi, Padmaker Pandey

Civil Law – Constitution of India, 1950 – Article 227 – Civil Procedure Code, 1950 – Order 41 Rules 27 - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Sections – 21(1)(a) & 21(1)(b):- Petition u/Article 227 – questioning the findings of the prescribed authority as well as appellate authority on the score of release application being granted exercising power chiefly the Act, 1972 – *Bonafide need* – plea setup in defence by the tenant before the court below that they have sufficient alternative accommodation in the form of a vacant space behind the shop in question being used as a godown - court finds that, it clearly transpires that landlords needed not only the shop to settle the sons but also for the purpose of self-settlement as they were not

having sufficient financial resources for their sons and daughters to survive and since building was in a dilapidated state they intended it reconstruction after demolition – and survey commission report did not support the case of tenant, - and, once the landlord has set up a need and it has come to be stated and proves that members of the family are not gainfully employed, any business even if run a few may not suffice the financial need of the entire family and, therefore, need would be *bona fide* – held, landlord is a sole arbitrator of his need and it does not lie in the mouth of tenant to suggest as to which accommodations would suit the landlord better – A tenant must understand that after all he is a tenant and cannot claim an indefeasible right to retain tenancy – and if the *bona fide need* issue has been decided correctly in favour of the landlord, the question whether the building was in a dilapidated condition or not need not be gone into – and the application for release deserved to be allowed - petition lack merit and is, accordingly, dismissed. (Para – 24, 25, 29, 33)

Application Dismissed. (E-11)

List of Cases cited:

1. Shiv Sarup Gupta Vs Dr. Mahesh Chand Gupta – (1999 vol. 6 SCC 222),
2. Guru Prasad Vs 1st A.D.J., Kanpur ((1999 Vol. 2 ARC 28),
3. Ramesh Chand & anr. Vs Ghaziabad Development Authority & ors. (Appeal Civil No. 2349 of 2008 decided 31.03.2008,

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

1. Heard Ms. Shreya Gupta, learned counsel for the petitioners and Sri Atul Dayal, learned Senior Advocate assisted by Sri Prakash Chandra Dwivedi, learned counsel for the respondent – landlord.

2. This is a tenant petition filed under Article 227 of the Constitution invoking superintending and supervisory jurisdiction

of this Court to question the findings of the prescribed authority as well as the appellate authority on the score of release application being granted exercising power chiefly under Section 21(1)(a) and then at the same time under Section 21 (1) (b) of the U.P. Act No.- 13 of 1972.

3. There is no dispute *qua jural* relationship of landlord and tenant between petitioner and the respondent, however, the plea is set up in defence by the tenant before the prescribed authority as well as before the appellate authority was that tenant had sufficient alternative accommodation in the form of a vacant space behind the shops in question being used as a godown and, therefore, neither the need was so pressing, nor bona fide one inasmuch as on the point of comparative hardships, the petitioner having no other source of livelihood except the business being run from the shop, it tilted more in favour of the tenant.

4. Here another point pressed before this Court is that after the release application was filed petitioner came to know that some partition had already taken amongst the co-owners of the property and the property in question having gone to the share of Vijay Prakash Bajpai, one of the respondents in the release application, the need set up by the landlord-respondent no more remained *bona fide*.

5. A third argument was also advanced that certain documents were sought to be led qua separate share as a result of partition, by moving appropriate application under Order 41 Rule 27 of CPC but hearing as to the admissibility of those documents was deferred to be considered by the court of appeal at the time of final judgment but it completely got scaped from

the consideration by the court and hence judgment is rendered bad. In support of her argument, she has relied upon a judgment of Supreme Court in the case of **Ramesh Chand and another v. Ghaziabad Development Authority and others** in Appeal (Civil) No.- 2349 of 2008 decided on 31st March, 2008.

6. In support of her above arguments, learned counsel for the petitioner has led the Court to the pleadings raised in the release application, the amended release application, the written statement filed including the written statement filed by Vijay Prakash Bajpai impleaded as proforma respondents in the case and also the survey commission report including the documents sought to be brought on record vide application filed under Order 41 Rule 27 CPC on 15th May, 2024. She has taken the Court through the grounds raised in appeal also to question the order of prescribed authority for there being no findings touching the point of availability of alternative accommodation.

7. Yet another argument advanced by Ms. Shreya Gupta is that release application could not have been allowed simultaneously under Section 21(1)(a) and Section 21(1) (b) of the Act No.- 13 of 1972. In support of her argument learned counsel for the petitioner has relied upon the Division Bench judgment of this Court in the case of **Guru Prasad v. 1st Additional District Judge, Kanpur, 1999 (2) ARC 28**.

8. Meeting the arguments advanced by learned counsel for the petitioner, Sri Atul Dayal, learned Senior Advocate submitted before the Court that throughout the plea taken in the release application was that accommodation needed for the landlord to

settle the sons and heirs and it was also throughout the case that there was a joint family but for the mutual convenience they had adjusted the accommodation into possession specific, however, there had been no partition in metes and bounds and, therefore it would not lie in the mouth of tenant to suggest that the shop in question had fallen in the share of Vijay Prakash Bajpai and that he being not applicant for the release, the release application deserved to be dismissed. He submitted that when the property is joint one, any one of co-owners of the property can maintain the release application.

9. In support of his argument learned counsel for the respondent has further submitted that no document in evidence was led by the tenant petitioner to demonstrate that the particular shop in question had gone to the share of Vijay Prakash Bajpai. He further submitted that Municipal No.- 60/39 was allotted to the entire plot/ campus where the building situates and upon mutual understanding for the purposes of municipal taxes, the shares were determined as 1/4th each but nowhere it has come on record that particular shop in question had gone to the share of Vijay Prakash Bajpai. He submits that it is true that house No.- 60/39 was there claimed by the Vijay Prakash Bajpai but that does not mean that the shop in question itself had fallen to his share in house No.- 60/39.

10. Arguing on the point of alternative accommodation, it is submitted by Sri Dayal, learned Senior Advocate appearing for respondent that this accommodation was already there and there is no denial to that effect but the accommodation was being used as a godown and this has come to be averred so in the release application by way of amendment.

11. Sri Dayal has further contended that the survey commission report which has been heavily relied upon by learned counsel appearing for the respondent only comes to show that there is certain area which was being used as godown.

12. Sri Dayal thus submitted that merely for certain area being used as godown, it does not give any right to tenant to question the bona fide need on the ground of an alternative accommodation. He submitted that the landlord is the sole arbiter of his need and requirement and there being a joint family, once the need has been set up, may be for a son or two, that itself is sufficient to allow the release application. He submits that once need got set up, even in affidavit of a son it has not come to be averred that need was set up for him alone, it will not dilute the merit of the release application and will not weaken the point of *bona fide* need.

13. Meeting the point upon Order 41 Rule 27 application, Sri Dayal first submitted that the municipal assessment records that were sought to be led in evidence would not have changed the complexion of the case as to *bona fide* need either. He submitted that this was for the assessment year 2016 and the amendment is sought to be led much thereafter. Besides this Sri Dayal argues that this was only in respect of the municipal No.- 60/39 and is not indicative of any fact that shop in question situated in house No.- 60/39 alone. Therefore, according to Mr. Dayal, a case instituted against the Nagar Nigam for the purposes of municipal taxes to fasten liability upon the co-owners, cannot be an evidence of an absolute partition in metes and bounds of the property so as to enable the tenant to question the bona fide need and it is on this count also, he submits, the

sons of Vijay Prakash Bajpai would fall within the meaning of the family and not outside the family as was sought to be argued by learned counsel for the petitioner. He submits that court of appeal though has not referred to these documents quite specifically but even reference to them would not have changed the merit of the case as far as the release application was concerned. He sought to urge that a document led even if not considered, can become a good ground for remand provided it affects the merit of the case and non consideration thereof can be proved to have led to miscarriage of justice.

14. Replying to the argument that release could not have been allowed both on the grounds of 21(1)(a) & 21(1)(b) simultaneously, Mr. Dayal submitted that once the court is satisfied with the bona fide need and grants release for that, any observation made on count of release of building also for it being in a dilapidated condition would not vitiate the decision of release. He further argued that while allowing release court may consider bona fide need to the effect that building being in a dilapidated condition needed demolition to be raised again to be used by landlord to satisfy his/ her need.

15. In the rejoinder Ms. Shreya Gupta has sought to argue that the document as was suggested by Mr. Dayal to be old one being the year of assessment 2016, was not an old one but issued in the financial year 2023-24 only and, therefore, petitioner could not have its knowledge prior to its issuance.

16. On the point of building being in a dilapidated condition, Ms. Gupta argued that engineer's report was contested and another engineer's report was submitted on

behalf of the tenant that fully demonstrated that only work of repair was needed. Thus, she has sought to urge that building was not in a dilapidated condition to be released under Section 21(1) (b).

17. Replying to the argument raised in counter Ms. Shreya Gupta, learned counsel for the petitioner further submitted that the affidavit of Sandeep Bajpai, one of the heirs of the release applicants fully demonstrated that he did not admit that he needed the shop in question though the need was set up for him. She, therefore, submitted that if there is a need specific set up, the shop can be released in favour of that needy person only and no general directions for the release can be made.

18. Having heard learned counsel for the respective parties and having perused the records, I see three following points to have emerged for consideration by this Court:

(i). Whether there was a bona fide need established by the tenant-petitioner and findings returned by the prescribed authority can be termed to be perverse;

(ii). Whether the judgment of court of appeal is bad for non consideration of the additional evidence though taken on record; and

(iii) Whether the findings returned under Section 21(1)(b) are liable to be ignored in the event the Court concurs with the findings under Section 21(1)(a) of the Act No.- 13 of 1972.

19. Insofar as the *bona fide* need is concerned, I have gone through the application of release placed before me. Although it has come to be specifically averred vide paragraph 4 that the building was in a dilapidated condition for

construction being old and in paragraph 6 it has been stated that petitioners had sufficient means to demolish the construction to raise new building, but in paragraph 9 it has come to be stated that tenanted premises in question was needed to establish the sons of petitioner No.- 1 and 2 as they had already got married and had their own families. The details of the families have been given in the same paragraph and in paragraph 11 it has been stated that petitioners needed very badly the accommodation in tenancy of opposite party No.-2 and for which they had been making repeated requests. It has also been averred in paragraph 13 that petitioners wanted to start business in electronics and electrical goods and its repair in the accommodation after the release and reconstruction. Further it has been stated that they do not intend to let out the newly constructed shop to anyone else and have pleaded that in view of hardships being faced by them for settlement of members of family, they needed the shop in question. In paragraph 19 it is clearly averred that progress in life of the sons and daughters are stuck due to the lack of income. Thus the relief was that the release application to be allowed and tenanted premises be handed over to the respondent – landlords.

20. Reading the entire release application as discussed above any prudent man would come to conclude that the landlords needed not only the shop to settle the sons but also for the purposes of self settlement as they were not having sufficient financial resources for their sons and daughters to survive and since building was in a dilapidated state they intended its reconstruction after demolition. So in a sense it can be construed also that demand of release was sought for reconstruction

after its demolition for personal need of the family to use it after its reconstruction.

21. The need was set up for family need as well as for the sons' and daughters' need and at the same time the release was sought to raise needbased reconstruction and with further statement that it would not be let out to a third party any further.

22. In the written statement that was filed in reply to the release application it has come to be averred in paragraph 27 that there is commercial place available with an area of 400 Square feet which would be sufficient alternative accommodation available to the landlord to fullfill the needs of the sons and daughters.

23. Interestingly in paragraph 25 it has come to be averred that commercial use was being done jointly by the sons of late Vishwanath Bajpai and also Vijay Prakash Bajpai and others. In reply to this an application was filed by the respondent-landlord to amend the release application with averments to the effect that accommodation was being used as a godown and I am apprised at the bar that this amendment was though questioned but ultimately challenge laid to the amendment came to an end with the rejection of the of the petition by the higher courts.

24. Now looking to the pleadings raised by respective parties it clearly transpires that the accommodation was needed by the family for its own use and settlement of their sons and daughters and it cannot be said that there was a person specific need. Even though it may not have come in the affidavit of Sandeep Bajpai that he needed the shop in question but I do not find to be there something to infer in support of the petitioner tenant that there

was no more any need of the shop in question for him. It is an affidavit filed in support of release application and for a little vagueness in it, if any, it cannot be read negatively to benefit the defence.

25. The survey commission report is there which also upon perusal I do not find to be supporting the case of the tenant petitioner to question *bona fide* element need set up by landlord. All that has come that behind the shop there is certain space already in possession of landlord and landlord has come to state candidly that it was already in use as godown. Hence need could not to be neutralized for this accommodation. It has been held that admittedly by this Court and there are the authorities of the Supreme Court that landlord is a sole arbitrator of his need and it does not lie in the mouth of tenant to suggest as to which accommodations would suit the landlord better (**Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta (1999) 6 SCC 222**).

26. In the face of the fact that there is no denial to the available premises of 400 square yard being used as a godown, the tenant cannot suggest that that space can be used for purposes for which need was set up better.

27. Coming to the second point as to the evidence being not considered sought to be led by way of additional evidence though there was an order by the court of appeal that it would deal with at the stage of final hearing, I gave this opportunity to the petitioner's counsel to demonstrate that how the additional evidence in any manner help her client in getting the findings by the prescribed authority on the question of *bona fide* need reversed. She though has sought to place before the Court the plaint

filed in the suit by the Vijay Prakash Bajpai against the municipal corporation and also certain papers qua municipal assessment of the premises in question but upon perusal thereof, I am not able to infer from those documents that there was in fact any partition in metes and bounds and the shop in question fell in the share of Vijay Prakash Bajpai. There is no pleading as such in the entire written statement except for the additional evidence sought to be led. The court may not have considered this additional evidence but even after considering this additional evidence, since the shop in question cannot be said to be have already fallen in the share of Vijay Prakash Bajpai, it could not have led the court to hold that for alleged partition the need no more remained a *bona fide* one.

28. Besides the above, I do not find there to be any pleading raised before the court of appeal or before the prescribed authority that there was a partition in metes and bounds to be suggestive of shop in question falling in the share of Vijay Prakash Bajpai or there to be any admission by Vijay Prakash Bajpai as to partition and ownership of shop coming to him. In the absence of such pleadings raised even if the additional evidence is considered, it cannot said with certainty that the shop in question had fallen in the share of Vijay Prakash Bajpai and, therefore, release application was not maintainable at the instance of other co-owners of the property. Nothing in the affidavit of Sandeep Bajpai as has been argued to be demonstrative of any such partition.

29. Even otherwise if the ownership of landlords is not disputed and while there exists joint ownership and co-owners are in joint possession and do not claim partition, it is not for the tenant to question title to

non-suit the landlord in a claim for release set up for *bona fide* need. A tenant must understand that after all he is a tenant and cannot claim an indefeasible right to retain tenancy. Once landlord has set up a need and it has come to be stated and proves that members of the family are not gainfully employed, any business even if run by a few may not suffice the financial need of the entire family and, therefore, need would be *bona fide*. Similarly it should be landlord's choice to use a particular partition of his property for a particular business to settle members of the family. Tenant should make search for a new accommodation to accommodate the landlord and not vice versa.

30. A matter can be remanded if a particular point was required to be addressed but only when it may affect merit of the matter. It will be too technical a view to be taken to set aside an order to remit the matter to be decided for consideration of such evidence which the Court finds to be of no help to the party leading such evidence and result is bound to be the same. In matters where substantive rights as to title may be an issue, a matter can be remanded but in summary trial of eviction of tenant for want of premises by landlord to settle his family, I do not see any justification for any justification for such highly technical to be taken to remand a matter for consideration of certain more documents to test the *bona fide* need of landlord. Thus, I do not see there to be any prejudice caused to the tenant in the matter for no consideration of plaint of suit filed by one of the landlords against Municipal Corporation for settlement of municipal taxes and document relating to assessment of the building more especially when issue as to the application of Act No.- 13 of 1972

was not involved. Remand for remands' sake is not necessary.

31. Coming to the last argument on the question of order being passed under Section 21(1)(a) and Section 21(1)(b) of the Act No.- 13 of 1972 simultaneously, in my view once findings returned on the question of *bona fide* need is sustainable for not suffering from any perversity so as to interfere with, this itself shows a sufficient ground to order for release. Once the court finds that the *bona fide* need issue has been decided correctly in favour of the landlord, the question whether the building was in a dilapidated condition or not and whether the order on that count is sustainable need not be gone into. The judgment of Division Bench which has been cited raises a valid point that where the *bona fide* need is set up, this can be allowed irrespective of the state of building and even if claim of *bona fide* need is held not sustainable, still landlord can press for release on the ground that building is in a dilapidated stage. Vide paragraphs 5, 6, 7 & 8 of the judgement, the Court has held thus:

"5. When the composite application under clauses (a) and (b) of Section 21(1) is made by the landlord it is open to him to press his case under any of the two clauses. He may claim eviction of the tenant under clause (a) if proves bonafide requirement of the building for his personal occupation and also satisfies the other requirements laid down by the relevant Rules. In such a case even if the building is in dilapidated condition which requires demolition and new construction the case will be covered by clause (a) and not by clause (b). If the landlord fails to satisfy the requirement of clause (a) he can

still press the application for release of the building under clause (b).

6. In *Bhulan Singh v. Ganendra Kumar Roy Chowdhury* [AIR 1950 Calcutta 74.] , a Division Bench of Calcutta High Court while considering the proviso (f) to Section 11 of West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, which provided that where the premises are bona fide required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the premises are held it may be released in favour of the landlord, has laid down as under:

"It is suggested that this provision giving the landlord a right to possession, if he established that he required the premises bona fide for rebuilding, could have no application whatsoever unless the state of the premises was such that they required to be rebuilt. It is to be observed that proviso (f) to Sec. 11(1) of the Act does not mention premises, requiring rebuilding. What it states is that sub-sec. (1) shall have no application if the landlord requires the premises bona fide for rebuilding. The state of the premises therefore is not an essential factor in the case".

7. Following the aforementioned decision of Calcutta High Court as well as other cases a learned Single Judge of this court in *Smt. Champa Kunwar Trust v. District Judge*, [AIR 1976 All. 252.] has held that state or the condition of the building is not material for the purpose of application of Section 21(1)(a). Another learned Single Judge in *Madan Gopal v. III Addl. District Judge*, [1982 Allahabad Rent Cases 226.] has also held that a very old or dilapidated premises can be released under Section 21(1)(a) without complying with the provision of Section 21(1)(b) or Rule

17. Relevant extract from the said decision of learned Judge is reproduced below.

"Then question arises for consideration whether the premises could have been released for making new constructions and that too after demolition of the premises in dispute, in absence of non-compliance of Rule 17 of the Rules framed under the 'Act'. It is not in dispute that the plan has already been submitted and the finding has been recorded by the appellate court that the shop is in dilapidated condition. The appellate court relied upon evidence including affidavits and other material on record in arriving at this finding. It believed the affidavits filed on behalf of landlord. Though the shop may not be in such a dilapidated condition which requires immediate attention, but it is an old shop and from its structure it can be said to be dilapidated. The word 'dilapidated' is a relative term and the meaning given to it cannot be static. Under Section 21(1)(a) of the 'Act' a premises can be released in the existing form even for the purpose of new constructions and in the instant case the need of the landlord has been held to be bona fide and genuine and the premises have been released under Section 21(1) of the Act and the need of the landlord having been found to be genuine under Section 21(1)(a) of the Act, as such, there was no question of applicability of Section 21(1)(b) of the 'Act' as also Rule 17 of the Rules framed under the Act. This ground also has got no force."

8. In *Hans Raj Sharma v. Ist Additional District Judge, Badaun* [1986 (12) ALR 408.] , a learned Single Judge while analysing clauses (a) and (b) of Section 21, has held as follows:

"An analysis of the clauses (a) and (b) clearly leads to the conclusion that where a landlord applies for an order of eviction of a tenant on the ground that the

building is in a dilapidated condition and is required for purposes of demolition and new construction the case will be squarely covered by clause (b). Where, on the other hand, the application of the landlord is founded on the assertion that the building is required for the personal occupation of the landlord whether in its existing form or after demolition and new construction, the case will be covered by clause (a) of Section 21(1). A building may be required for personal occupation by the landlord after demolition and new construction even if it may not be in a dilapidated condition. The landlord may simply require the building for his personal occupation in whatever condition it may be, whether in its existing form or after demolition and new construction."

32. And finally vide paragraph 10 of the judgment answered the reference as under:

"10. The need of the landlord under Section 21(1)(a) can be considered even if the landlord had pleaded that the building is in dilapidated condition and requires demolition and new construction."

33. Looking to this above legal aspect and applying the same to the facts of the present case, I find that the pleading was raised that there was a need but the building was too old to be used. If the judgment of Division Bench is read in its correct perspective and is applied to the facts of the case it can, of course, be held that the court rightly concluded that the building was in a dilapidated condition but since need was there, the application for release deserved to be allowed.

34. Thus, I do not find any manifest error either in the order of prescribed

authority or of the appellate authority to exercise my extraordinary supervisory jurisdiction under Article 227 of the Constitution.

35. Petition lacks merit and is, accordingly, dismissed.

36. Cost made easy.

(2024) 12 ILRA 793
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 3172 of 1983

Jageshwar Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

T. Rathore, Mahesh Prasad Yadav, V.S. Singh

Counsel for the Respondent:

D.G.A., A.G.A., G.S., Chaturvedi

Indian Evidence Act, 1872 - Section 3 - Code of Criminal Procedure, 1973 -Section 173 - Failure to seize and prepare inventory of material objects relied upon for identification, effect on prosecution case - Pre-existing enmity. There were various civil and criminal cases which were either undergone between the parties or were pending on the date of incident in various courts and, therefore, the PW-1 was throughout knowing the names of the three accused persons, whom he had named in the FIR. Court was of the view that when three young able-bodied persons had entered the house with their faces covered and were also

carrying fire arms, then the PW-1 would not have the audacity to have a scuffle with them and get the clothes, by which they were covering their faces, removed and thereafter recognize them. In a full-fledged investigation no remnants of the firing were found. If the source of light namely torches and lanterns were shown to the police and the investigating agency, then the non-preparation of the inventories of the torches and lantern and the fact that they were not taken into custody, would go against the prosecution. 32. Prosecution not able to prove the charges beyond reasonable doubt against the accused persons. Criminal appeal allowed. Appellant Sriman Singh directed to be released forthwith.

Allowed. (E-5)

List of Cases cited:

1. Manzoor Vs St. Of U. P. reported in AIR 1983 SC 295.

2. Bhup Singh Vs St. of U.P. reported in 2014 SCC Online ALL 11723

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

1. Heard Sri M.P. Yadav, learned counsel for the appellants, learned counsel for the informant, learned A.G.A. Sri Rahul Asthana, for the State and perused the material available on record.

2. Present criminal appeal has been filed against the judgment and order of conviction dated 20.12.1983, passed by learned Special Judge, Banda, in Sessions Trial No.112 of 1981, whereby the learned Special Judge, Banda (hereinafter referred as 'trial court') has convicted the appellants under Sections 447, 302/34, 394 IPC and sentenced them as under:-

(I) to undergo 3 months rigorous imprisonment under Section 447 IPC;

(II) to undergo life imprisonment under Section 302/34 IPC; and

(III) to undergo 7 years rigorous imprisonment under Section 394 IPC. All the sentences were directed to run concurrently.

3. The factual matrix of the case is that upon an incident having taken place in the midnight of 19/20.1.1981, wherein Saroj, the wife of PW-1 Ram Adhar had died, a First Information Report was got lodged on 20.1.1981 at 11:15 AM by Ramadhar Singh. The case as has been taken in FIR is that while Ramadhar Singh and his wife were asleep in their house on the first floor in the midnight of 19/20.1.1981, four miscreants entered the house. In the FIR, a complete detail has been given as to who and where people were sleeping on the ground floor. It has been stated that the mother of the first informant Smt. Bilasiya and his sister Shyama Bai were sleeping in the eastern side of the ground floor and when there was some noise from the roof of the first floor, then the mother and wife of the first informant woke up. When the wife of the first informant reached the place from where the noise was coming, the four miscreants, who were carrying firearms, fired upon the neck of the deceased and the deceased, who was wife of the first informant fell down on the empty cot, which was lying over there. Upon her falling down, one of the miscreants took out from the neck of his wife a piece of jewellery (panch moharo ka gajra, sone ka). After the incident had taken place, PW-1 Ramadhar ran towards the miscreants and tried to catch hold of them and when he had caught hold of one of the miscreants, the others, with the butts of their guns started beating the PW-1. However, upon a hue

and cry being raised by the first informant, his two brothers namely, Moti Lal Singh and Heera Lal Singh came armed with their guns and started firing upon the miscreants. When the guns were fired, upon hearing the sounds of the firearms, Ramraj Singh and Valle Singh also came with their validly licensed guns. Upon this, the miscreants jumped out from the eastern side of the house. While they were running away, the two brothers of the first informant alongwith Valle Singh and Ramraj Singh and others, who had assembled at the place of incident saw them running away. However, since the miscreants were firing upon the collected crowd, no one dared to further run towards them and catch hold of them. It has further been stated in the FIR that the miscreants had covered their faces with a piece of cloth (*angauchha*). In the scuffle which followed the firing, the three persons who had covered their faces with the pieces of cloths, could not hold their coverings back and the coverings fell away and, therefore, the first informant recognized them as Jageshwar Singh, son of Prahlad Singh, Vichitra Singh son of Bajinath Singh and Sriman, son of Jageshwar Singh. He has stated that he recognized the three miscreants fairly well in the light which was coming out from the lantern and the moon light. He has stated that his brothers had also recognized the three miscreants while they were running away. They were seen by the brothers and the others, who were collected at the place of incident in the lights of torches and in the moon light. The fourth miscreant whom the first informant had not recognized, had been described as a young man with an average built wearing dhoti, kurta and sadri. He has stated that if he was brought before him, he would recognize him. Still further, it has been stated that the wife of the first informant upon falling on the cot,

had immediately died and that her dead body was lying on the cot. He has also stated about his injury in the FIR and has stated that on the right side of his face, there were injuries. He has also given the value of the ornament, which was stolen away. He has still further given the reason for not having lodged the FIR immediately at the time of the incident. Upon the FIR having been lodged, the police got into action and reached the spot and took into its custody the lantern and a recovery memo with regard to which was prepared as Exhibit Ka-2. The other ornaments, which the deceased was wearing were also taken into custody and their recovery memo was prepared as Exhibit Ka-3. The torch was also shown to the police and was given back to the persons who had shown them as the Supurdgars of the torches. However, recovery memo of it was prepared as Exhibit Ka-4. The plain soil and the blood stained soil were also taken into custody, the memo of which was prepared and exhibited as Exhibit Ka-15. The PW-1 first informant got his injuries treated by Dr. K.L. Agarwal and the medical report was exhibited as Exhibit Ka-17. Upon the police having come, panchayatnama was got prepared. The preparation of the panchayatnama commenced at 4:15 PM on 20.1.1981 and concluded at 5:45 PM. Thereafter, the dead body was sent for postmortem and the postmortem was conducted on 21.1.1981 at 3:00 PM. Upon the investigation having been completed, the police submitted its report and when the Court took cognizance, it framed charges under Sections 460, 302 read with Sections 34, 404, 394 IPC on 29.5.1981 against the three named accused persons namely, Jageshwar Singh, Vichitra Singh and Man Singh.

4. From the side of prosecution as many as seven prosecution witnesses were examined. PW-1 is the first informant and

the husband of the deceased. He has in his examination-in-chief narrated the facts as were reported in the FIR. He had stated that he had four brothers, known by the names of Heera Singh, Moti Singh, Ram Gopal Singh and Chhotey Lal. He had also stated that the name of his mother was Bilasiya and the name of his sister was Shyama Bai. The name of the wife of his brother Heera Singh was Smt. Mullan. In the statement-in-chief, he has also stated that the scribe of the FIR was one Binda Singh. Upon cross-examination, he has given various information with regard to various cases, which were pending between the first informant's family and the accused persons. He had stated that Shyam Lal, who was real brother of Jageshwar Singh was also an accused in the murder of the uncle of the first informant namely, Jageshwar @ Jaggu. He had further stated that even Vichitra Singh, who was an accused in the instant case and was real brother of Jageshwar Singh was an accused in the murder case of Jageshwar @ Jaggu, the uncle of the first informant.

5. He has also stated that Sriman, the accused in the instant case, was the son of the Jageshwar Singh who was the accused in the murder case of Jageshwar @ Jaggu. He has thereafter also informed the Court that all the accused in the murder case of Jageshwar @ Jaggu had been acquitted. He has informed the Court that after the incident had taken place, the crowd which had collected at the place of incident had not told the first informant the names of the persons whom they had seen jumping from the eastern side of the house. The next litigation which, he had informed, was being contested between his family and the family of the accused persons, was that between Kallu and his own father, where there was a case with regard to land and he

had stated that Vichitra Singh, one of the accused, was a witness against his father in that case and thereafter Kallu had won the case. The other case which he had informed of was where one Jagdish Singh son of Ram Avtar had been murdered in the village and in that case the younger brothers of the first informant Chhota Singh, Moti Lal Singh and another villager Bale Singh, his brother Gyan Prasad and his brother-in-law Satya Narayan were accused. They were all convicted and appeal had been filed against the conviction order. He has stated that Bale Singh who had been convicted in the murder of Jagdish was the prosecution witness in the instant case as well. He has thereafter also narrated that alongwith all the other accused in the murder of Jagdish Singh, Vichitra Singh and Jageshwar Singh were also accused in that case, but they had been acquitted.

6. After having narrated about a few other civil litigations, it had been brought to the notice of the Court by the learned counsel that certain evidence which was led by Moti Lal, the real brother of the first informant in the case of Rukmin Vs. Sadhu was also brought to the notice of the court in Original Suit No.1 of 1978 and in that case he had stated that Jamuniya, the widow of Sadhu, had willed her property to Sriman Singh and Rukmin the real sister of Sadhu Singh had contested the case against Sriman Singh (accused of this case) and had challenged the will.

7. Learned counsel has, therefore, submitted that when Moti Lal, the brother of the first informant had led his oral evidence in the above case, then there was enmity between Sriman Singh the accused (in the instant case) and the informants side and and therefore, the accused had been

named by the first informant in the instant FIR.

8. Upon being asked as to whether there was any other literate person in the family of the first informant, the first informant had informed that Hira Lal was a Lekhpal and that he was educated upto class 8th and that he was always visiting the house of the first informant. However, since he was not there on the date of incident, therefore, he had not got the report scribed by him. He has also stated that as everybody in the family was grieving, the report was not got scribed by Hira Singh. Upon a pointed question being asked as to why the FIR was got lodged very belatedly, PW1 had stated that the police station was around 13 miles away and that primarily was the reason for the delayed FIR. He denied the fact that the mulling over of various names as to who all could be implicated, was not the reason for the delay. Upon another pointed question being asked as to why other jewellery which his wife was wearing was not taken away, he had stated that the dacoits had only taken the jewellery which was there in the neck of the deceased and the other jewellery was not touched by them.

9. PW-2 Moti Lal, the brother of the first informant, had also given more or less the same sequence of events as was given by the first informant. He had also reiterated in his cross-examination the fact that there was enmity between the family of the first informant and the various accused persons. He had very categorically stated that he had no knowledge before the FIR was lodged as to who were the persons to be made accused in the case. He has stated that the moment Ram Adhar Singh had fallen down, the accused persons had fled away from the place or occurrence.

10. PW-3 Ram Raj Singh, was the son of Balwant and uncle of the first informant, and he was thus the cousin of the first informant. In his examination in chief, he has chiefly informed that he had seen the incident in torch light and that he had in the Court also got the torch which he could also submit in the court. Upon being asked as to where he was standing at the time of the incident, he had stated that he had informed the Darogaji, the Investigating Officer, about the place where he was standing and if that place was not provided in the site plan then he did not know the reason for that. He had however, spoken something which was against what the PW-1 had spoken and that was that he had seen the faces of the accused which were not covered and that they were only having a piece of cloth for covering, which was insufficient.

11. PW-4 is Bale Singh, a villager who had also reached the place of incident armed with his licensed gun. He has also stated that he had seen the four persons jumping down from the eastern side of the house of Ram Adhar. He has, however, stated that Ram Adhar was lying in an unconscious state in his house. In the cross-examination, he has also divulged all the litigations which were pending between the families of the first informant and the accused persons. He has, however, consistently stated that the first informant Ram Adhar was lying in an unconscious state when he had reached the house.

12. PW-5 is Munnu Singh, Head Constable who had proven the chik FIR and the entries of the general diary.

13. The Investigating Officer Sri Manni Lal Mishra was produced as PW No.6 and he has stated the manner in which

the investigation had taken place. He had very categorically stated that nowhere at the place of incident was any wad or empty cartridges etc. found. He has denied the fact that there were any manipulation with the FIR or with the Panchayatnama. Upon a question being asked as to whether Moti Lal, the brother of the first informant had shown the empty cartridges and the wad which had fallen down as a result of the firing which he had done, he had stated that though these objects were shown to him, but he had not taken them in to his possession.

14. PW-7 is a doctor, who had conducted the medical examination on the PW-1. He had also done the postmortem of the deceased Smt. Saroj. He has proven the medical report and the postmortem report.

15. Upon the conclusion of the testimonies which were recorded of the prosecution witnesses, the statements of three accused were recorded under Section 313 Cr.P.C. When the judgment and order dated 20.12.1983 was delivered by the trial court, the instant Criminal Appeal was filed. During the pendency of the criminal appeal two of the appellants namely Jageshwar Singh and Vichitra Singh had died and, therefore, the appeal vis-a-vis appellant No.1 Jageshwar Singh and appellant No.2 Vichitra Singh stood abated. The appeal was only argued vis-a-vis appellant No.3 Sriman Singh by Sri M.P. Yadav, Advocate.

16. Learned counsel for the appellants has stated that if the allegations made in the FIR are perused it would be clear that the three named accused persons namely Jageshwar Singh, Vichitra Singh and Sriman Singh had covered their faces with pieces of cloths and, therefore, initially the PW-1 had

not been able to recognize them but when the PW-1 had entered into a scuffle with them, the pieces of clothes which were covering the faces of the three accused persons had come off and he had recognized them as Jageshwar Singh, Vichitra Singh and Sriman Singh.

17. Learned counsel for the appellants states that the fact of the matter was that certain complete outsiders had entered the house of the first informant for committing robbery etc. and that the first informant had not been able to recognize them at all but after the completion of incident, he had thought it best that the incident be not wasted away and that it be used against his enemies who were contesting various cases with his family and, therefore the names of Jageshwar, Vichitra Singh and Sriman Singh were introduced in the case.

18. Learned counsel for the appellant has relied upon the statements which were made a part of the evidence and has stated that since Moti Lal, the brother of the first informant had given evidence against Sriman Singh in the Civil Case No. 1 of 1978 (Rukmin Vs. Sadhu) and because Ramraj had appeared in the witness box and had testified against the accused Sriman Singh, there was a definite enmity between the families of the first informant and the accused persons and, therefore, they were falsely implicated in the case.

19. Learned counsel for the appellants states that in the cross-examinations PW-1 and PW-2 had very truthfully come up with the answers that there were other criminal and civil cases pending between the parties and that, he submits, must have been a definite reason for the false implication of the accused persons.

20. Learned counsel for the appellants has further stated that the source of light

had not been categorically mentioned by the prosecution. He submits that the torch and lantern which had been mentioned by the prosecution had nowhere been taken into custody by the police and, therefore, the entire case of the prosecution became baseless in the absence of any light. In this regard, learned counsel for the appellants has relied upon the judgment of this Court in **Manzoor vs State Of Uttar Pradesh reported in AIR 1983 SC 295**. Learned counsel for the appellants specifically relied upon paragraph No.12 of the judgment and submits that when torches etc. had not been produced in the evidence, the Investigating Officer could not simply say that he had seen the torches and had returned them back to the persons who had shown the torches, would not be taken as a proper evidence. The exact portion of paragraph No.12, which is relevant for the case is being reproduced here as under:-

“12. There is then the evidence of P.Ws. 1 and 2, the home-guards of whom only P.W. 2 had identified the appellants in the identification parade held on 17.11.1978. The four home-guards including P.Ws. 1 and 2 are stated to have flashed their torch lights and to have seen the two persons running away from the scene of occurrence after they had heard the alarm of the injured Gul Bahar near the railway line. The torches have not been produced in evidence, and the investigating officer P.W. 12 would say in his evidence that he saw those torches 30 and returned them to the home-guards. It is not known why the investigating officer P.W. 12 thought it fit to return the torches with the aid of which the home-guards are stated to have seen the two persons running away from the scene of occurrence though that will be a relevant piece of material evidence in the case. P.W. 12 has stated that after

recording the statement (Ex. Ka. 11) of the deceased Gul Bahar at the District hospital, Saharanpur he went to the mela and recorded the statements of the four home-guards.”

21. Learned counsel for the appellants further relied upon the judgment of this Court in **Bhup Singh Vs. State of U.P. reported in 2014 SCC Online ALL 11723** wherein he specifically relies upon paragraph No.19 and the same is being reproduced here as under :-

“....19. As discussed above, non production of torch in the court also creates a doubt regarding truthfulness of the statements of the witnesses that they had recognized the accused persons in the torch light. In this regard, the Hon'ble Supreme Court in the case of Manzoor v. State of Uttar Pradesh, AIR 1983 Supreme Court 295 held that the accused persons were identified by the witnesses in torch light but the torch was not produced in court, the Hon'ble Apex Court held that torch has not been produced in evidence and Investigating Officer PW-12 says in his evidence that he saw those torches and returned them to Home guards. It is not known why the Investigating Officer PW-12 thought it fit to return the torch with the help of which the Home Guards are said to have seen the persons running away from the scene of occurrence though it was a relevant piece of evidence.”

22. Learned counsel for the appellants stated that it was highly improbable that one person i.e. PW-1 had a scuffle with four able-bodied persons who had come to the house of the PW-1 to commit robbery etc. He submits that no person in his senses would have indulged in the scuffle as had been stated by the PW-1, specially when

the four accused persons were carrying firearms.

23. Learned counsel for the appellants also states that there is no evidence with regard to firing having been done from either side as no empty cartridge or wad etc. were found at the place of incident.

24. Learned counsel for the appellants further stated that despite the fact that the brother of the first informant was a Lekhpal and was a literate person, he was not asked to scribe the FIR but one Binda Singh had got the FIR scribed and he was also not produced in the witness box.

25. Learned counsel for the appellants states that if the statements of PW-2 and PW-3 are seen, it would become clear that before the FIR was lodged, they had not mentioned about any name of any person whom they had seen during the incident. Learned counsel for the appellants, therefore, submits that only after thoroughly thinking out as to who was to be made an accused, the FIR was lodged.

26. Learned counsel for the appellants further has stated that there was a contradiction in the sense that the PW-3 Ramraj Singh had at Page 62 of the paper book stated that he had seen the persons who had entered the house of PW-1 but he had stated that their faces were not covered. This was in direct contradiction to what the PW-1 had stated that all the faces of the accused persons were initially covered but the faces could be seen after there was a scuffle between the first informant and the accused persons and the pieces of clothes which were covering their faces had been removed.

27. Still further, learned counsel for the appellants states that if the statement of

Bale Singh is seen then there was again a contradiction because all the witnesses had stated that PW-1 was fighting with the accused persons straight and erect, but PW-4 had stated that he had seen the PW-1 in a fainted state.

28. In effect learned counsel for the appellant states that pre-existing enmity was the reason for including the names of the accused persons in the FIR and that in fact they were not there on the spot and they were wrongly implicated in the case.

29. Learned AGA, however, in reply has submitted that the eye-witnesses could not be lightly brushed-aside and the testimony of the eye-witnesses had to be minutely looked into and minor aberrations could be brushed-aside. He submits that PW-1 was not an ordinary eye-witnesses but he was also an injured eye-witnesses and the testimony of an injured eye-witness could not be brushed-aside lightly.

30. Having heard the learned counsel for the appellant Sri M.P. Yadav and the learned AGA Sri Rahul Asthana, we do find that there were various civil and criminal cases which were either undergone between the parties or were pending on the date of incident in various courts and, therefore, the PW-1 was throughout knowing the names of the three accused persons, whom he had named in the FIR.

31. We are also of the view that when the incident had occurred and three young able bodied persons had entered the house with their faces covered and were also carrying fire arms, then the PW-1 would not have the audacity to have a scuffle with them and get the clothes, by which they were covering their faces, removed and thereafter recognize them. This appears to

be a story which could not be believed at all. Further, we are of the view that when the incident had occurred and a full-fledged investigation had taken place and when no remnants of the firing were found, then also we are of the view that something fishy was there with regard to the prosecution story. Also, relying upon the two judgments which had been cited by the learned counsel for the appellants, we are of the view that if the source of light namely torches and lanterns were shown to the police and the investigating agency, then the non-preparation of the inventories of the torches and lantern and the fact that they were not taken into custody, would go against the prosecution.

32. We, thus, for all the reasons stated above are of the view that the prosecution had not been able to prove the charges beyond reasonable doubt against the accused persons. The appellants Jageshwar Singh and Vichitra Singh have already died and the appeal against them stood abated. The appeal vis-a-vis Sriman Singh stands **allowed**. The judgment and order 20.12.1983 is set-aside. The appeal is thus allowed vis-a-vis Sriman Singh.

33. The appellant Sriman Singh, after non-bailable warrants were issued against him, is in jail. He be released forthwith if he is not required in any other case.

(2024) 12 ILRA 801
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.12.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 8535 of 2022
 With
 Criminal Appeal No. 7952 of 2022

Shiv Sharan & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:

Ghan Shyam Das, Prakhar Saran
 Srivastava, Rahdey Shyam Yadav, Rajiv
 Lochan Shukla

Counsel for the Respondents:

Dur Vijay Singh, G.A.

(A) Criminal Law - Appeal against conviction and sentence by trial court in a case based on circumstantial evidence - Indian Penal Code, 1860 - Section 302/149 , 147, 201 & 364 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v) - Last seen - Chain of circumstances - Inconclusiveness of evidence - Inadequacy of Evidence in Circumstantial Cases - In cases relying solely on circumstantial evidence, the prosecution must establish a complete chain of circumstances leading to the conclusion of guilt beyond any reasonable doubt - Merely on the strength of evidence of last seen the chain of circumstances required to be proved in a case of circumstantial evidence, would not be sufficiently connected.(Para - 25,27)

Informant's nephew (Ram Niwas) was taken on 17.11.2003 by accused - did not return - Recovery of clothes and shoes was made on accused's pointing - no disclosure statement or recovery memo prepared in presence of independent persons - Evidence on record not carefully examined by trial Court nor inherent flaws in the evidence of PW-1 - noticed an inadequacies in the evidence of recovery - Relevant aspects have not been factored in while convicting the accused persons - trial court convicted accused based on circumstantial evidence. (Paras – 3,4, 8,20,26,31)

HELD: - Chain of circumstances not sufficiently connected such that it leads to the hypothesis of guilt exclusively attributed to the accused appellants. Chain left incomplete. Alternate hypothesis consistent with the innocence of accused appellants cannot be ruled out otherwise. Judgment of conviction and sentence set aside. Appellants acquitted due to insufficient evidence to sustain the conviction, shall be released forthwith unless wanted in any other case. (Para -29,30,32)

Appeals allowed. (E-7)

List of Cases cited:

1. Bobby Vs St. of Kerala, 2023 SCC Online SC 50
2. Sharad Birdhichand Sarda Vs St. of Maha., (1984) SCC OnLine SC 138

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

1. Heard Sri Kamal Krishna, learned Senior counsel assisted by Sri Ghan Shyam Das, learned counsel for the appellants, Sri Vikas Goswami, learned A.G.A. for the State and Sri Dur Vijay Singh, learned counsel for the informant.

2. These two appeals are directed against the judgment and order of conviction and sentence dated 11.10.2022 and 28.10.2022, passed by Special Judge SC/ST Act, IInd Additional District & Sessions Judge, Farrukhabad in Special Sessions Trial No.08 of 2005, arising out of Case Crime No.598 of 2003, Police Station Mohammadabad, District Farrukhabad, whereby the accused appellants Aneet, Badam, Roshan, Jarman, Rajendra, Shiv Sharan and Rishipal have been convicted and sentenced to life imprisonment under Section 302/149 IPC read with Section 3(2)(v) SC/ST Act alongwith fine of Rs.10,000/- and in default of payment to undergo two years additional

imprisonment; sentenced to five years rigorous imprisonment under Section 364 IPC alongwith fine of Rs.5,000/- and in default of payment to undergo one year additional imprisonment; sentenced to five years rigorous imprisonment under Section 201 IPC alongwith fine of Rs.5,000/- and in default of payment to undergo one year additional imprisonment and a fine of Rs.5,000/- under Section 147 IPC and in default of payment to undergo three months additional imprisonment. All the sentences are to run concurrently.

3. The first information report in the present case has been lodged on 23.11.2003 at 06.10 pm on the basis of a written report made by the informant Ram Charan, who has been produced as PW-1 during trial. The allegation in the first information report is that at 09.00 am on 17.11.2003, informant's nephew Ram Niwas was taken by the fellow residents of village, namely accused Rishipal, Shiv Sharan, Aneet and Badam to Kutchery (District Court) at Fatehgarh, whereafter nephew of informant did not return. Despite the efforts made the missing nephew could not be traced. On 19.11.2003, informant's brother Ram Prakash had gone to the house of Harinath Lodhi in his attempt to trace out his missing nephew. Harinath Lodhi was not present at home. So the informant's brother came to the house of Rajendra Singh, where accused Rishipal, Shiv Sharan, Sanjay and Rajeev shot dead informant's brother Ram Prakash. After this incident accused Rishipal, Shiv Sharan, Aneet, Roshan and Badam alongwith Jarman son of Dafedar Lodhi, confessed to Suresh Yadav, Rakesh Yadav and Harinath Lodhi that on 17.11.2003, they have taken Ram Niwas and has done him to death. Later, Ram Prakash has also been done to death. The accused persons further stated that if

anybody stood up against them they would not spare him. With these allegations the FIR came to be lodged in the present case. The written report on the basis of which FIR came to be lodged has been proved by PW-1.

4. Investigation in the present matter proceeded and on 19.12.2003, recovery was made of the clothes and shoes of missing nephew Ram Niwas on the pointing out of accused Shiv Sharan and Rishipal. These two accused also confessed that they have killed the deceased and his body has been buried on the river bank by digging a pit. The recovery memo of the pant, shirt and the pair of shoes has been exhibited during trial as Ex.ka.2.

5. It is admitted that neither the dead body of the deceased has been recovered nor his whereabouts have been found. The investigation ultimately concluded with submission of a charge sheet against the accused persons on 18.1.2004 and 4.3.2004. Cognizance was taken in the matter by the concerned Magistrate whereupon the case was committed to the Court of Sessions and got registered as Special Sessions Trial No.08 of 2005. The charges were framed against the accused under Sections 147, 364, 302/149, 201 I.P.C. as well as Section 3(2)(v) of SC/ST Act. Charges were read out to the accused, who denied their implications and demanded trial.

6. During the course of trial, the prosecution has produced the FIR; written report; recovery memo of pant shirt, shoes and charge sheet etc. In addition to the documentary evidence the prosecution has produced the informant Ram Charan as PW-1, whereas, Anil has been produced as PW-2. PW-3 to PW-6 are formal police

witnesses, who have proved the prosecution papers and disclosed the manner in which investigation has been conducted in the case. PW-6 notably is the Investigating Officer whose statement shall be dealt with in the matter, later.

7. The aforesaid evidence led by the prosecution in the present trial has been confronted to the accused, who have denied the prosecution evidence and have stated that on account of enmity between the families they have been falsely implicated. The defence has not produced any evidence on its behalf. On the basis of above evidence the trial Court has convicted the accused appellants and sentenced them, as per above. Thus aggrieved, these appeals are preferred by the accused appellants and are disposed of by this common judgment.

8. The basic facts of the case are already noticed above according to which the nephew of the informant was taken to the Kutchery (District Court) at Fatehgarh on 17.11.2003 at 09.00 am, whereafter he has not returned. It is also brought on record that the brother of the informant Ram Prakash had gone looking for the missing nephew Ram Niwas where he too was done to death by Rishpal, Shiv Sharan, Sanjay and Rajiv. So far as the murder of Ram Prakash is concerned, a separate trial has been conducted in which some of the accused appellants have been convicted and their appeals against the judgment of conviction and sentence is pending before this Court. The charge framed in the present trial does not relate to the murder of Ram Prakash and therefore, this Court is not required to refer to the evidence in that regard or make any observations which may impact the pending appeals relating to the offence of murder of Ram Prakash. We, therefore, confine our discussion to the

charges framed against the accused persons i.e. in respect of disappearance of Ram Niwas and his alleged murder.

9. The prosecution case essentially relies upon the testimony of two witnesses i.e. PW-1 and PW-2. PW-1 is the informant while PW-2 Anil is the witness of recovery of shoes and clothes of the missing boy Ram Niwas. Testimony of these two witnesses, therefore, forms the basis of the prosecution case and before proceeding any further it would thus be imperative for us to briefly refer to their testimony.

10. PW-1 in his examination-in-chief has stated that on 17.11.2003 at 09.00 am, his nephew Ram Niwas was taken by accused Rishipal, Shiv Sharan, Aneet and Badam to Kutchery (District Court) at Fatehgarh, whereafter, he has not returned. On 19.11.2003, informant's brother Ram Prakash, who was a Lekhpal, had gone to the house of Harinath Lodhi where he was not found. Informant's brother Ram Prakash then came to the house of Dr. Rajendra where Rishipal, Shiv Sharan, Sanjay and Rajiv shot him dead. After the above incident accused Rishipal, Shiv Sharan, Aneet, Badam, Roshan, Rajendra and Jarman made a confessional statement before Suresh Yadav, Rakesh Yadav, Harinath Lodhi, Amar Singh Lodhi and Chhotey Pradhan that they have killed Ram Niwas and his body has been done to death. Thereafter, Pairokar Ram Prakash has also been disposed. If anyone comes forward to depose against the accused they too would be dealt with in the same fashion.

11. When PW-1 enquired from accused Rajendra then he was informed that the accused persons have taken his nephew Ram Niwas from Bholepur. Accused Rajendra had helped other

accused in abducting his nephew. Since accused were threatening the villagers therefore, PW-1 suspected the accused of killing his nephew. PW-1 has also proved the written report dated 23.11.2003, which was scribed by Omkar Singh. His statement was also recorded by the Investigating Officer.

12. In the cross-examination PW-1 has admitted that the fact about the disappearance of Ram Niwas came to his knowledge for the first time on 20.11.2003. Harinath Lodhi and Chhotey Pradhan were also present then. They were on cordial terms with each other. In his further cross-examination PW-1 has stated that his nephew disappeared on 17.11.2003. The fact that his nephew disappeared from Bholepur was told to him by several persons. Rakesh son of Ganga Singh had also told him of such fact. This witness, however, did not remember the name of other persons who gave him such information. He has stated that because of the murder of his brother Ram Prakash there was some delay in lodging the FIR. Four of the present accused namely, Rishipal, Shiv Sharan, Rajiv and Sanjeev are responsible for the murder of Ram Prakash.

13. The other prosecution witness is Anil (PW-2), who too has alleged that the accused persons have killed Ram Niwas. He has stated that in connection with the offence police had come to him and alongwith Shiv Sharan and Rishipal he had gone to the bushes near the power house from where two tamancha and three live cartridges were recovered. These two accused confessed that they have killed deceased Ram Niwas and Ram Prakash by these weapons. Recovery memo in respect of tamancha and live cartridges were

prepared on which signatures of PW-2 were obtained. The recovery memo in respect of Tamancha and live cartridges however are not produced during the present trial.

14. Accused Rishipal and Shiv Sharan also claimed that they have concealed the shoes and clothes of the deceased Ram Niwas and they can show such place. These persons then led the police to Kali river and from the place identified by these two accused, clothes and shoes of deceased were extracted, which were identified by PW-2. The dead body of Ram Niwas was also searched at the place indicated by the accused but it could not be found/recovered. The recovery memo of clothes and shoes have been proved by PW-2. These materials have been exhibited during trial as Ex.Ka.1 to Ex.Ka.4.

15. In the cross-examination, Anil has stated that deceased was from his caste and lived in his village. Their houses were at a distance of 200 meters. He was not aware as to when the deceased Ram Niwas had been done to death. His disclosure made before Court about the disappearance of Ram Niwas is based upon the information furnished to him by the family members of Ram Niwas. Alongwith him, the police had called accused Rajendra also. He had however not seen the accused with deceased Ram Niwas. This witness has admitted that the recovery memo of Tamancha and live cartridges allegedly recovered on the pointing out of accused Shiv Sharan and Rishipal are not exhibited during the trial of the present case.

16. At this juncture, we may also refer to the statement of the Investigating Officer (PW-06), who has admitted that parcha no.1 to 10 in the case diary has not been

scribed by him and it only contains his signatures. The person who had scribed these parchas in the case diary has not been identified. The Investigating Officer moreover, has admitted that there is neither any disclosure statement of the accused persons on record nor recovery memo prepared in respect of Tamancha and live cartridges etc. is exhibited. The statement of Investigating Officer, in that regard, is reproduced herein below:-

"मुझे मेरी विवेचना के दौरान ऐसा कोई चश्मदीद साक्षी नहीं मिला जिसमे इस मुकदमे की घटना होते देखा हो। मुझे ऐसा भी कोई साक्ष्य नहीं मिला जिसने अभिगण को तमंचा, कारतूस मृतक की पेंट शर्ट व जूते आदि छिपाते हुये देखा हो। विवेचना के दौरान अभियुक्त द्वारा अपहरण के उपरान्त अपहृत को कहां कहां ले जाया गया आदि जो बातें अभियुक्तगण ने मुझे दिये गये वयानो मे जो बातें बतायी थी उनको मैने तस्दीक करने का कोई प्रयास नहीं किया जिसकी मे कोई वजह नहीं बता सकता।"

17. From the evidence of PW-1 it is abundantly clear that he himself has not witnessed the disappearance of Ram Niwas. He has stated in his cross-examination that Ram Niwas had disappeared from Bholepur. This fact was told to him by Rakesh son of Ganga Singh and other persons but neither Rakesh nor anyone else, in that regard, has been produced. In the cross-examination the witness has primarily alleged that missing nephew had gone alongwith accused Rajendra.

18. Though in the examination-in-chief it is alleged that accused Rajendra also helped other accused in disappearance of Ram Niwas but except for stating so, neither this witness has specified the place of disappearance of his nephew nor he is specific about seeing the missing nephew leaving with the accused. The testimony of PW-1, taken in its entirety, remotely

suggests of evidence in the nature of last seen against accused.

19. There is however, contradiction in the version of PW-1, inasmuch as in his examination-in-chief he is specific in implicating accused Rishipal, Shiv Sharan, Aneet and Badam as being the persons who had taken the missing nephew but in the cross-examination he has specified accused Rajendra as being the person, who had facilitated the disappearance of his nephew. In the cross-examination, PW-1 is not specific about the involvement of other accused persons. The evidence of last seen is thus not very inspiring.

20. The only other evidence on record is the recovery of clothes and shoes of the missing boy Ram Niwas. It is the prosecution case that accused Shiv Sharan and Rishipal led the police party alongwith PW-2 to the place where recovered items were concealed. What is however relevant to note here is that there is no disclosure statement of these two accused on record. The Investigating Officer has also admitted that there is no disclosure statement of accused Shiv Sharan and Rishipal, which led to the recovery of the clothes and shoes of the informant's nephew Ram Niwas. The recovery memo prepared in respect of the clothes

21. The only witness of the recovery are police personnel. In the absence of there being any disclosure statement or the recovery having been proved by any independent person, we are not inclined to attach much importance to the recovery of clothes and shoes of Ram Niwas.

22. Apart from the testimony of above two witnesses there is no other evidence led by the prosecution in this case.

23. Though PW-1 has also stated that confessional statement was made by the accused before certain persons but the person before whom such confessional statement are made have not been produced. In its absence, the evidence remains hearsay in nature and thus not admissible in law.

24. The evidence on record once are taken in its entirety and carefully analysed we find that it only suggests that Ram Niwas has gone missing. His whereabouts are not ascertained. Neither any specific evidence has been led by the prosecution to show that he has been taken anywhere or whether at all he has been done to death. The evidence in that regard reveals inconclusiveness.

25. The only material to implicate the accused appellants is the statement of PW-1. His evidence in the nature of last seen is not inspiring. Reasons for such opinion of the Court has already been expressed above. The law is otherwise settled that merely on the strength of evidence of last seen the chain of circumstances required to be proved in a case of circumstantial evidence, would not be sufficiently connected.

26. The other evidence in the nature of recovery of clothes and shoes of the deceased are also not found proved. Such recovery otherwise fails to meet the requirement of law, inasmuch as there is no disclosure statement or recovery memo prepared in the presence of independent persons. In coming to such conclusion we rely upon the judgment of Supreme Court in *Boby Vs. State of Kerala* 2023 SCC Online SC 50.

27. Admittedly this is a case based on circumstantial evidence. In order to prove

such case of circumstantial evidence onus is upon the prosecution to connect the chain of circumstances such that it leads to hypothesis of guilt specifically attributed to the accused.

28. Five golden principles have been culled out for the purpose by the Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) SCC OnLine SC 138 in para 152 and 153 of the judgment which are reproduced:-

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

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

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

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

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

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

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

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

32. In that view of the matter, this appeal succeeds and is allowed. The judgment of conviction and sentence dated 11.10.2022 and 28.10.2022, passed by Special Judge SC/ST Act, IInd Additional District & Sessions Judge, Farrukhabad in

Criminal Law-The Code of Criminal Procedure,1973 - Section 397 -The Narcotic Drugs and Psychotropic Substance Act,1985 - Sections 60 & 63-

Criminal Revision against the impugned order dismissing the release application filed by the owner of truck--- There is no report on record which could suggests that any proceeding for confiscation of said vehicle under Section 60 of the Act is pending before the competent authority, even there is no specific report that the competent authority has been moved by the police for confiscation of the vehicle. No useful purpose of law appears to be served by keeping the vehicle parked at police station in unattended position which is bound to cause deterioration in its value, utility and serviceability--- Learned trial court has not considered the judgment of the Hon'ble Supreme Court in Sunderbhai Ambalal Desai v/s

St. of Gujarat reported in 2002 (10) SCC 283--- Impugned order is set-aside.

Revision allowed. (E-15)

List of Cases cited:

1. Sunderbhai Ambalal Desai Vs St. of Guj. reported in 2002 (10) SCC 283
2. Matter Under Article 227 No. 3077 of 2023 (Kanhaiya Yadav Vs St. of U.P. & anr.).

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

1. Instant Criminal Revision has been preferred against the order dated 10.4.2024 passed by Additional District and Session Judge, Court no. 6, Azamgarh in Criminal Misc. Case No. 01 of 2024 arising out of Case Crime No. 161 of 2023, under section 8/20 N.D.P.S. Act, P.S. Tarwan, District Azamgarh. By the impugned order trial court has dismissed the release application filed by the revisionist claiming himself as registered owner of truck bearing Registration No. U.P. 21-AN-5992. The said truck/container has been seized by the police on 22.6.2023 under Section 8/20 N.D.P.S. Act on charges of carrying illicit Ganja of 20 Kg 500 gram quantity. The revisionist was arrested by police from the truck and said contraband and Rs. 3,52,000/- Cash were recovered from his possession.

2. Heard learned counsel for the revisionist, learned AGA for the State and perused the record.

3. Learned counsel for the revisionist submitted that revisionist has been falsely implicated in the case. He is registered owner of the truck and which is only source of livelihood of the revisionist. The revisionist has already been released on

bail in Case Crime No.161 of 2023, under Section 8/20 of Narcotic Drugs and Psychotropic Substance Act, Police Station Tarwa, District Azamgarh by this Court on 17.8.2023 in Criminal Misc. Bail Application No. 34627 of 2023 whereby revisionist has been released on bail in said offence on the ground that procedure prescribed in the Rule 10(1) of the Narcotic Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules, 2022 have been violated. The police has seized the truck of the revisionist and fraudulently framed case under Section 8/20 NDPS Act. There is no report regarding initiation or pendency of proceedings under sections 60 and 63 NDPS with regard to said contraband. The vehicle of the revisionist has been wrongly seized by the trial court without assigning any cogent reason and by cryptic manner impugned order has been passed which is not sustainable under law. The revisionist has no criminal history to his credit prior to alleged incident.

4. It is further submitted that the vehicle was never used in transportation of illicit contraband under NDPS Act. The utility and serviceability of the vehicle is being rapidly deteriorated due to its parking at police station campus in unattended manner for such a long period and there is danger of its being rusted and inserviceable. He undertakes to maintain the character and colour of the vehicle if same is directed to be released in favour of the revisionist by the order of this Court. He undertakes to produce the vehicle on the direction of the Court on his own expenses. The revisionist has wrongly been made accused in the case and vehicle has been seized in violation of mandatory provisions of the act. The vehicle has not been confiscated as yet by the competent court in

the NDPS, Act. Therefore, it is prayed that the vehicle may kindly be released in favour of the revisionist.

5. Lastly, in support of his contention, learned counsel for the revisionist placed reliance on judgement of Hon'ble Supreme Court passed in *Sunderbhai Ambalal Desai vs State of Gujarat reported in 2002 (10) SCC 283* and a judgement of this Court passed in Matter Under Article 227 No. 3077 of 2023 (*Kanhaiya Yadav vs. State of U.P. and Another*).

6. Per contra learned A.G.A. opposed the prayer for release of the vehicle and submitted that no illegality or perversity in the impugned order passed by the trial court, by which release application filed by the applicant has been dismissed. It is further submitted that revisionist was arrested from the spot and from his possession 20 kg 500 gram Ganja which is above the commercial quantity, has been recovered. The revisionist is registered owner of the alleged vehicle.

7. Section 20 NDPS Act provides punishment for contravention in relation to cannabis plant and cannabis which reads as under:-

"20. Punishment for contravention in relation to cannabis plant and cannabis.—

Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,—

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis,

shall be punishable,—

1[(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b),—

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to 2[one year], or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

8. **Section 52A of NDPS Act**, provides for Disposal of seized narcotic drugs and psychotropic substances, which may be reproduced as under:-

"The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled

substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 4[such drugs, substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

9. Section 60 of the NDPS Act, provides for confiscation of the illicit drugs, substances, plants, articles and conveyances involved in an offence under the act, which reads as under:-

" 60 Liability of illicit drugs, substances, plants, articles and conveyances to confiscation-*[(1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.]*

(2) Any narcotic drug or psychotropic substance or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance or controlled substances] which is liable to confiscation under sub-section (1) and the receptacles, packages and coverings in which any narcotic drug or psychotropic substance 2[or controlled substances], materials,

apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.

(3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance 2[or controlled substances], or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

10. Section 63 of the NDPS Act, provides for procedure and making confiscation, which reads as under:-

"63. Procedure in making confiscations.—*(1) In the trial of offences under this Act, whether the accused is convicted or acquitted or discharged, the court shall decide whether any article or thing seized under this Act is liable to confiscation under section 60 or section 61 or section 62 and, if it decides that the article is so liable, it may order confiscation accordingly.*

(2) Where any article or thing seized under this Act appears to be liable to confiscation under section 60 or section 61 or section 62, but the person who committed the offence in connection therewith is not known or cannot be found, the court may inquire into and decide such liability, and may order confiscation accordingly:

Provided that no order of confiscation of an article or thing shall be made until the expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim:

Provided further that if any such article or thing, other than a narcotic drug, psychotropic substance 5[controlled substance], the opium poppy, coca plant or cannabis plant is liable to speedy and natural decay, or if the court is of opinion that its sale would be for the benefit of its owner, it may at any time direct it to be sold; and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale."

11. Perusal of Section 63 provides that the question of confiscation of vehicle shall be decided by trial court, whether the accused is convicted or acquitted or discharge. In present case this is an admitted fact that trial is still pending and it is likely to take considerable time to come to its logical end. Hon'ble Ambika lal Desai considered section 451/457 Cr.P.C. which provides for disposal of case property seized by police and involved in an offence. Hon'ble Court held section 451 Cr.P.C. clearly empowers the court to pass appropriate orders with regard to such property:-

1. for the proper custody pending conclusion inquiry or trial.

2. to order it to be sold or otherwise disposed of after recording such evidence as it think necessary;

3. if the property is subject to speedy and natural decay to dispose of the same.

12. In paragraph nos. 7, 17 and 18, Hon'ble Court has observed as under:-

"7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

17. In our view, whatever be the situation, it is of no use to keep such-seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as

per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

13. In the present case there is no report on record which could suggest that any proceeding for confiscation of said vehicle under Section 60 of the Act is pending before the competent authority, even there is no specific report that the competent authority has been moved by the police for confiscation of the vehicle. No useful purpose of law appears to be served by keeping the vehicle parked at police station in unattended position which is bound to cause deterioration in its value, utility and serviceability.

14. Learned trial court has dismissed the application for release without considering all these issues mainly on the ground that vehicle has been seized under the provisions of NDPS Act. Learned trial court has not considered the judgment of the Hon'ble Supreme Court in ***Sunderbhai Ambalal Desai vs State of Gujarat reported in 2002 (10) SCC 283*** in which procedure for release of the vehicles which are seized by the police under some offence has been provided.

15. The impugned order is not sustainable under law as it is vitiated by illegality. The vehicle is liable to be released in favour of the revisionist who is registered owner of the vehicle, subject to certain conditions.

16. The impugned order is set-aside. The trial court is directed to release the

that they were inimical to the deceased – Relevancy – Held, the allegations/acquisitions made in the FIR or evidence of witness cannot form an evidence of conspiracy unless there is some evidence of conspiracy which comes under purview of Section 10 of Evidence Act to connect the proposed accused with the other accused persons who are projected as perpetuates of crime in the case. Allegation cannot form basis of prove and learned trial court has rightly declined to issue process against respondent nos. 2 and 3 in this case. (Para 18 and 19)

Criminal Revision dismissed. (E-1)

(2024) 12 ILRA 814
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2024
BEFORE

1. Hardeep Singh Vs St. of Pun.; 2014 (3) SCC 92

2. Bhagwan Swaroop Vs St. of Mah.; AIR 1965 SC 682

3. Criminal Appeal No. 1049 of 2006; Siva @ Jeeva @ Mottai Khadar @...Vs St. by Inspector of Police decided on 16.4.2019

Counsel for the Revisionist:
Amarnath Tripathi

1. Supplementary affidavit filed today
is taken on record.

2. Instant criminal revision has been preferred against the impugned order dated 4.8.2023 passed by learned Additional District and Sessions Judge, Court No. 14/Special Judge (Gangster Act), Varanasi in S.T. No. 450 of 2021 arising out of Case Crime No. 145 of 2020, P.S. Jaitpura, District Varanasi. By the impugned order learned trial court has dismissed the application 34-kha under section 319 Cr.P.C. filed by the revisionist wherein prayer has been made to summon respondent nos. 2 and 3, who were named in the F.I.R. as conspirator, as additional

accused to face trial together with the accused who are already facing trial in the aforesaid case.

3. Heard Sri Amarnath Tripathi, learned counsel for the revisionist, Sri Rajesh Kumar, learned counsel for the respondent no. 3, learned AGA for the State and perused the material available on record.

4. Learned counsel for the revisionist submitted that in the present case F.I.R. was lodged at the instance of Kailash Singh on 28.8.2020 at around 5:30 P.M. on the basis of incident dated 28.8.2020 at about 10:30 A.M. his nephew Abhishek Singh, who was an advocate by profession, was going to District Court Chandauli by riding a motor-bike bearing Registration No. UP55AC1701. He was accompanied by his friend Deepak Gond who was pillion rider. Some miscreants were chasing them near Chaukaghat Kali Temple and open 4-5 around fire at Abhishek which resulted in death of Abhishek and Balmiki Gond, a passerby and his companion Deepak Gond got seriously injured by fire arm injury. There was enmity with regard to land between Abhishek Singh and named accused Shardul Singh and Shiveshwar Rai. These people had lodged an F.I.R. also against Abhishek Singh which was under inquiry by P.S. Pandeypur Lalitpur. The named accused would often threaten Abhishek Singh and respondent nos. 2 and 3 hatched a conspiracy with hired killers to commit this offence who opened indiscriminate fire on Abhishek Singh @ Prince and his companion Deepak Gaud.

5. Learned counsel for the revisionist submitted that the revisionist is named in the F.I.R. along with one unknown person. Investigation officer submitted charge sheet

twice in the case firstly against 11 accused persons on 13.12.2020 and subsequently against 15 accused persons on 18.12.2020 under sections 302, 307, 120-B, 145, 148, 149, 216-A/34 I.P.C. and sections 3,25, 27 of Arms Act, however, as many as 26 persons whose name surfaced during investigation have been charge sheeted. The investigating officer has exonerated the named accused persons who are respondent nos. 2 and 3 in present revision after investigation on the ground that their complicity in the offence was not found. The deceased Abhishek Singh was accused in Case No. 132 of 2013 under section 307, 394, 506 I.P.C. P.S. Ramnagar, District Varanasi in which he was sent to jail and he was released from jail in 2019.

6. He next submitted that during trial charge sheeted accused persons' evidence of P.W. 1 Kailash Singh, P.W. 2 Wife of the deceased Balmiki Gond and P.W. 3 injured Deepak Gaud has been recorded, however, P.W. 2, and P.W. 3 have not supported the prosecution version in their evidence and they declined to identify the charge sheeted accused persons who were present in the court at the time of their evidence. P.W. 1 Kailash Singh the informant has fully supported the F.I.R. version in his evidence and alleged the named accused Sharadul Singh and Shiveshwar Rai as chief conspirator in this case in which two persons were killed and one was seriously injured due to fire arm injuries caused by the charge sheeted accused persons.

7. Learned trial court has dismissed the application under section 319 Cr.P.C. filed by the revisionist /informant without considering the fact that respondent nos. 2 and 3 are named in the F.I.R. and was attributed with role of chief conspirator in

the alleged offence and there has been long enmity between Abhishek Singh and respondent nos. 2 and 3 with regard to land in dispute.

8. Per contra, learned counsel for the respondent nos. 2 and 3 submitted that apart from bald allegations made in the F.I.R. against respondent nos. 2 and 3 and statement of P.W. 1, there is no plausible evidence regarding conspiracy against respondent no. 2 and 3 even P.W. 3 the injured has stated nothing in his evidence. The F.I.R. version has not been corroborated by any other evidence on record. The deceased Abhishek Singh @ Prince himself has long criminal history and he developed enemies during course time. Respondent Nos. 2 and 3 has nothing to do with incident in present case. P.W. 4 Surya Dubey has been declared hostile and he has also stated nothing against the proposed accused Sharadal Singh and Shiveshwar Rai. Learned trial court has dismissed 319 Cr.P.C. after considering the detail fact and circumstance of the case and impugned order needs no interference in the present revision. The case is fixed for recording prosecution evidence. The role of respondent no. 2 and 3 was not found in this offence by investigating officer and he dropped their name in charge sheet. During investigation this fact emerged that Vivek Singh Katta who was harboring long enmity with deceased Abhishek Singh @ Prince hatched conspiracy with jailed accused Abhishek Singh @ Honey to eliminate Abhishek Singh @ Prince.

9. The ambit and scope of exercise of power under section 319 Cr.P.C. has been discussed by Hon'ble Supreme Court in Constitution Bench **judgement Hardeep Singh vs. State of Punjab 2014 (3) SCC 92**

wherein paragraph nos. 98 and 99 Hon'ble Court observed as under:-

" 98. 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.

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."

10. The case of present revisionist/informant that proposed accused respondent nos. 2 and 3 were present on the

spot where offence is committed by perpetuates of the crime whose name is surfaced during investigation. Respondent nos. 2 and 3 undoubtedly named in the F.I.R. but on the basis of suspension due to their previous enmity with the deceased Abhishek @ Prince and the informant has stated in FIR that some miscreants open 4-5 round fire on his nephew Abhishek Singh @ Prince which is resulted in death. Abhishek Singh @ Prince and one passerby namely Balmiki Gond the companion of Abhishek Singh, namely, Deepak Gond at the time of incident who was also travelling along with Abhishek Singh @ Prince on motor bike suffers series of injuries in the incident. The allegation against respondent nos. 2 and 3 in FIR is that these people were harbouring enmity with Abhishek @ Prince and they had lodged FIR against him also and which was investigated by police at P.S Pandeypur District Jhansi.

11. The similar statement was given by the informant in his statement recorded under section 161 Cr.P.C. before police in respect of respondent nos. 2 and 3 in which he has stated therein that he had named Sharadul Singh and Shiveshwar Rai in FIR and these people would have got his nephew killed. He also stated therein that one Vivek Singh Katta had also enmity with deceased Abhishek @ Prince but he had shot fire at one Arif Ansari, a sand merchant at Bihar in mistaken identity of Abhishek @ Prince and in that murder case Abhishek was subsequently made accused by the father of the deceased.

12. Informant Kailash Singh has stated in his sworn testimony before the Court during trial of other accused persons that miscreants chased his nephew Abhishek @ Prince who was an Advocate by profession near Kali Temple Chauka Ghat Varanasi

and opened fire at him when he was moving on motorcycle along with his companion Deepak Gond, the pillion rider. One passerby Balmiki Gond also suffered fire arm injury in the incident. Sharadul Singh and Shiveshwar Rai were keeping evil eye on his land and on account of that land, they had filed an application against Abhishek @ Prince which was being inquired by Pandeypur Police. These persons worked as builder and on their incitement this incident was caused upon his nephew. These people are main accused in the case. In cross examination of co-accused persons wherein it is stated that whatever that in his statement 161 Cr.P.C. only that portion is stated by him which is finds place in written report exhibit Ka and he shown other materials therein. P.W.s 2, 3 and 4 have stated nothing about respondent nos. 2 and 3.

13. So far as charge of criminal conspiracy is concerned, the same is defined in section 120A I.P.C. which may be reproduced as Under:-

"120A. Definition of criminal conspiracy

When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

14. Section 120B IPC provides punishment of criminal conspiracy which reads as under:-

"120B. Punishment of criminal conspiracy

(1) *Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 51[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.*

(2) *Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]"*

15. Thus, conspiracy is a separate offence which is based on principle of vicarious liability if conspirator is not perpetrator of the crime.

16. A three Judge bench judgement of Hon'ble Supreme Court in ***Bhagwan Swaroop vs. State of Maharashtra AIR 1965 SC 682*** has analyzed the ingredients of section 10 of Evidence Act which provides that things said or done by conspirator in reference to common design will be relevant fact for charge of criminal conspiracy.

The ingredients are as follows:-

"1. There shall be a prima facie, evidence affording aa reasonable ground for a code to believe that to or more persons are members of a conspiracy;

2. if the said condition is fulfilled, anything said, done are written by any of them in reference to their common intention will be evidence against the other;

3. anything said, done or written by him should have been said, done or written by him after the intention was formwed by any one of them;

4. It would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and

5. it can only be used against a co-conspirator and not in his favour."

17. The High Court of ***Madrash in Siva @ Jeeva@ Mottai Khadar @...vs State by Inspector of Police*** in Criminal Appeal No.1049 of 2006 dated 16.4.2019 held in paragraph no. 25 and 27 as under:-

"25.It is settled law that to prove a criminal conspiracy, there must be evidence, direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. There must be a meeting of minds, resulting in ultimate decision taken by the conspirators, regarding the commission of offence and where the factum of conspiracy is sought to be inferred from circumstances, the Prosecution has to show that those circumstances give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

27.Merely levelling a charge of conspiracy, without proper and believable evidence, is not sufficient to mulct criminal liability on the Respondents. The purpose or circumstances, warranting an inference of existence of a conspiracy, should be proved so as to bring the Respondents to face the trial in criminal court."

18. If we analyse the facts stated and evidence adduced in the case in hand there is nothing in the statement of P.W. 1 or in

evidence of any other witness to show that there was meeting of minds amongst respondent nos. 2 and 3 and other accused persons who are facing trial in the case to commit the offence. In so far as the FIR version which has been recorded by P.W. 1 in his sworn testimony before the court which has been formed basis of moving an application under section 319 Cr.P.C. against respondent nos. 2 and 3 there is only allegation against respondent nos. 2 and 3 that they were inimical to the deceased Abhishek @ Prince and they have lodged a false case against him at police station concerned which were being inquired into at the time of incident.

19. The allegations/ acquisitions made in the FIR or evidence of witness cannot form an evidence of conspiracy unless there is some evidence of conspiracy which comes under purview of section 10 of Evidence Act to connect the proposed accused with the other accused persons who are projected as perpetuators of crime in the case. Allegation cannot form basis of prove and learned trial court has rightly declined to issue process against respondent nos. 2 and 3 in this case for want of requisite evidence against them as additional accused in exercise of power under section 319 Cr.P.C.

20. In fact only allegation against them in FIR as well as in statement of P.W. 1 there is no material whatsoever at record to connect respondent nos. 2 and 3 with the offence which is being tried.

21. Consequently, I find no illegality irregularity or perversity in the impugned order passed by learned trial court while dismissing the application under section 319 Cr.P.C. filed by the informant/revisionist to summon the

respondent nos. 2 and 3 under section 319 Cr.P.C. The revision is devoid of merit and deserves to be dismissed.

22. The revision is hereby *dismissed*.

(2024) 12 ILRA 819

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 26.11.2024

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 482 No. 10390 of 2024

Prateek Agarwal

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Ayush Singh, Rudra Pratap Singh, Sushil Kumar Singh

Counsel for the Opposite Parties:

G.A.

A. Criminal Law - Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Sections 302 & 328-quashing of order-trial court issued a notice to the applicant without following proper procedure, specifically without recording the statements of the complainant and witnesses as required u/s 223 of the B.N.S.S. 2023, vitiates the issuance of notice to the accused and subsequent proceedings-Such procedural irregularity is a valid ground for invoking the inherent powers u/s 482 Cr.P.C.-a Magistrate cannot take cognizance of a complaint without giving the accused an opportunity to be heard- the accused must be provided with copies of the complaint, sworn statements, and witness statements to prepare a response-Reliance was placed on a Karnataka High Court ruling which clarified the procedure u/s 223 BNSS emphasizing that recording statements

before issuing notice is mandatory-The impugned orders were set aside.(Para 1 to 10)

B. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of section 223 of the BNSS shall append to it. the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance.(Para 10)

The application is allowed. (E-6)

List of Cases cited:

Sri Basanagouda R. Patil Vs Shri Shivananda S. Patil, Crl. Petition No. 7526 of 2024

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

1. Heard Sri Sushil Kumar Singh, learned counsel for the applicant and Sri Alok Kumar Tiwari, learned A.G.A. for the State.

2. The present application under Section 482 Cr.P.C. is filed with the prayer to quash the impugned order dated 8.11.2024 passed by the Sessions Judge, Sitapur, in Criminal Revision No.Nil/2024 (C.I.S.S. No.187/2024, Case Crime No.460/2023, under Sections 302, 328 I.P.C., Police Station Kotwali, District Sitapur) as well as the order dated 15.10.2024, passed by the Chief Judicial Magistrate, Sitapur.

3. With the consent of learned A.G.A., present application under Section 482 Cr.P.C. is being decided finally.

4. Learned counsel for the applicant submits that the applicant was falsely

implicated in the present case, as no evidence was found after detail investigation final report was submitted by the Investigating Officer. He further submits that protest petition was filed by the complainant of the present case, which was treated as a complaint case by the learned trial court on 15.10.2024 under Section 210 of B.N.S.S., 2023 and notice was issued to the accused person/applicant under the provisions of proviso (1) of Section 223 of B.N.S.S.

Learned counsel for the applicant submits that prior to the issuance of notice to the accused/applicant, it was obligatory on the part of the learned court below to record the statement of the complainant as well as witnesses and thereafter, copy of the complaint as well as statement of complainant and other witnesses taken on oath were to be provided to the accused annexing the notice, but in the present case, statement was not recorded, and therefore, impugned order is bad in the eyes of law. Relying on the decision of Karnataka High Court passed in *Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)* learned counsel for the applicant requests for kind indulgence of this Court.

5. Learned A.G.A. opposes the prayer of the applicant and submits that statement can be recorded after appearance of the accused/applicant however, he does not dispute the intentions of the Section 223 of B.N.S.S. as well as the legal pronouncement of the High Court of Karnataka in the aforesaid case.

6. Considering the arguments of learned counsel for the parties, going through the record of the application as well as other relevant documents, it is

evident that a protest petition was filed by the complainant of the present case, which was treated as a complaint case by the trial court on 15.10.2024 under Section 210 of B.N.S.S., 2023. It is also evident that at the moment, the complaint was registered, the trial court, before recording the statement of complainant as well as witnesses, issued notice to the accused/applicant, which is erroneous.

7. Section 223 of B.N.S.S. reads as under :-

"223. Examination of complainant. - (1) A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses –

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them:

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless –

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

8. Proviso of Sub Section (1) of Section 223 of the B.N.S.S. mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present, if any, and reduce it into writing. The Proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the B.N.S.S. deals with the issuance of process which is akin to Section 204 of the Cr.P.C.

9. Relevant part of the order dated 27.9.2024 passed in ***Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)*** passed by High Court of Karnataka is as under:-

"8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant

shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

10. Therefore, the procedural drill would be this way:

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append

to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.

12. Swinging back to the facts of the case the concerned Court has passed the following order:

"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of BNS, 2023.

Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.

For hearing.

Call on 13.08.2024."

The moment complaint is filed, notice is issued to the accused. This procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.

13. For the aforesaid reasons the following:

ORDER

(i) Criminal Petition is allowed.

(ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.

(iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.

(iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.

Consequently, I.A.No.2 of 2024 stands disposed."

10. In view of the above facts and discussions, present application is **allowed**. The impugned order dated 15.10.2024 is in violation of the provision of Section 223 of B.N.S.S., and therefore, the same is hereby set aside.

11. The Chief Judicial Magistrate, Sitapur is directed to pass fresh order after recording the statement of the complainant as well as witnesses of the present case.

(2024) 12 ILRA 823
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Application U/S 482 No. 18360 of 2024

Sumit Punjabi @ Sumit Arora ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Ajay Nand Pandey, Shravana Kumar Yadav,
 Syed Imran Ibrahim

Counsel for the Opposite Parties:

G.A.

A. Criminal Law - U.P. Gangsters and Anti-Social Activities(Prevention) Act,1986 - U.P. Gangsters and Anti-Social Activities(Prevention) Rules 2021- Rule 24-quashing of proceedings- non-compliance with Rule 24-Charge sheet was filed after 21 months and 2 days violating Rule 24 which mandates investigation completion within six months-Ten investigating officers handled the case but none adhered to the procedural requirements-Held, A strict departmental inquiry was directed against the investigating officers-the

police were granted the liberty to prepare a fresh gang chart in compliance with the Rule.(Para 1to 15)

B. Rule 24 mandates that an investigation must be completed within six months from the date of registration of FIR-A maximum extension of three months is allowed with approval but in no case can the investigation extend beyond one year.(Para 6)

The application is disposed of. (E-6)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard learned counsel for applicant and learned AGA for the State.

2. Through the instant proceedings, the applicant has challenged the cognizance/summoning order dated 10.04.2024 on a limited ground that the Rules framed under the Provisions of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 have not been complied with by the police.

3. Thus, the learned counsel for the applicant submits that; (i) besides Rules 16 and 17 of the Rules 2021, Rule 24 for expeditious investigation has been violated, (ii) the FIR was registered on 29.4.2022, whereas the charge sheet was filed on 3.2.2024 almost after a delay of 21 months and two days, (iii) the applicant is a businessman and he is arrayed as an accused in the base case on the basis of confessional statement of co-accused, which is impermissible under the law, (iv) the applicant's arrest was stayed by this Court vide order dated 1.8.2022, on Court's prima facie, satisfaction that the applicant is innocent and has been arrayed as an accused by the police because of ulterior reasons.

4. *Per contra*, learned AGA states that the applicant is a habitual offender and three cases have been registered against the applicant of similar nature and there are serious allegations of running a gambling racket for illegal gain.

5. Vide order dated 10.12.2024, all the Investigating Officers who had been part of the investigation were directed to present virtually through video conferencing, and in compliance of the order, the S.S.P. Baghpat appeared virtually along with Investigating Officers and apprised to the Court that the FIR was registered on 29.4.2022, thereafter, the investigation was conducted by ten Investigating Officers and on completion of the investigation the charge sheet was filed on 3.2.2024. The name of Investigation Officers along with the period for which the investigation was remained with them, are outlined herein in tabular format:-

Sr No.	Name of the Investigator	Start of investigation and final submission of report	Period of investigation
1	Inspector Shri Madan Pal Singh	29.4.2022	01 day
2	In-charge Inspector Shri Novendra Singh Sirohi	from 30.4.2022 to 13.08.2022	03 months and 13 days
3.	Inspector Shri Indrapal Singh	from 01.09.2022 to 27.10.2022	1 month and 27 days
4.	S.H.O. Shri Virendra Rana	from 19.11.2022 to 20.11.2022	02 days
5.	S.I. Shri Bhurendra Singh	from 15.12.2022 to 16.12.2022	02 days
6.	In-charge Inspector Shri Satendra Singh Siddhu	From 10.01.2023 to 20.5.2023	04 months and 10 days
7.	In-charge Inspector	from 18.06.2023 to	01 month and 15 days

	Shri Kaushlendra Singh	3.8.2023	
8.	In-charge Inspector Shri Bachchu Singh	from 13.08.2023 to 28.09.2023	01 month and 15 days
9.	In-charge Inspector Shri Pradeep Dodiya	from 2.10.2023 to 2.12.2023	02 months
10.	Inspector Shri Jitendra Kumar	from 4.12.2023 to 3.2.2024	02 months

6. For clarity, Rule 24 of the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 is extracted herein below:

“The rule stipulates the investigation shall be conducted expeditiously within six months of the registration of the case and in unavoidable circumstances with the approval of the District Police In-Charge, a maximum extension of three months can be provided but in no case the investigation cannot be extended for more than one year.”

7. In the instant case, the charge sheet was filed after a delay of 21 months and 2 days and the same is in contravention of Rule 24.

8. The provisions of Gangsters Act is stringent in nature and the idea is to punish declared criminals who have deliberately chosen the life of crime. The activities of these professionals perpetrators of organized crimes and violence, and orgy has a far more baneful effect on the health and morals of the society and its people. If the activity of such criminal are subjected to the same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of the state administration is bound to shake.

9. It is noticed that the Investigating Officers have not followed the procedure of the Act in a letter and spirit, may be for the reasons best known to them. The State Government had issued various Government Orders and Notifications to streamline the procedure to invoke the provisions of the Gangsters Act. Unfortunately, the police have not been following them in letter and spirit. Therefore, it was desired by the State to frame the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 under the Act and that is how the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021 came into existence in exercise of power conferred by Section 23 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 in suppression of all earlier Government Orders and Notifications made thereunder.

10. In the instant case, the investigation travelled through ten Investigating Officers and none of the Investigating Officer followed Rule 24 of the Rules, 2021 the reason best known to the Investigating Officers, and the S.S.P. and District Magistrate as well who had approved the gang chart did not care about compliance of rules. Its premature in instant proceedings to come to any conclusion as to who is responsible for the delay in investigation and at whose behest the investigation has been delayed intentionally or unintentionally. The ignorance of law or statutory provision is no excuse based on the most basic and cardinal principles of jurisprudence of law. There is a thin line between knowing everything and well informed and this particular role expects a prudent officer to understand his role, duties and responsibilities of the post which he is holding, the onus remains individual

officers to act diligence, integrity, and awareness of the law they are sworn to uphold.

11. The legal maxim *ignorantia juris non excusat* is a corner stone of legal systems globally, emphasizing that individuals are presumed to know the law and cannot evade liability or responsibility by claiming ignorance. The police officers are entrusted with the enforcement of laws and the administration of justice, this principles assumes high significance particularly when the police officers fail to fulfil their statutory duties on conducting investigation within prescribed time frame knowingly the repercussions of non following the statutory duty in a time bound manner. It could be a case of negligence, lack of adequate training, or wilful misconduct, but none of these excuses absolve the police officer from liability therefore, ensuring accountability through legal process and institutional reforms by imparting training is essential to uphold justice and public trust in law enforcement.

12. Based on the aforesaid deliberations, it cannot be construed that all ten Investigating Officers were not aware about the Rule 24 of the U.P. Gangsters and Anti Social Activities (Prevention) Rules, 2021. Giving benefit to the criminals who is systematically operating a gang which is involved in gambling and other cases in similar nature would shake the people's confidence in police administration in upholding the rule of law therefore, a time bound departmental inquiry-not for namesake be conducted with a message to other police officers to realize the importance of position and function they are discharging so that a strong message may go. The Investigating

15. The Registrar (Compliance) is directed to transmit forthwith a copy of this order to the D.G.P. Uttar Pradesh for strict compliance.

HELD: - Application under Section 319 Cr.P.C. not maintainable to summon a company for the offense of Section 138 N.I. Act after the expiry of the limitation period, even though the cheque in question was issued on behalf of the company. Impleadment application in the form of amendment is maintainable in such

proceedings on fulfilling the conditions, even though there is no specific provision of impleadment in Cr.P.C. or N.I. Act. In the garb of an application under Section 319 Cr.P.C. defect of non-impleading the company cannot be cured despite being time-barred. No illegality in impugned order. **(Para -26 to 29)**

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

List of Cases cited:

1. Aneeta Hada Vs M/S God Father Travels & Tours Pvt. Ltd., (2012) 5 SCC 661
2. Dilip Hariramani Vs B.O.B., (2022) SCC OnLine SC 579
3. Himanshu Vs B. Shivamurthy & anr., (2019) 3 SCC 797
4. Jitendra Mangala Vs St. of U.P & anr., Application u/s 482 No. 6343 of 2024
5. N. Harihara Krishnan Vs J. Thomas, (2018) 13 SCC 663
6. Somesh Sarjivan Jain Vs St. of Guj. & ors., Special Criminal Application No. 1790 of 2009
7. Oanali Ismailji Sadikot Vs St. of Guj. & anr., Special Criminal Application (Quashing) No. 4536 of 2015
8. S.R. Sukumar Vs S. Sunaad Raghuram, (2015) 9 SCC 609
9. Usher Agro Ltd. Vs St. of U.P. & anr., (2018) 3 JIC 225 (All)

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

1. Heard Sri Sushil Kr. Chaturvedi, learned counsel for the applicant and Sri Uday Bhan, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of the impugned

order dated 10.9.2024 passed by Presiding Officer, Special Judge, N.I. Act, Agra in application dated 2.7.2024, under Section 319 Cr.P.C. in Complaint Case No. 2186 of 2017 (Maya Rani vs. Ram Autar), under Section 138 N.I. Act, P.S. Jagdishpura, District Agra. Further prayer is to summon the opposite party No.3/company for facing trial.

3. Facts giving rise to the present case are that a cheque dated 16.12.2016 for the amount of Rs.26,37,100/- was issued on behalf of the company M/s Anupam Omarion Infrastructure (India) Pvt. Ltd. by opposite party No.2 being its director as well as authorized signatory. That cheque was presented before the bank on 16.12.2016, but the same was returned on 8.3.2017 with the endorsement "fund insufficient", thereafter the applicant sent a notice to opposite party No.2 as well as the company (opposite party No.3) on 31.3.2017. However, despite expiry of 15 days from the date of receiving the notice, the cheque amount was neither paid by opposite party No.2 nor by opposite party No.3. Thereafter, the complaint was filed on 24.4.2017, impleading opposite party No.2 as proprietor of opposite party No.3. It is undisputed that respondent No.3 (company) was not arraigned as accused in the complaint. After perusal of the record, learned Magistrate took cognizance on 22.6.2017 and summon was issued to opposite party No.2. After conclusion of evidence of the applicant and an application under Section 319 Cr.P.C. was filed by the applicant on 2.7.2024 to summon opposite party No.3 on the ground that by mistake the opposite party No.3 could not be impleaded at the time of filing the complaint though the cheque in question was issued on behalf of the company. However, that application was

rejected by the court below by impugned order dated 10.9.2024 which has been challenged in the present application.

4. Contention of learned counsel for the applicant is that the applicant is the complainant in the complaint in question and she could not implead the company but impleaded its proprietor at the time of filing the complaint in the year 2017. When this fact came into the knowledge of the applicant in the year 2024, then she filed an application under Section 319 Cr.P.C. to summon the company, namely, M/s Anupam Omarion Infrastructure (India) Pvt. Ltd. on the ground that by mistake it could not be impleaded as a party along with its proprietor and that application was rejected by the court below by the impugned order. It is further submitted that after bouncing of the cheque, issued on behalf of the company, though the applicant sent a demand notice to the company as well as its proprietor, but by mistake she could not implead the company as a party. Therefore, the court below erroneously rejected her application under Section 319 Cr.P.C. for summoning the company as additional accused.

5. Per contra, learned A.G.A. submitted that when the applicant has not impleaded the company on whose behalf the cheque in question was issued, then the complaint itself is defective in view of Section 141 N.I. Act as well as the law laid down by the Apex Court in the case of ***Aneeta Hada vs. M/S God Father Travels and Tours Pvt. Ltd.; (2012) 5 SCC 661.***

6. After hearing submissions of learned counsel for the parties, a sole question arises herein whether the application under Section 319 Cr.P.C. is maintainable to summon the company for

the offence of Section 138 N.I. Act after the expiry of limitation period, though in the complaint, company was not impleaded despite the fact that the cheque in question was issued on behalf of the company.

7. To decide the above question, it is pertinent to refer Section 138, 141 and 142 N.I. Act which are being quoted as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to 68[two] years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the*

period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 69[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.

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.

Explanation.—For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

142. Cognizance of offences.—71[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no court shall take cognizance of any offence punishable under Section 138

except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have

been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

8. From the perusal of Section 138 N.I. Act, it is clear that for the prosecution of the drawer of a cheque on bouncing of the same following conditions must be satisfied:-

(i) The cheque must be issued by the drawer for the account maintained by him with banker in discharge of any liability;

(ii) The cheque has been presented before the bank during the period of its validity and the cheque has been returned by the bank as unpaid for the reason of insufficient fund in the account of the drawer to honour the cheque;

(iii) On receiving the information from the bank about the dishonouring of the cheque, payee or holder in due course of the cheque sends a demand notice within 30 days in writing (which also includes through electronic means as per Section 4 of the Information Technology Act) to the drawer of the cheque to pay the cheque amount and;

(iv) The drawer of the cheque fails to make payment of the cheque amount within 15 days of receiving the demand notice.

9. From the conjoint reading of Section 138 and 141 N.I. Act, it is clear, if the cheque is issued on behalf of the company/firm then primarily the company/firm should be prosecuted on fulfilling the condition mentioned under Section 138 N.I. Act and apart from the

company, its officer or director who was incharge of and was responsible for the conduct of business of the company/firm may also be prosecuted vicariously. Therefore, for the prosecution of company/firm under Section 138 N.I. Act, it should be arraigned as prime accused in the complaint and unless the company/firm arraigned in the complaint, cognizance of offence under Section 142 N.I. Act for the offence under Section 138 N.I. Act cannot be taken. If the concerned court has mistakenly taken cognizance against the director of the company on the basis of the complaint in which the company/firm was not impleaded as accused, then such cognizance under Section 142 N.I. Act would be absolutely illegal as the proceeding cannot go on against the director, partner or employee of the company vicariously in absence of the company as the cognizance of the offence can be taken against the drawer of the cheque and in case of cheque is issued on behalf of the company the drawer of the cheque would be the company.

10. The Apex Court in the case of ***Aneeta Hada (supra)*** observed that without impleading the company/firm, prosecution of its director is bad in the eyes of law. Paragraphs No. 39, 58 and 59 of the ***Aneeta Hada (supra)*** is quoted as under:-

"39. The word "deemed" used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallises the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in S.M.S.

Pharmaceuticals Ltd. [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee (sic drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. 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 drag-net 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 [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove."

11. The above ratio of *Aneeta Hada (supra)* was again reaffirmed and reiterated in the case of *Dilip Hariramani vs. Bank of Baroda; (2022) SCC OnLine SC 579*. In this judgement the Apex Court observed that the liability of director or partner of the company/firm is vicarious only because of fiction as per Section 141 N.I. Act but the primary liability is of the company/firm for commission of offence under Section 138 N.I. Act. Paragraph No.16 of *Dilip Hariramani (supra)* is quoted as under:-

"16. The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused,

the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Section 141 of the NI Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender. This view has been subsequently followed in Sharad Kumar Sanghi v. Sangita Rane,¹⁷ Himanshu v. B. Shivamurthy,¹⁸ and Hindustan Unilever Limited v. State of Madhya Pradesh.¹⁹ The exception carved out in Aneeta Hada (supra),²⁰ which applies when there is a legal bar for prosecuting a company or a firm, is not felicitous for the present case. No such plea or assertion is made by the respondent."

12. From the above mentioned legal position, it is clear that in case a cheque is issued on behalf of the company/firm then unless the company/firm is arrayed as an accused in the complaint, cognizance for the offence under Section 138 N.I. Act and subsequent proceeding is erroneous. Therefore, a question arises if a complaint is filed after dishonouring of the cheque issued by the director/officer/partner on behalf of the company/firm without impleading the company/firm, then whether this defect can be cured after taking cognizance on the basis of above complaint. The Apex Court in the case of *Himanshu vs. B.*

Shivamurthy and another; (2019) 3 SCC 797 observed that whether the cheque in question was issued on behalf of the company/firm and on getting dishonoured, the demand notice was given only to the director and not to the company, in that case if the complaint is filed against the director without impleading the company then at subsequent stage company cannot be permitted to be impleaded as accused because no cause of action arises in absence of demand notice to the company. Paragraph No.13 of the ***Himanshu (supra)*** is quoted as under:-

"13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for 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, the High Court was in error in holding that the company could now be arraigned as an accused."

13. From the perusal of the judgement in ***Himanshu (supra)***, it is clear that if all ingredients, including service of demand of notice under Section 138 N.I. Act for initiating the proceeding against the company, are fulfilled and there is satisfactory explanation of delay then impleadment of company in the complaint at subsequent stage is permissible or the fresh complaint may be filed by impleading the company on fulfilment of legal necessity including the explanation of delay (this view was also taken in the case of ***Jitendra Mangala vs. Stat of U.P and***

another.; Application u/s 482 No. 6343 of 2024).

14. However, if the company is permitted to be impleaded on subsequent stage as accused then fresh cognizance order has to be passed because the cognizance on the complaint filed without impleading the company, is itself bad. Presumption of law that court takes cognizance of offence not cognizance of the offender is not applicable in the case of N.I. Act as the cognizance under the N.I. Act is person specific (drawer of the cheque).

15. So far as the applicability of the provision of Section 319 Cr.P.C. in the proceeding of N.I. Act is concerned, to decide this issue Section 319 Cr.P.C. is needed to be referred and same is quoted 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 afresh, 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."

16. From the perusal of Section 319 Cr.P.C., it is clear that this section would apply where it appears from the evidence on record that any person has committed any offence but is not an accused before the court. In case of proceeding under Section 138 N.I. Act a person can be said to have committed an offence only when being drawer of the cheque he fails to make the payment of the dishonoured cheque issued by him despite the expiry of 15 days from the date of receiving the demand notice. Therefore, even if the cheque issued by the company got bounced but notice was not given to the company then despite the evidence on record that bounced cheque was issued by the company, it cannot be said that the company has committed any offence. In such cases, the company cannot be impleaded or summoned.

17. However, in those cases where apart from fulfilling the other conditions of Section 138 N.I. Act, demand notice was also issued to the company on bouncing of the cheque, then even though the company was

not accused before the court even then from the record it can be presumed that the company has committed the offence, therefore, the company can be permitted to be impleaded as an accused but on the applicability of Section 319 Cr.P.C. there is a presumption under Section 319(4)(b) Cr.P.C. that if the court proceeds against such person then it would be deemed that such person was accused on the date when the cognizance was taken but if the cognizance under Section 142 N.I. Act is taken without impleading the company that itself is erroneous and the same cannot be declared valid retrospectively in the garb of Section 319 Cr.P.C. From the perusal of Section 142(1)(b) Cr.P.C., it is clear that cognizance of the offence under Section 138 N.I. Act is taken against the accused mentioned in the complaint, therefore, when the company itself was not a party at the time of taking cognizance then cognizance cannot be said to be valid under Section 142 N.I. Act. Therefore, if on fulfilling the other condition, the company is permitted to be impleaded as a party then the court has to take fresh cognizance of the offence against the company as per Section 142 N.I. Act. Therefore, Section 319 Cr.P.C. cannot be strictly applied in the proceeding of Section 138 N.I. Act.

18. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

19. Hon'ble Apex Court in the case of *N. Harihara Krishnan vs. J. Thomas*;

(2018) 13 SCC 663 has observed that invoking Section 319 Cr.P.C. as a device to initiate proceeding against the company beyond the period of limitation is not permissible. Paragraphs No. 26, 27, 28, 29 of *N. Harihara Krishnan (supra)* are being quoted as under:-

"26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are : (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows

from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking

cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint."

20. The issue of maintainability of the application under Section 319 Cr.P.C. was also considered by the Gujarat High Court in the case of **Somesh Sarjivan Jain vs. State of Gujarat and others; Special Criminal Application No. 1790 of 2009** wherein it is observed that the application under Section 319 Cr.P.C. is not maintainable to arraign the accused subsequently in the complaint. Paragraph

No. 7.3 of the Somesh Sarjivan Jain (supra) is quoted as under:-

"7.03. In the present case, as stated above, admittedly no notice has been issued and served upon the petitioner as required under section 138 of the Negotiable Instruments Act and therefore, cause of action for filing the complaint against the petitioner for the offence under section 138 of the Negotiable Instruments Act does not arise. Therefore, as such in absence of any statutory notice upon the petitioner even as proprietor of Jain Electronics, a Proprietorship Firm - drawer of the cheque, petitioner cannot be prosecuted for the offence under section 138 of the Negotiable Instruments Act and therefore, in absence of such notice as required under section 138 of the Negotiable Instruments Act and any eventuality as contemplated under Clause (C) of provision to section 138 of the Negotiable Instruments Act, no complaint can be filed against petitioner for the offence under section 138 of the Negotiable Instruments Act and even the learned Magistrate cannot take cognizance of the offence against the petitioner for the offence under section 138 of the Negotiable Instruments Act. Under the circumstances, petitioner cannot be arraigned as accused subsequently for the offence under section 138 of the Negotiable Instruments Act in exercise of the powers under section 319 of the Code of Criminal Procedure. By exercising powers under section 319 of the Code of

Criminal Procedure arraigning the accused subsequently, complaint winch otherwise was not maintainable against the petitioner for the offence punishable under section 138 of the Negotiable Instruments Act, cannot be made maintainable. Under the circumstances, nobody can be arraigned as accused by the learned Magistrate in exercise of the powers under section 319 of the the Code of Criminal Procedure in a complaint for the offence under section 138 of the Negotiable Instruments Act which otherwise is not maintainable.”

21. Gujarat High Court again considered the issue of maintainability of the application under Section 319 Cr.P.C. in the proceeding under Section 138 N.I. Act in the case of ***Oanali Ismailji Sadikot vs. State of Gujarat and another; Special Criminal Application (Quashing) No. 4536 of 2015***. In that case, Hon'ble Justice J.B. Pardiwala, after discussing in detail the object of Section 319 Cr.P.C., observed that the application under Section 319 Cr.P.C. is not maintainable in the proceeding of N.I. Act. Paragraphs No. 72, 73 and 76 *Oanali Ismailji Sadikot (supra)* are quoted as under:-

“72. I am of the view that by virtue of a legal fiction, it cannot be said that on the date of filing of the complaint, the Court was justified in taking cognizance and issue process against the partners in the absence of the legal entity and no fault could be found so far as the legality and validity of the cognizance is concerned. The legal fiction is altogether for a different

purpose and it should not be brought in aid of curing a serious defect or infirmity in the complaint or the order taking cognizance. When Sub-section (4)(b) of Section 319 of the Code says that it will be presumed that the newly added person had been an accused person when the Court took cognizance of the complaint upon which the inquiry or trial was commenced, the same indicates that the Court is not empowered to take cognizance of any fresh offence if any accused is impleaded by invoking Section 319 and the newly added accused could be tried only for the offence already taken cognizance against the other accused,

73. The policy of the Code is that the offence can be taken cognizance of once only and not repeatedly upon discovery of further particulars. In a given case, the complainant may not even know the names and other particulars of the offenders, and it would, therefore, be sufficient for him to lodge a complaint making the persons who are known as the accused. When such a trial proceeds against the known accused, if the evidence led in trial discloses offences committed by other persons who could be tried along with the accused, then there need not be a fresh complaint and fresh order of cognizance against those persons. I reiterate that the complaint was liable to be dismissed on the very first day of its presentation and no process could have been issued against the partners in the absence of the partnership firm.

76. *In view of the aforesaid discussion, I hold that the application under Section 319 of the Cr.P.C. is not maintainable, and the Court below rightly rejected the same. The third question is answered accordingly.*"

22. Though it is clear from the legal position discussed above that application under Section 319 Cr.P.C. is not maintainable but a question arises whether the impleadment is permissible in certain circumstances despite the fact, there is no specific provision in Cr.P.C. (or B.N.S.S) for impleadment.

23. The Apex Court in the case of **S.R. Sukumar vs. S. Sunaad Raghuram; (2015) 9 SCC 609** observed in paragraphs No. 17 and 18 that in certain circumstances amendment in complaint to correct the curable infirmities is permissible. Paragraphs No. 17 & 18 are quoted as under:-

"17. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board v. Modi Distillery, 1995 (SLT Soft) 1194 : (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi

Distillery and the name was sought to be amended. In such factual background, this Court has held as follows:—

"...The learned Single Judge has focussed his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and

furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery. Furthermore, the legal infirmity is of such a nature which could be easily cured..."

18. What is discernible from the U.P. Pollution Control Board's case is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact

that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint."

24. In the proceeding of Section 138 N.I. Act if company is not impleaded at the time of filing complaint though cheque was issued by company, then in case of fulfilling all conditions of Section 138 N.I. Act, including issuance of demand notice, if there is satisfactory explanation of delay, then impleadment of company would be a curable defect. Hence amendment may be allowed to implead the company

25. From the analysis and the legal position discussed above, it is clear that if the proceeding under Section 138 N.I. Act is initiated on bouncing of the cheque issued on behalf of the company, without impleading the company then at post cognizance stage company can be permitted to be impleaded if apart from fulfilling other condition of Section 138 N.I. Act, a demand notice was also sent to the company within the prescribed period subject to the condition that the delay has been properly explained as required under the proviso of Section 142(1)(b) of N.I. Act.

26. In view of the above analysis this Court also holds that application under Section 319 Cr.P.C. is not maintainable in the proceeding of

Section 138 N.I. Act. However, impleadment application in the form of amendment is maintainable in such proceeding on fulfilling the conditions, mentioned in earlier paragraph, despite the fact that there is no specific provision of impleadment in Cr.P.C. or N.I. Act.

27. So far as the judgement of the coordinate Bench of this Court in *Usher Agro Ltd. vs. State of U.P. and another; (2018) 3 JIC 225 (All)*, relied upon by the counsel for the applicant is concerned, in that case applicant has prayed for impleadment and to summon the company but in the present case applicant has not prayed for impleadment of the company. Additionally, facts in the case of the *Usher Agro Ltd. (supra)* are different from the facts of the present case, therefore, same will not help the applicant. This Court respectfully submits that the coordinate Bench while passing the order in *Usher Agro Ltd. (supra)* did not take into account the observation of *N. Harihara Krishnan (supra)* that an application under Section 319 Cr.P.C. cannot be permitted to initiate time barred proceeding.

28. Coming back to the fact of the present case, it is clear that the cheque in question was issued on behalf of the company M/s Anupam Omarion Infrastructure (India) Pvt. Ltd. and on bouncing of the cheque the demand notice dated 31.3.2017 was issued to its signatory director as well as company but the company failed to pay the cheque amount therefore on the date of filing of the complaint cause of action was also arisen against the company but the company was not impleaded even then the company can be permitted to be impleaded as party if delay is satisfactorily explained for not impleading the company. However, in the

29. In view of the above fact, this Court does not find any illegality in the impugned order by which the application of the applicant under Section 319 Cr.P.C. was rejected. Accordingly, the application is **dismissed**.

Rahul Tripathi **...Applicant**
Versus
State of U.P. & Anr. **...Respondents**
Counsel for the Applicant:

1. Pramod Suryabhan Pawar Vs St. of Maha. & anr., 2019 LawSuit (SC) 1504

2. Sonu @ Subhash Kumar Vs St. of U.P. & anr., 2021 LawSuit (SC) 163
3. Harshvardhan Yadav Vs St. of U.P. & anr., 2021 SCC Online All 500
4. Anurag Soni Vs St. of Chhattisgarh, 2019 (13) SCC 1
5. St. of Haryana & ors. Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335
6. R.P. Kapur Vs St. of Punj., A.I.R. 1960 S.C. 866
7. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha., AIR 2021 SC 1918
8. Pramod Suryabahan Pawar, (2019) 9 SCC 608
9. Sonu Alias Subhash Kumar Vs St. of U.P. & anr.. (2021) 18 SCC 517
10. Shambhu Kharwar Vs St. of U.P., AIR 2022 SC 3901
11. Naim Ahamed Vs St. (NCT of Delhi), 2023 SCC OnLine SC 89
12. Deepak Gulati Vs St. of Har., (2013) 7 SCC 675
13. Kaini Rajan Vs St. of Kerala, (2013) 9 SCC 113
14. Dr. Dhruvaram Murlidhar Sonar Vs The St. of Maha., Criminal Appeal No. 1443 of 2018
15. Anurag Soni Vs St. of Chhattisgarh, AIR 2019 SC 1857
16. Mahesh Damu Khare Vs St. of Maha. & anr., 2024 SCC OnLine 3471

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Sanjay Kumar Mishra, learned counsel for the applicant, Mr. Amit Singh Chauhan, learned A.G.A. for the State and perused the record.

2. The present application has been filed by the applicant to quash the charge-

sheet dated 02.08.2024, cognizance order dated 11.09.2024 as well as entire proceedings of Sessions Trial No. 2224 of 2024 (State Vs. Rahul Tripathi), arising out of Case No. 360 of 2024, under Sections 493, 406, 384, 504, 506 and 376 I.P.C., Police Station Tundla, District Firozabad, pending in the court of Session Court, Firozabad.

3. Brief facts of the case are that an F.I.R. was lodged on 05.06.2024 at 18:10 hours by Priyanka Singh i.e. opposite party no.2 against three named accused persons including the applicant which came to be registered as Case Crime No. 0436 of 2021, under Sections 493, 406, 384, 504, 506 and 376 I.P.C. with the allegation that when opposite party no.2/ informant in the year 2011 was pursuing her B.B.A. from G.L.A. University, she came to know the applicant Rahul Tripathi, who was also pursuing his B.Tech course from the same University. After passage of few years, the applicant proposed the informant to marry with her. On 10.06.2021, the applicant came to Tundla and in absence of the parents of the informant, on the pretext of promising to marry with her, he established physical relationship with her against her wishes. The informant started crying, therefore, applicant tendered his apology and stated that he really loves her and wants to perform marriage with her. The informant believing the words given by the applicant, had not disclosed the aforesaid incident to any one and also due to fear of defamation in the society. The applicant with intention to cheat the informant, silently captured objectionable video of the aforesaid incident. After a few days, the applicant called informant at his flat at Gaur City 11 Avenue 282, M Tower Noida UP 201301. When the informant expressed her inability to go there, the applicant threatened her to

make the video viral. Being afraid of defamation, she conceded to the demands as raised by the applicant. The applicant also demanded money from her after threatening to defame her by making her objectional video viral. When the informant came to know about applicant performing marriage with some other girl, she went to meet Rahul's mother namely Manju Lata Tripathi as well as her sister namely Priya on 19.05.2024 and shared the entire incident. On hearing the incident as had happened with the informant both mother and sister of the applicant started abusing her and they also demanded Rs.10,00,000/- for deleting the video which was captured by the applicant in his mobile phone. The informant went to report about the incident before the police station, but when nothing was done, an application was sent requesting for registration of the F.I.R. After investigation charge-sheet has been submitted against the applicant.

4. Learned counsel for the applicant submits that F.I.R. has been lodged with false and frivolous allegations. The applicant and opposite party no.2 are major and were friendly with each other. The relation between them, if any, was consensual. The applicant had never established any relationship forcefully with opposite party no.2. The medical report does not corroborate with the offence as made in the F.I.R. He further submits that no false promise of marriage has been given to opposite party no.2 by applicant. They were just friends and from the statements of the charge-sheet witnesses it is clear that a business relationship was between them. There is no allegation to the fact that promise of marriage was given to opposite party no.2 was false as is made in the F.I.R.

5. In support of his submission he has relied upon judgment of *Pramod*

Suryabhan Pawar Vs. State of Maharashtra & another, 2019 LawSuit(SC) 1504 and *Sonu @ Subhash Kumar Vs. State of Uttar Pradesh & Anr. 2021 LawSuit(SC) 163*. Several other submission have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant has also been touched upon at length.

6. Learned A.G.A. for the State on the other hand submits that from the version of the FIR as well as statements of opposite party no.2 recorded under Section 161 and 164 Cr.P.C., the offence under the relevant section is made out against the applicant. He further submits that applicant had obtained consent for sexual relationship by making false promise of marriage, therefore, such consent was given under some misconception of fact, amounted to rape. The aforesaid has been held in the case of *Harshvardhan Yadav Vs. State of U.P. and Another, 2021 SCC Online All 500*. Relying upon another case of *Anurag Soni v. State of Chhattisgarh, 2019 (13) SCC 1*, learned AGA submits that the consent of opposite party no.2 was based on misconception, such consent is immaterial as it is not voluntary consent, therefore, offence under the relevant section is made out. He further submits that from the version of the FIR as well as statements of witnesses it is clear that from the very inception, the consent of opposite party no.2 was result of false promise to marry, which cannot be taken as consent and hence, the act as done by applicant amounts to rape. He further submits that all the other contentions relate to disputed questions of fact. From perusal of the records, prima facie, it can not be said at this stage that no offence has been committed by the applicants.

7. In order to appreciate the rival contentions of learned counsel for the parties, it would be necessary to revisit the relevant laws.

As far as the scope of Section 482 Cr.P.C. which has been invoked by the applicant for quashing of the charge-sheet is concerned, it is saving clause which deals with the inherent powers of the High Court to pass any order as may be necessary to give effect to any order under the Cr.P.C., or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

8. Law relating to quashing of charge-sheet has already been well-settled as reiterated by this Court in the ***State of Haryana and Ors. Vs. Bhajan Lal and Ors.*** reported in ***1992 Supp (1) SCC 335*** in which this Court held as below:

“102. (1) *Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

(2) *Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).*

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(7) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously Instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

9. It is to be noted that while considering these aspects, the Court does not have to go in detail by way of minute examination about the correctness or otherwise of the facts alleged and the Court has to examine the same by taking a prima facie view of the matter based on the materials on record and if on consideration of the factual matrix of the allegations, no prima facie case is made out of commission of any offence of which cognizance can be taken, the High Court would be within its power to intervene and quash any such complaint or FIR in exercise of the inherent power under Section 482 Cr.P.C.

In this regard one may also refer to the decision of this Court in ***R.P. Kapur Vs. State of Punjab A.I.R. 1960 S.C. 866***, wherein this Court while dealing with Section 561-A, the counterpart provision of Section 482 in the erstwhile Code, observed that the High Courts should be cautious in interfering with a criminal proceeding at the stage of investigation. However, there are certain cases where the court, to prevent the abuse of the process of any court or otherwise to secure the ends of justice can quash the criminal proceedings. The said cases of exceptions have been reiterated in the case of ***Neeharika Infrastructure Private Limited Vs.***

State of Maharashtra, AIR 2021 SC 1918, by stating as below:-

“(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of the complaint or the first information report to decide whether the offence is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High

Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.”

(emphasis supplied)

10. Having underscored the power of the High Court to exercise inherent power under Section 482 Cr.P.C. for quashing of charge-sheet, for better appreciation of merits of the case as well as submissions made by learned counsel for the applicant and learned A.G.A. for the State this Court needs to understand the scope of the offence under Section 375 I.P.C. which deals with various aspects of rape, punishable under Section 376 I.P.C. as well as other relevant sections in which charge-sheet has been submitted in the present case.

11. In the instant case, the allegations in the F.I.R. are that the applicant who was known to opposite party no.2 as they were studying in the same college, after so many years of completion of studies, came to the house of opposite party no.2 and forcefully established physical relationship on false promise to marry her. This act continued for number of times as the applicant had made video of the aforesaid incident and threatened to make the same viral. After investigation charge-sheet in the present matter has been submitted under Sections 493, 406, 504, 506, 384 and 376 I.P.C. The allegations made in the F.I.R. as well as charge-sheet included offence under Section 376 I.P.C. as well as 493, 406, 384, 504, 506 I.P.C., which are reproduced as under:-

“493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage:- Every

man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

406. Punishment for criminal breach of trust.—*Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

384. Punishment for extortion.—*Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

504. Intentional insult with intent to provoke breach of the peace.—*Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

12. An offence of rape if established in terms of Section 375 is punishable under Section 376 of the I.P.C. In the present case, the second description of Section 376 is relevant which is set out below:

"376. Punishment for rape.-

1. *Whoever, except in the cases provided for in subsection (2), commits rap, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.*

2. *Whoever, -*

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n. commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

14. Further, Section 506 IPC speaks of criminal intimidation which is defines in Section 503 IPC. The said provisions read as under:-

"503. Criminal intimidation.-

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

506. Punishment for criminal intimidation.- *Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

If threat be to cause death or grievous hurt, etc.- *And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

13. Sub-section 2 of Section 376 is an exception to sub-section 1 of the said provision. Sub-section 2, inter alia, states that whosoever commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

14. In the present case it has to be seen whether the aforesaid offences are committed by the applicant within the meaning of the aforesaid provisions or not? A bare perusal of the F.I.R. reveals that the

applicant and opposite party no.2 came in contact in the year 2011 when they were pursuing their studies from G.L.A. University. Thereafter after passage of nearly 10 years on 10.06.2021 the applicant came to Tundla and in absence of parents of opposite party no.2, on false promise to marry her, forcefully established physical relationship with her. Thus, it cannot be said that the relationship between the two was consensual. The applicant had forcefully established physical relationship, consent for which was given under some misconception of false promise to marry, therefore, the same cannot be considered to be consent in view of the provisions of law.

15. While Section 375 deals with various aspect of rape, in the present case, the allegations against the applicant is that he forcefully established physical relations with opposite party no.2 without her consent, which amounts to rape without a consent has been mentioned under Section 375 I.P.C. as follows:-

375. Rape.-- *A man is said to commit "rape" if he—*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

16. In this regard relevant provisions are contained in Section 90 of the I.P.C. which deals with consent given under false misconception. Section 90 provides that a consent is not a consent under the I.P.C. if such consent is given by a person under fear or injury, or under a

misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequences of such fear or misconception. Section 90 I.P.C. reads as follows:-

“90. Consent known to be given under fear or misconception.—

A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or”

17. It is the case of the informant that the applicant had established physical relationship with her without her consent. She has stated that the applicant came to her house and gave a promise that he will marry her and established physical relations despite her not consenting to the aforesaid. Thus, the physical relationship as established by opposite party no.2 with the applicant was on the misconception of fact that he would marry her because of the promise made by applicant that he would ultimately marry her. It has never been a case of the victim that they were having prolonged relationship. It is only when the opposite party no.2 went for her studies in the G.L.A. University in which applicant was also studying, they came to know each other in the year 2011 and after passage of nearly 10 years the applicant once came to her house where such false promise was made by the applicant that he will marry her and forcefully established physical relationship with her.

18. While dealing with a similar situation, the principles of law which must govern a situation like the present were enunciated in the following observations as made by Apex Court in the case of **Pramod Suryabahan Pawar (2019) 9 SCC 608**, which reads as follows:-

“16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman's “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it.”

19. Further the Court has observed that:

18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's

decision to engage in the sexual act.

(emphasis supplied)

20. Considering the aforesaid case as well as the case of **Sonu Alias Subhash Kumar Vs. State of Uttar Pradesh and another (2021) 18 Supreme Court Cases 517** Hon'ble Supreme Court in the case of **Shambhu Kharwar Vs. State of Uttar Pradesh; AIR 2022 SC 3901** observed as follows:-

“12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action...

[...]

14. [...] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled...

[...]

21. Thus, from the aforesaid it is clear that there is difference between false promise to marry and breach of promise to marry. The aforesaid issue has been considered in the case of **Naim Ahamed Vs. State (NCT of Delhi) 2023 SCC OnLine SC89**, which reads as follows:-

“It is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376.”

22. It must also be clear that for a promise to be a false promise to amount to misconception of fact within the meaning of Section 90 of IPC, it must have been made from the very beginning with an intention to deceive the woman to persuade her to have a physical relationship. Therefore, if it is established that such consent was given under a misconception of fact, the said consent is vitiated and not a valid consent. In this regard we may refer to the case of **Deepak Gulati Vs. State of Haryana (2013) 7 SCC 675** in which it was held as follows:

“21. Consent may be express or implied, coerced or misguided, obtained willingly or

through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

“24. Hence, it is evident that there must be adequate

evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other; unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

23. Thus, the law has been settled that if the consent is given by the victim under a misconception of fact, it is vitiated. In ***Kaini Rajan Vs. State of Kerala, (2013) 9 SCC 113***, explaining the essentials and parameters of the offence of rape, Hon'ble Supreme Court observed as follows:-

"Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done

without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

24. Even in the case of ***Dr. Dhruvaram Murlidhar Sonar v. The State of Maharashtra in Criminal Appeal No. 1443 of 2018*** Hon'ble Supreme Court has observed that it is clear distinction between rape and consensual sex and, in such cases, it must be very carefully examined whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect

only to satisfy his lust, as the later falls within the ambit of cheating or deception. The Supreme Court after referring to various decisions has observed as follows:

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

25. It has been settled view that the question whether consent given by the

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

26. In **Anurag Soni v State of Chhattisgarh, AIR 2019 SC 1857**, the accused never intended to marry the victim; he gave false promise to the victim to marry her and on such false promise he had physical relationship with the victim; the victim initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact. The victim, in the aforesaid case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady, she and her family members would continue to pressurize the accused to marry and the victim will give the consent for physical relation. Even considering Section 114A of the Evidence Act which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. From the very inception, the promise given by the accused to marry the victim was a false

promise and from the very beginning there was no intention of the accused to marry the victim as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the victim to give her consent for the physical relationship.

27. Thus, the sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the victim to marry, did not have any intention to marry and the victim gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC. Similarly, the legal definition of rape, once governed by Section 376, has been redefined under Section 64 BNS.

28. In *Anurag Soni* (supra), the Supreme Court, has also expressed its concern on such tendency increasing in the society in following words:

"Such incidents are on increase nowadays. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the

victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity."

29. Rape is considered as the most physically and morally reprehensible crime in a society and has a long life effect on the mind of victims. The victim has to go through a serious emotional trauma and physical suffering. Sexual intercourse with the victim on the pretext of false promise to marry is, and ought to be a an offence of rape under the penal provisions. It is becoming a phenomenon that the accused makes a false promise of marriage with the mala fide intention to deceive the victim. For the major women population in our society, promise of marriage is a great allurements and they are trapped in a situation which results in their sexual abuse and exploitation. These cases are increasing day by day as the accused person believes that they will escape from the criminal liability and punishment taking advantage of law.

30. Therefore, in the light of above discussion, it is necessary for the legislature to provide a clear and specific legal framework to deal with the cases where the accused obtained consent for sexual intercourse on the false promise of

marriage. But till such law is enacted, the court should take into consideration the social reality and reality of human life and continue giving protection to such women who have suffered on account of false promise of marriage. Unless there is prolonged relationship which raises a strong inference of consensual sex, in other cases, particularly, in cases of single act of sexual intercourse as is the case in the present case, or relationship for a short time, persuaded by false promise of marriage or where circumstances show that the accused never intended to fulfill the promise or he could not be able to fulfill the promise on account of factors such as the accused was already married, he disclosed wrong identity, name, religion and other details to play deception to obtain consent for sexual intercourse, or the like. Obtaining consent for sexual relationship by false promise of marriage should be termed as consent given under misconception of fact and must amount to rape. The court cannot become a silent spectator and give license to those who are trying to exploit the innocent girls and have sexual intercourse with them on the pretext of a false promise of marriage. This feudal mind set and male 'chauhanism' that women are nothing but an object of enjoyment is required to be rigorously addressed and strictly dealt with in order to create a healthier society and to increase a sense of security and protection in the mind of women. And, this is emphasized that this is the responsibility of all the democratic institutions in the country, more so because, all the women protective laws against all forms of sexual exploitation and abuse have been enacted to make the constitutional goal of gender justice a social reality.

31. As regard Section 506 I.P.C. which speaks about punishment for

criminal intimidation which is defined in Section 503 I.P.C. Section 493 I.P.C. deals with Cohabitation caused by a man deceitfully inducing a belief of lawful marriage, criminal breach of trust. Section 384 I.P.C. provides punishment for extortion. Prima facie from perusal of the impugned F.I.R., charge-sheet and other material available on record it is apparent that most of offences levelled against the applicant are made out, he therefore, is not entitled to any relief from this Court in exercise of extra ordinary jurisdiction u/s 482 Cr.P.C. The ingredients of criminal intimidation are threat to another person, inter alia, with any injury to his person, reputation with intent to cause alarm to that person or to cause that person to any act which he is not legally bound to do.

32. In the instant case relationship between the applicant and opposite party no.2 was not consensual, as the applicant indulged in sexual activity with a false promise to marry, thus causing injury to the opposite party no.2 by way of harming her reputation and threatening her for making her video viral in case she does not concede to the demand as raised by the applicant to continue the said relationship despite having knowledge that the applicant has no intention to marry.

33. The Apex Court in the case of ***Mahesh Damu Khare Vs. State of Maharashtra and Another; 2024 SCC OnLine 3471***, while noticing that in large number of cases as decided by the court dealing with similar matter, there is a worrying trend that consensual relationships going on for prolonged period, upon turning sour, have been sought to be criminalised by invoking criminal jurisprudence. If criminality is to be attached to such prolonged physical

relationship at a very belated stage, it can lead to serious consequences. It will open the scope for imputing criminality to such long term relationship after turning sour, as such an allegation can be made even at a belated stage to drag a person in the juggernaut of stringent criminal process. There is always a danger of attributing criminal intent to an otherwise disturbed civil relationship of which the Court must also be mindful.

34 Keeping in mind the aforesaid observation of the Court, in the present facts of the case, the relationship between the applicant and opposite party no.2 was not prolonged physical relationship as the opposite party no.2 came to know the applicant as she was also pursuing her studies from the same University as that by the applicant. After completion of his studies and passage of nearly ten years the applicant came to her residence and giving false promise to marry, forces her for physical relationship, thus, it cannot be said to be prolonged physical relationship.

35. So far as the consent of the victim is concerned, this Court finds that the consent of victim in the present case is based on misconception of fact. Thus, such consent is immaterial as it is not a voluntary consent. The applicant established physical relation with the victim giving a false promise to marry her, hence from the very inception, the consent given by the victim is a result of a false promise to marry her. Such false promise amounts to commission of rape and the offence of rape is made out against the applicant.

36. In view of the above discussions and deliberations, the present application fails and is, accordingly,

dismissed. There shall be no order as to costs.

37. The Court would like to appreciate the hard work put in by Ms. Shubhangi Jain, Research Associate, who has drawn attention to detail and the same shown in her work of providing legal assistance in this matter.

(2024) 12 ILRA 854

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 22.11.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ - A No. 2347 of 2023

S M Shahnawaz

...Petitioner

Versus

Bachchu Lal

...Respondent

Counsel for the Petitioner:

Kamlesh Kumar Tiwari

Counsel for the Respondents:

G.S. Chauhan

Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- General Clauses Act, 1897 -Section 6(c)-judgment and order filed- said decree became final between the parties- petitioner filed execution case - rejected on the ground that New Rent Control Act ,2021 came w.e.f. 11.01.2021-therefore, in light of Section 38 of Act, 2021, the Court has no jurisdiction to decide the case and accordingly, dismissed-Hence, present petition.- Section 6(c) of General Clauses Act, 1897 provides that unless a different intention appears- repeal would not affect any right, privilege, obligation or liability acquired- Section 36 read with Section 46 of Act, 2021 is having power of execution of orders, which are passed under the provisions of Act, 2021, meaning thereby order passed under Act,

1972 shall be executed only under the provisions of Act, 1972-Section 46 of Act, 2021 also clearly provides that old proceeding under Act, 1972 shall continue under the provisions of Act, 1972 upto the logical ending.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Hanumat Singh Vs Phuna; 1969 0 Supreme (Raj) 208
2. Karnataka housing board VS Nagamani; 2019 0 supreme(SC)538
3. Infrastructure Pvt. Ltd & anr. Vs Ambience island apartment Owners & ors.2021 2 SCC 163
4. Pratap Narain Agarwal Vs Ragho Prasad & ors. AIR 1970 ALLAHABAD 15

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri K.K. Tiwari, learned counsel for the petitioner and Sri Mahesh Sharma, advocate holding brief of Sri G.S. Chauhan, learned counsel for the respondent.

2. Present petition has been filed with following relief;

“(I) Issue a writ order or direction in the nature of certiorari quashing the impugned order dated 21.12.2022 passed by Civil Judge, Mauranipur, District Jhansi in Misc. Case No. 07 of 2022 (S.M. Shahnawaz Vs. Bachchu Lal) to this writ petition.”

3. Brief facts of the case are that petitioner has filed P.A. Case No. 2 of 2016 under the provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to

as “Act, 1972”), which was allowed vide judgment and decree dated 21.12.2021. The said decree became final between the parties. Thereafter, petitioner has filed execution case being Civil Misc. Case No. 07 of 2022 before Civil Judge, Mauranipur, Jhansi to execute the judgement and decree dated 21.12.2021. Learned Civil Judge has rejected the execution case on the ground that New Rent Control Act i.e. Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as “Act, 2021”) came w.e.f. 11.01.2021. Therefore, in light of Section 38 of Act, 2021, this Court has no jurisdiction to decide the case and accordingly, dismissed. Hence, present petition.

4. Learned counsel for the petitioner submitted that undisputedly, case was filed under the provisions of Act, 1972 and also decreed. Therefore, execution proceeding shall only lie under the provisions of Old Act i.e. Act, 1972, which he had filed. He also pointed out that Section 36 of Act, 2021 provides that Rent Authority shall execute only those orders, which were passed under the provisions of this Act i.e. Act, 2021, therefore, order is ex facie bad. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***Hanumat Singh Vs. Phuna; 1969 0 Supreme (Raj) 208.***

5. Per contra, Sri Mahesh Sharma, advocate holding brief of Sri G.S. Chauhan, learned counsel for the respondent opposed and submitted that execution case is not the continuance of suit proceeding, but it would be treated as fresh suit, therefore, it cannot be filed under the provisions of Old Act. He also invited attention of the Court to Section 34 of U.P. Act No. 16 of 2021, which provides that Rent Authority is having power of Civil Court for execution

of order. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as judgment of Full Bench of this Court in the matters of **Karnataka housing board VS. Nagamani; 2019 0 supreme(SC)538, Infrastructure pvt. Ltd and another vs. Ambience island apartment Owners And others 2021 2 SCC 163 & Pratap narain agarwal vs. ragho prasad and other AIR 1970 ALLAHABAD 15.**

6. I have considered the rival submissions advanced by learned counsel for the parties and perused the records, Act, 1972, Act, 2021 as well as judgments relied upon.

7. Section 36 of Act, 2021 is relevant to decide the present controversy and the same is being quoted below;

“36. Execution of order.-36.

(1) The Rent Authority shall, on an application filed by any party, execute an order of a Rent Tribunal or any other order made under this Act, in such manner as may be prescribed, by-

(a) delivering possession of the premises to the person in whose favour the decision has been made; or

(b) attaching one or more bank accounts of the opposite party for the purpose of recovering the amount specified in such order; or

(c) appointing any advocate or any other competent person including officers of the Rent Authority or local administration or local body for the execution of such order; or

(d) attachment of salary and allowance of the opposite party; or

(e) attachment and sale of the movable or immovable property of the opposite party

(2) The Rent Authority may take help from the local police for execution of the final orders:

Provided that no applicant shall obtain help of the police unless he pays such costs as may be decided by the Rent Authority.

(3) The Rent Authority shall conduct the execution proceedings, in relation to its order or an order of a Rent Tribunal or any other order passed under this Act, in a summary manner and dispose of the application for execution made under this section within a period of thirty days from the date of service of notice on the opposite party”

8. From perusal of Section 36(1) of Act, 2021, it is apparently clear that Rent Authority under this Act is having jurisdiction to execute only those orders, which are passed by Rent Tribunal or any other order made under this Act i.e. Act, 2021.

9. I have also perused the Section 34 of Act, 2021 relied upon by learned counsel for respondent and the same is quoted below;

“34. Powers of Rent Authority and Rent Tribunal.- *(1) The Rent Authority and the Rent Tribunal shall, for discharging their functions under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Act. no. 5 of 1908) for the purposes of,-*

(a) summoning and enforcing the attendance of any person and examining him on oath,

(b) requiring the discovery and production of documents,

(c) issuing commission for examination of the witnesses or documents,

(d) issuing commission for local investigation,

(e) receiving evidence on affidavits,

(1) dismissing an application or appeal *fer default* or deciding it *ex-parte*;

(g) setting aside any order of dismissal of any application or appeal for default or any other order passed by it *ex-parte*:

(h) any other matter, which may be prescribed.

(2) Any proceeding before the Rent Authority or Rent Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code, 1860 (Act. no. 45 of 1860); and the Rent Authority and the Rent Tribunal shall be deemed to be a Civil Court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (Act. no. 2 of 1974).

(3) For the purposes of holding any inquiry or discharging any duty under this Act, the Rent Authority may-

(a) after giving not less than twenty-four hours' notice in writing, enter and inspect or authorize any officer subordinate to it, to enter and inspect any premises at any time between sunrise and sunset,

(b) by a written order, require any person to produce for its inspection such books or documents relevant to the inquiry, at such time and at such place as may be specified in the order

(4) The Rent Authority may, if it thinks fit, appoint one or more persons having special knowledge of the matter under consideration as an assessor or valuer to advise it in the proceeding before it.

(5) Any clerical or arithmetical mistake any order passed by the Rent

Authority or any other error arising out of any accidental omission may, at any time, be corrected by the Rent Authority on an application received by it in this behalf from any of the parties or otherwise

(6) The Rent Authority may exercise the powers of a Judicial Magistrate of the First Class for the recovery of the fine under the provisions of the Code of Criminal Procedure, 1973 (Act. no. 2 of 1974) and the Rent Authority shall be deemed to be a Magistrate under the said Code for the purposes of such recovery

(7) An order made by a Rent Authority or an order passed in appeal under this Chapter shall be executable by the Rent Authority as a decree of a Civil Court and for this purpose, the Rent Authority shall have the powers of a Civil Court.

(8) The Rent Authority may set aside or recall any order passed *ex-parte* if the aggrieved party files an application and satisfies it that the notice was not duly served or that he was prevented by any sufficient cause from appearing when the case was taken up for hearing.

(9) Save as otherwise expressly provided in this Act, every order made by the Rent Authority shall, subject to decision in appeal, be final and shall not be called in question in any original suit, application or execution proceedings."

10. No doubt, Rent Authority is having same power vested under the provisions of Code of Civil Procedure, 1908, but Section 34 of Act, 2021 shall always be read with Section 36 of Act, 2021, which clearly provides that Rent Authority shall execute an order of Rent Tribunal or any order made under this Act. In the present case, undisputedly, neither

any order has been passed under the provisions of Act, 2021 nor proceeding was initiated under the provisions of Act, 1972.

11. In present dispute, application was filed under Section 21 of Act, 1972 before the Prescribed Authority defined in Section 2(e) of Act, 1972. Therefore, in light of Section 36 of Act, 2021, Rent Authority is having no jurisdiction to execute the order passed by Prescribed Authority under the provisions of Act, 1972.

12. For proper adjudication of this issue, I have also perused Section 46 of Act, 2021, which is being quoted below;

“46. Repeal and savings.- (1) *The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act no. 13 of 1972) and, the Uttar Pradesh Regulation of Urban Premises Tenancy (Second) Ordinance, 2021 (U.P. Ordinance No. 3 of 2021) is hereby repealed.*

(2) *Notwithstanding such repeal, all cases and other proceedings under the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act no. 13 of 1972) pending, at the commencement of this Act, shall be continued and disposed of in accordance with the provisions of the said Act of 1972 as if that Act had continued to be in force and this Act had not been promulgated.*

(3) *All cases and proceedings relating to any dispute between a landlord and a tenant under any law other than the law repealed by sub-section (1) pending before the Civil Court or in appeal before any other Court on the date of commencement of this Act, in respect of the premises to which this Act applies, shall be*

continued before such Court and disposed of in accordance with such applicable law.

(4) *Notwithstanding such repeal anything done or any action taken under the Uttar Pradesh Regulation of Urban Premises Tenancy Ordinance, 2021 (U.P. Ordinance no. 2 of 2021) and the Uttar Pradesh Regulation of Urban Premises Tenancy (Second) Ordinance, 2021 (U.P. Ordinance no. 3 of 2021) shall be deemed to have been done or taken under the corresponding provisions of this Act.”*

13. Section 46 of Act, 2021 clearly provides that all cases and other proceedings under the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) pending, at the commencement of this Act, shall be continued and disposed of in accordance with law with the provisions of the said Act of 1972 as if that Act had continued to be in force and this Act had not been promulgated, meaning thereby, eviction proceeding under the provisions of Act, 1972 shall also obtain its logical ending under the provisions of Act, 1972.

14. I have also perused the Section 6 of The General Clauses Act, 1897 and the same is being quoted below;

“6. Effect of repeal.- *Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not*

(a) *revive anything not in force or existing at the time at which the repeal takes effect; or*

(b) *affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

15. Section 6(c) of General Clauses Act, 1897 clearly provides that unless a different intention appears, repeal would not affect any right, privilege, obligation or liability acquired. In the present case, intention of legislation is very clear that Section 36 read with Section 46 of Act, 2021 is having power of execution of orders, which are passed under the provisions of Act, 2021, meaning thereby order passed under Act, 1972 shall be executed only under the provisions of Act, 1972.

16. I have also perused the judgments relied upon by learned counsel for the parties. While relying upon the judgements I have to see as to whether execution proceeding is in continuation of suit proceeding or a different fresh proceeding. In most of the judgement, Courts have taken the view that execution proceeding is a separate proceeding, but here the issue is different. Section 36 read with Section

46 of Act, 2021 clearly provides that Rent Authority is having power to execute those orders, which were passed by Rent Tribunal or under the provisions of Act, 2021 meaning thereby any other order passed in Act, 1972 cannot be executed under the provisions of Act, 2021.

17. Section 46 of Act, 2021 also clearly provides that old proceeding under Act, 1972 shall continue under the provisions of Act, 1972 upto the logical ending.

18. Therefore, judgements so relied upon are not relevant in the present controversy.

19. After considering the provisions of Act, 1972 as well as Act, 2021, this Court is of the firm view that any order passed under the provisions of Act, 1972 shall only be executed under the provisions of Act, 1972.

20. Therefore, under such facts and circumstances of the case, impugned order dated 21.12.2022 passed by Civil Judge, Mauranipur, Jhansi is hereby set aside.

21. With the aforesaid observations, writ petition is **allowed**. No order as to costs.

22. Matter is remanded back to Trial Court to decide the execution case on merits expeditiously in accordance with law, maximum within a period of three months from the date of production of certified copy of this order after providing opportunity of hearing to both sides.

(2024) 12 ILRA 860
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 8254 of 2022
 With
 Criminal Appeal No. 10177 of 2022
 and other connected cases

Piyush Shyamdasani **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sr. Advocate, Aditya Prakash Singh, Neeraj Joshi, Ravitendra Pratap Singh Chandel, Sharique Ahmed, Sushil Shukla

Counsel for the Respondent:

Sr. Advocate, Deepankar Shukla, G.A., Pradeep Kumar Mishra, Raghuvansh Misra, Sangam Lal Kesharwani, Saurabh Chaturvedi, Tanzeel Ahmad

Criminal Law-The Code of Criminal Procedure, 1973- Section 372 - The Indian Penal Code-1860-Sections 364, 302, 201, 120B, 404, 34, 203 & 202 - The Arms Act, 1959-Sections 4/25 - The Evidence Act, 1872-Sections 65B & 106-Criminal Appeal challenging the judgment of conviction and sentence- The prosecution has proved by primary evidence that on the date of incident accused A-1 took his wife- victim to restaurant for dinner---During the intervening period for 8 to 10 minutes, the accused A-1 went downstairs and the victim was sitting alone at the table--- Trial court rightly recorded the finding that it is unnatural for a husband not to protest when some unknown assailants were trying to abduct his wife, by forcing him out of the car and instead of speeding away the car or showing any protest, he has virtually surrendered before the said persons--- Accused A-1 did not suffer

any injury and is gave incorrect St.ment in the FIR that he was given injuries by the assailants-- All the witnesses of fact have clearly St.d that immediately after the marriage, Jyoti was complaining about the unresponsive and cruel behaviour of her husband and their testimony could not be shattered despite lengthy cross-examination--- The circumstance proved by the prosecution that immediately after the incident, the victim was found in an injured condition in car of A-1 and then she was shifted to hospital where she was declared dead, also proved that accused Piyush Shyamdasani has not given the correct version to the police and has failed to discharge burden under Section 106 of Evidence Act.

The manner in which the injuries are caused to the victim, also suggest that it is not a case of abduction and motive was to commit murder--- No motive regarding any enmity has not come on record--- The number and nature of injuries caused on the body of the victim clearly shows that the assailants were made sure that the victim did not survive the injuries and therefore prosecution has proved that the death of deceased was of homicidal in nature--- The prosecution has been able to prove the complete chain of evidence against A-1,A-3, A-4, A-5 & A-6- the involvement of A-2 in criminal conspiracy with A-1, A-3 to A-6 is not proved--- Result Criminal Appeal of A-1,A-3, A-4, A-5 & A-6 and Criminal Appeal of A-2 is allowed and she is acquitted of the charge. (Para 156, 158, 159 & 160)

List of Cases cited:

1. Mahaveer Singh Vs St. of Har., (2001) 7 SCC 148
2. Ravindra Singh Vs St. of Pun., (2022) 7 SCC
3. Saju Vs St. of Kerala, (2001) 1 SCC 378
4. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal, (2020) 7 SCC 1
5. Randeep Singh Rana @ Rana & Anr Vs St. of Har. & ors. in Criminal Appeal No. 297 of 2024
6. Sharad BirdhiChand Sarda Vs St. of Mah., (1984) 4 SCC 116

7. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

8. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors., (2020) 7 SCC 1

9. Anvar P.V. Vs P.K. Basheer & ors., (2014) 10 SCC 473

10. Ramanand @ Nandlal Bharti Vs St. of U.P., AIR 2022 SCC 5273

11. Subramanya Vs St. of Karn., AIR 2022 SCC 5110

12. Shafi Mohammad Vs St. of H.P., (2018) 2 SCC 801

13. Balbir Singh Vs St. of Uttarakhand, (2023) Live Law SC 861

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. These appeals have been filed challenging the judgment of conviction dated 20.10.2022 and order of sentence dated 21.10.2022 passed by Additional Sessions Judge, Court No.1, Kanpur Nagar in Sessions Trial No. 36 of 2015, arising out of Case Crime No. 151 of 2014 and in Sessions Trial No. 37 of 2015, arising out of Case Crime No. 155 of 2014, P.S.- Swaroop Nagar, District- Kanpur Nagar vide which the learned Sessions Judge has convicted and sentenced the appellants as under:

Convicted under Section	Name of Accused	Sentence	Fine	Default Sentence
Section 302/120B IPC	Piyush Shyamdasani, Manisha	Life Imprisonment	Rs.20,000/- each	6 Months SI

	Makheja, Ashish Kashya P, Awadhesh Chaturvedi, Renu @ Akhilesh Kanaujiya, Sonu Kashya P			
201/120B IPC	Piyush Shyamdasani, Manisha Makheja, Ashish Kashya P, Awadhesh Chaturvedi, Renu @ Akhilesh Kanaujiya, Sonu Kashya P	3 years RI	Rs.5000/- each	2 months SI
364/120B IPC	Piyush Shyamdasani, Ashish	10 Years RI	Rs.10,000/- each	3 Months SI

	Kashya p, Awadh esh Chatur vedi, Renu @ Akhiles h Kanaui ya, Sonu Kashya p			
203 IPC	Piyush Shyam dasani,	One year Impriso nment	Rs.10 00/-	One mont h SI
404 IPC	Awadh esh Chatur vedi, Renu @ Akhiles h Kanaui ya, Sonu Kashya p	02 Years RI	Rs.50 00/- each	Two mont hs SI
4/25 of Arms Act	Renu @ Akhiles h Kanaui ya and Sonu Kashya p	01 year impriso nment	Rs. 1,000	Two mont hs SI

2. Heard Sri G.S. Chaturvedi, learned Senior Advocate as well as Sri V.P. Srivastava, learned Senior Advocate for the

appellants and Sri Vinay Saran, learned Senior Advocate assisted by Sri Pradeep Kumar Mishra, learned counsel for the informant in all connected appeals and the learned AGA for the State.

3. Brief facts of the prosecution cases are that on 28.7.2014, Piyush Shyamdasani, filed a written complaint to the Police Station- Swaroop Nagar, District- Kanpur Nagar. This complaint reads as under:

"सेवा में थाना अध्यक्ष स्वरूप नगर कानपुर नगर महोदय मैं पियूष श्यामदसानी पुत्र श्री ओम प्रकाश श्याम (का० फटा) निवासी 117/H-1/189 Pandu Nagar, (का० फटा) दिनांक 27.7.14 को अपनी पत्नी श्रीमती ज्योती (का० फटा) दसानी के साथ गाड़ी नं० U.P 78 BR (का० फटा) एकाई में होटल बरान्दा वी आई पी रोड से रवाना खाकर घर वापस जा रहे थे, कि समय करीब रात 11.30 PM बजे मेरी गाड़ी के सामने चार मोटर साइकिल सवार कुल 7/8 लोग सामने से कम्पनी बाग से रावतपुर रोड पर आ गए और मेरी गाड़ी पर ठोकर मारी सामने से मारी, मेरे विरोध करने पर मेरे साथ मार पीट कर मुझे गाड़ी के बाहर गिरा दिया तथा 3/4 लोग गाड़ी में बैठ कर जिनमें एक व्यक्ति गाड़ी चलाकर लेकर भाग गया, जिस में मेरी पत्नी भी बैठी थी, उपरोक्त में से दो लोग टोपी लगाय थे, सभी लोग रावतपुर की तरफ गाड़ी लेकर भाग गए मैं, थाने आकर सूचना दे रहा हूँ। मेरी रिपोर्ट लिखकर आवश्यक कार्यवाही करने की कृपा करे। प्रार्थी ह० अग्रेजी पियूष, पियूष श्याम दसानी पुत्र श्री ओम प्रकाश श्यामदसानी Mob. 9956353535 निवासी- 117/H-1/187 पाण्डू नगर थाना- काकादेव दिनांक- 28.7.14 लेखक अभिनव पोद्दार निवासी- सिविल लाइन योग टावर Mob. 9956037000.

ह० C/C 1632 महेश चन्द्र दुबे
थाना- स्वरूप नगर
जनपद- कानपुर नगर
दि०- 28/7/14"

4. The police came in action and on the basis of the mobile phone location of victim- Jyoti, wife of the informant, reached the place, where she was found in a critically injured condition inside a Honda

Accord Car. She was taken to hospital and on way she succumbed to the injuries and was declared brought dead.

5. During the investigation, a team of six of Investigating Officers was constituted and on the basis of the call details of the informant as well as the victim, the police started investigation. It was found that the last call was made to victim by the informant on her mobile phone for a few seconds and before that the victim herself made a call to PW-7-Monika Ashudani, who was the paternal aunt (Bua) of the deceased. Later on, during investigation, the police found that there is sufficient evidence against Piyush Shyamdasani, who is the husband of the victim, therefore, arrested him and thereafter, based on his disclosure statement four other accused persons, namely, Awadhesh Chaturvedi, Renu @ Akhilesh Kanaujiya, Ashish Kashyap and Sonu Kashyap were arrested. Later on, the police found evidence worth arrest against accused- Manisha Makheeja and she was also arrested. The police collected the post-mortem report of the victim and thereafter, on the basis of the confessional statements made by the aforesaid accused, certain recoveries of articles, i.e. blood stained handkerchief and blood stained clothes belonging to the victims, were effected. Similarly, the weapon of offence i.e. four knives were also recovered which were sent for forensic examination.

6. On completion of investigation, the charge-sheet was presented and the trial court framed the charges against all the accused persons under Sections 364, 302, 201, 120B, 404, 34, 203, 202 I.P.C and Section 4/25 of Arms Act.

7. It is worth noticing that the bail applications of accused- Piyush Shyamadasani, Renu @ Akhilesh Kanaujiya, Sonu Kashyap, was rejected vide order dated 17.8.2023 by this Court, however, the bail applications of Manisha Makheeja, Awadhesh Chaturvedi and Ashish Kashyap were allowed vide order dated 2.2.2023.

8. Piyush Shyamdasani filed Special Leave to Appeal (Crl.) No(s). 12641 of 2023, which was dismissed as withdrawn vide order dated 20.2.2024.

9. The present appeals are filed against the impugned judgment as stated above.

10. The informant has also filed Criminal Appeals No.121 of 2023 (Shankar Lal Nagdev vs. State of U.P.) under Section 372 of Cr.P.C. challenging the acquittal of accused- Mukesh Shyamdasani, Kamlesh Shyamdasani, and Smt. Poonam Shyamdasani.

11. For the sake of brevity, all the accused-appellants are referred to as per the memo of judgment of the Trial Court as under:

A-1	Piyush Shyamdasani
A-2	Manisha Makheeja
A-3	Awadhesh Chaturvedi
A-4	Renu @ Akhilesh Kanaujiya
A-5	Sonu Kashyap
A-6	Ashish Kashyap

12. All the accused persons did not plead guilty and claimed the trial.

13. The trial court recorded as much as 37 prosecution witnesses which are referred to in three categories i.e. witnesses of facts,

the Investigating Officers and the witnesses who gave technical expert evidence.

A. The witnesses of facts are read as under:

1.	PW-1	Rajesh @ Raja Nagdev, uncle of deceased- Jyoti
2.	PW-2	Vishesh Nagdev, brother of deceased- Jyoti
3.	PW-3	Smt. Maya Devi @ Kanchan Nagdev-mother of deceased- Jyoti
4.	PW-4	Hitesh Nagdev, elder brother of deceased- Jyoti
5.	PW-5	Triveni Shankar Dixit, Astrologer
6.	PW-6	Shankar Nagdev, father of deceased- Jyoti
7.	PW-7	Monika Ashudani, bua of deceased- Jyoti
8.	PW-8	Sanjay Khan, waiter at Varanda Restaurant

B. The Investigating Officers are read as under:

1.	PW-9	Const. Mahesh Chandra Dube
2.	PW-10	Const. Shri Narayan
3.	PW-11	SI Bholendra Chaturvedi
4.	PW-12	SI Rajesh Kumar Shukla
5.	PW-13	SI Smt. Poonam Awasthi
6.	PW-14	Abhinav Poddar
7.	PW-15	SI Harishankar Mishra
8.	PW-16	SI Jitendra Mohan Singh
9.	PW-18	SI Akhilesh Kumar Gaud
10.	PW-23	SI Shashibhushan Mishra
11.	PW-26	SI Dharm Prakash Shukla
12.	PW-27	SI Gopi Chandra Yadav
13.	PW-29	Const. Kulbhushan Singh
14.	PW-30	Inspector Rajeev Dwivedi

15.	PW-31	Sub Inspector Reena Gautam
16.	PW-32	Const. Karan Kumar Singh
17.	PW-34	Inspector Shiv Kumar Singh Rathaur
18.	PW-35	Const. Om Prakash
19.	PW-36	Head Constable, Brij Kishore Dixit
20.	PW-37	Sub Inspector- Ram Prakash
21.	CW-2	HCP Tejbahadur Singh
22.	CW-3	Inspector Shiv Kumar Singh Rathor

C. The witnesses who gave technical evidence are read as under:

1.	PW-17	Shubham Poddar, owner of Varanda Restaurant
2.	PW-20	Arvind Srivastava (Nodal Officer Tata Teleservice Ltd.)
3.	PW-21	Rajeev Singh Sengar (Nodal Officer Bharti Airtel)
4.	PW-22	Kaushik Ghoshal (Nodal Officer Vodafone)
5.	PW-24	Dr. Praveen Kumar Srivastava, In-charge Forensic Field Unit, Cantt
6.	PW-25	Vinod Kumar (Sr. Forensic Scientist), In-charge Forensic Field Uni, Kanpur Nagar
7.	CW-1	Madhu Balasu (Nodal Officer)

14. PW-1- Rajesh @ Raja Namdev, the real uncle of the deceased stated as under:

"आज दिनांक 19.8.15 को गवाह राजेश @ राजा नागदेव S/O स्व० रामचन्द नागदेव, उम्र 47 वर्ष पेशा

व्यापार R/O 914/A नेपियर टाउन, जबलपुर ने सशपथ बयान किया कि-

मृतक ज्योति श्याम दसानी मेरी सगी भतीजी थी, उसका घर का नाम पूजा था हमारे सिन्धी समाज में विवाह के बाद लड़की का नाम बदल दिया जाता है इसलिये उसका नाम ज्योति रखा। मैं पियूष श्याम दसानी के अतिरिक्त उनके पिता ओम प्रकाश, माता पूनम, भाई मुकेश व चाचा कमलेश को जानता हूँ जो सभी एक ही घर में रहते हैं।

ज्योति का विवाह कानपुर में 28.11.12 को पियूष श्याम दसानी के साथ हिन्दू रीति रिवाज से हुआ था।

ज्योति की मृत्यु की सूचना 27/28 की रात तीन सवा तीन बजे मिली। मृत्यु की सूचना मिलने से पूर्व रात सवा दो बजे मेरे बड़े भतीजे विशेष ने मोबाइल पर फोन कर बताया कि मेरे पापा शंकर नागदेव का फोन आया है और उन्हें कानपुर से यह खबर लगी है कि पूजा @ ज्योति तथा पियूष का अपहरण हो गया है। यह खबर उन्हें चुन्नी लाल द्वारा मिली थी। इस खबर के बाद मैं व मेरा भतीजा विशेष नागदेव के साथ बड़े भाई शंकर नागदेव के पास पहुँचे। वहाँ पहुँचे तो मेरे भाई व भाभी कंचन नागदेव बरामदे में बैठे थे। उन लोगों ने वहीं बात बताई कि चुन्नी लाल का फोन आया है कि ऐसा ऐसा हुआ है। मेरे कहने पर मेरे भाई ने चुन्नीलाल को जो उनके समर्थी है। को फोन लगाया। फोन चुन्नीलाल ने उठाया और फोन पर एक बात और बताया कि पियूष की हत्या हो गई है तथा पूजा @ ज्योति सीरियस है तथा I.C.U में भर्ती है। हम लोग हतप्रभ हुये, कुछ समय में नहीं आया तो मैंने पुनः चुन्नीलाल को फोन मिलाया। फोन ओमप्रकाश ने उठाया। इस बार उन्होंने बताया कि ज्योति की हत्या हो गई है और पियूष सीरियस है। उन्होंने बताया कि हमारे ऊपर कहर टूट पड़ा है। आप लोग जल्दी निकलिये। हम लोग तुरन्त कानपुर के लिये निकल पड़े। मैं मेरा बड़ा भाई शंकर नागदेव, भाभी कंचन जबलपुर से निकले तथा भाभी का बड़ा भाई नारायण पंगनानी सतना से हम लोग के साथ हो लिया। हम लोग कानपुर स्टेशन आकर श्री ओम प्रकाश के घर पांडु नगर पहुँचे। वहाँ पर लड़की की शव यात्रा की पूरी तैयारी करके रखी गई थी। हम लोगों के पहुँचने पर शव उठाने की बात पूछी हमने उसका विरोध किया कि मुझे लड़की का शकल देखना है। मेरे कड़े विरोध के बाद उन्होंने लड़की का चेहरा दिखाया। फिर शव यात्रा मेरी अनुमति से प्रारम्भ हो गई। अन्तिम संस्कार के पश्चात हम तीनों ओम प्रकाश के पास गये और कहा कि पियूष से मिलवाइये। उन्होंने बताया कि पियूष अभी सो रहा है। हमारे बार- बार कहने पर वह महें पियूष के कमरे में ले गये जहाँ वह अपनी माँ से बात कर रहा था। हम लोगों ने पियूष से पूछा तो उसने बताया कि हम दोनों Long drive पर जा रहे थे तीन-चार मोटर साइकल पर सात-आठ लोग आये तथा मेरे को गाली देते हुये कोई नुकीली चीज मेरे हाथ में मारकर मुझे उतार दिया तथा गाड़ी के साथ ज्योति को लेकर फरार हो गये मैंने

चोट दिखाने को कहा तो कोई चोट नहीं दिखी। मैंने दूसरा प्रश्न पियूष से किया कि तुमने पुलिस को फोन क्यों नहीं किया। जिसका उसने कोई उत्तर नहीं दिया। जब मैंने तीसरा प्रश्न किया तुम्हारी पत्नी को ले जाया जा रहा था। तो तुमने विरोध क्यों नहीं किया तो वह चुप रहा।

घटना से करीब 15 दिन पूर्व मेरे भाई से मेरी बात चीत हुई थी। जहाँ मेरा भतीजा मौजूद था उन्होंने बताया कि पूजा बहुत कठिनाई में है। भाई साहब ने बताया कि पियूष बहुत बिगड़ैल किस्म का लड़का है तथा पियूष का बगल के रहने वाली गुप्ता की लड़की से Strong affair है उसका लड़की का नाम मनीषा है। पियूष रात को 12-01 बजे चला जाता है और सुबह 4-5 बजे लौटता है। पूजा बहुत परेशानी में है उसका कोई हल निकालना है। फिर हम लोगों ने तय कि रक्षा बन्धन का त्योहार आने वाला है उस पर पूजा को बुलाकर बातचीत करके व जरूरत पड़ी तो कानपुर जाकर उनके माता पिता से बात करके हल निकालना है। फिर हमने पूजा पर निगरानी मतलब फोन पर बातचीत, करने लगे। फिर हमने सूचना मिली कि स्थिति और बिगड़ गई है।

घटना के तीन चार दिन पूर्व मेरी पत्नी से पूजा से फोन पर बात हो रही थी तथा मैंने वहीं फोन लेकर पूजा से बातचीत की तो उसने बताया कि स्थिति बिगड़ गई है। आज पियूष के फोन पर मनीषा का फोन आया था तो मैंने उसे उठा लिया तो मनीषा पियूष समझकर यह कह रही थी कि जल्दी काम कराओ। मनीषा ने बोला था लड़के वाले आने वाले है मेरा रिस्ता कही तय हो रहा है।

पूजा @ ज्योति मुझे भड़का कहती थी यद्यपि मैं सगा चाचा हूँ। फोन पर बात से हम लोगों को यह स्पष्ट हो गया कि पियूष ने मनीषा के कारण साजिश रचकर पूजा @ ज्योति की हत्या करवा दी।"

15. In cross-examination, this witness stated that the statement was recorded by the police on two occasions, firstly on 28.7.2014 and then on 8.8.2014. In cross-examination, this witness stated as under:

"जब घटना के करीब 15 दिन पहले शंकर नागदेव ने मुझसे बुलाकर पियूष व पूजा के सम्बन्धों में बताया तो अचम्भा हुआ, मैंने कल्पना भी नहीं की थी। दरोगा जी ने जब मेरा पहला बयान लिया था कि घटना से करीब 15 दिन पूर्व मेरे भाई से मेरी बातचीत हुई जहाँ मेरा भतीजा मौजूद था। उन्होंने बताया कि पूजा बहुत कठिनाई में है। भाई साहब ने बताया कि पियूष बहुत बिगड़ैल किस्म का लड़का है तथा पियूष के बगल में रहने वाली गुटका व्यवसाई की लड़की से Strong affair है उसका लड़की का

नाम मनीषा है। पियूष रात को 12 बजे चला जाता है और सुबह 4-5 बजे लौटता है। पूजा बहुत परेशानी में उसका कोई हल निकालता है। फिर हम लोगों ने तय किया कि रक्षा बन्धन का त्योहार आने वाला है उस पर पूजा को बुलाकर व जरूरत पड़ी तो बातचीत कर व उनके माता पिता से हल निकालना है। फिर हम लोगों ने पूजा पर निगरानी मतलब बातचीत करने लगे। यह बातें मैंने दरोगा जी बताई थी यदि नहीं लिखी तो उसकी वजह नहीं बता सकता क्योंकि मैंने विवेचक की शिकायत की थी। कि मनीषा को पुलिस Support कर रही थी। दिनांक 8.8.14 को मेरा बयान लिखा गया था बयान लिख पढ़कर सुनाया नहीं गया। यदि 28.7.14 व 8.8.14 के बयानों में कहीं भी मनीषा का नाम न आया हो तो कारण नहीं बता सकता यद्यपि मैंने मनीषा का नाम बताया था।

दिनांक 28.7.14 के बयान में कि फिर हमने पूजा पर निगरानी मतलब फोन पर बातचीत करने लगे। फिर हमें सूचना मिली कि स्थिति और बिगड़ गई है। जो भी दरोगा जी को बताया यदि न लिखी हो तो मैं वजह नहीं बता सकता। मैंने 28.7.14 के बयान में दरोगा जी को यह बात कि घटना के 3-4 दिन पूर्व मेरी पत्नी से पूजा से फोन पर बातचीत हो रही थी तभी मैंने वहीं फोन लेकर पूजा से बातचीत की तो उसने बताया कि स्थिति बिगड़ गई है। आज पियूष के फोन पर मनीषा की फोन आया तो मैंने उसे उठा लिया तो मनीषा पियूष समझकर यह कह रही थी कि जल्दी काम कराओ मनीषा ने बोला था कि लड़के वाले आने वाले हैं। मेरा रिश्ता कहीं तय हो रहा है। दरोगा जी को बताया था यदि नहीं लिखा तो मैं उसकी वजह नहीं बता सकता। 8.8.14 के बयान में कि पियूष के फोन पर मनीषा का फोन आया था तो मैंने उसे उठा लिया तो मनीषा पियूष समझकर यह कह रही थी कि जल्दी काम कराओ मनीषा ने बोला था लड़के वाले आने वाले हैं। मेरा रिश्ता कहीं तय हो रहा है। यह बात दरोगा जी की बताई थी या नहीं मुझे ध्यान नहीं है। दिनांक 8.8.14 को बयान में यह बात होगी कि पियूष सुबह 4-5 बजे लौटता है। यह बात दरोगा जी को बताई थी यदि नहीं लिखी तो वजह नहीं बता सकता। मैंने दिनांक 08.8.14 को यह बात कि हम लोग पूजा पर निगरानी मतलब फोन पर बातचीत करने लगे बताई थी यदि नहीं लिखी तो वजह नहीं बता सकता। "

16. This witness further stated that his family has every reason to believe that Piyush Shyamdasani got the murder of Pooja @ Jyoti, however, if his statement is not recorded by the police, he cannot give any explanation.

17. PW-2- Vishesh Nagdev, brother of deceased Jyoti, has also deposed on the same line as PW-1. This witness stated that on the date of incident, Jyoti made a phone call regarding the family problem and he (PW-2) told her that after 12-15 days, on the occasion of Raksha Bandhan, the victim will come to Jabalpur and they will sort out the problem. This witness deposed on the same line as the deposition made by PW-1 regarding the strained relationship between A-1 and the victim. This witness when confronted with statement under Section 161 of Cr.P.C., he stated that he has told about the affair of A-1 with A-2 to the I.O., if the same is not recorded, he cannot give any other reason.

18. PW-3- Smt. Maya Devi @ Kanchan Nagdev, mother of the deceased also deposed on the same line. The operative part of her statement read as under:

" घटना के 15 दिन पूर्व ज्योति ने टेलीफोन कर बताया कि पानी सर के ऊपर आ गया है, बर्दाश्त नहीं हो रहा है, अब मैं सब खुल कर आपको बताऊंगी। फिर उसने बताया कि यह जो मोबाइल पर होने वाली बातें होती हैं वह बाजू में रहने वाली गुटखे वाले की बेटी मनीषा से उसके affair है, पियूष उसी से बातें करता रहता है। उसके पीछे वह पागल हो चुका है। रात को गायब रहता है। मुझे बात-बात पर चिल्लाता है और डांटता है। मैंने फोन पर ज्योति से कहा कि सभी बातें अपने सास, ससुर जेठ व बड़ी सास को बताओ। बेटी ने कहा कि मैं सब को बता चुकी हूँ, सब को यह बात मालूम है। मेरी बेटी ने यह भी बताया कि सास ससुर आदि कहते हैं कि आज कल के जमाने में बच्चे यही करते हैं, इसको issue मत बनाओ, बात को हल्के में लेकर छोड़ दो। मेरी बातों पर किसी ने ध्यान नहीं दिया।

मैंने इस समस्या के समाधान की कोशिश की थी, मैंने अपनी बेटी की सास को फोन किया था जो उस समय कलकत्ता में थी। मैंने बेटी की सास को बताया कि वह (पियूष) मनीषा के पीछे पागल हो चुका है, आप अपने बेटे को समझाओ, मैंने यह भी कहा कि मेरी बेटी से दूरियां बढ़ती जा रही हैं, वह खुश नहीं है। उन्होंने कोई सन्तोष जनक जबाब नहीं दिया और कह कि जाने के बाद देख

लेंगे। फिर मैंने बेटी को बड़ी सास को फोन किया व उनको भी बताया कि पियूष का बाजू वाली लड़की मनीषा से सम्बन्ध है जो बढ़ गये है, आप अपने बेटे को समझाओ। उन्होंने भी यह कह कर कि समझायेंगे और फोन रख दिया।

दिनांक 27 घटना वाले दिन शाम को ज्योति से टेलीफोन पर बात हुई थी उसने बताया कि पियूष मनीषा के पीछे हद से ज्यादा पागल हो गया है कुछ भी कर सकता है। मैंने उसे धैर्य बंधाया। मैंने कहा धीरज रखो तुम रक्षाबन्धन पर आने वाली हो आम्ने सामने बात होगी, समाधान निकालेंगे। यह फोन land line वाले फोन पर आया था। ज्योति घबराई हुई थी, मैंने पूछा घबराई हुई क्यों हो तो उसने बताया कि मैंने एक दी दिन पहले पियूष का फोन उठा लिया जिस पर मनीषा का फोना आया था, मनीषा कह रही थी कि जल्दी से ज्योति का काम खतम करा दो मुझे देखने वाले आने वाले है मेरी शादी कहीं और न करा दे। इससे मैं डर गई। मैंने उसे ढाँढस बंधाया कि तुम आने वाली हो हम लोग समझा लेंगे, ये नाजुक रिश्ते है। जल्दी तोड़े नहीं जाते। उस दिन दो तीन बार फोन आया था। आखिरी फोन मेरे बड़े बेटे विशेष नागपाल ने उठाया था। "

19. This witness also proved the ornaments of the victim i.e. yellow metal ring, Ex.1, white metal ring, Ex.2, white metal pearl ring, Ex.3 and yellow metal earrings, Ex.4, which were recovered by the police vide Ex.Ka.2 along with letter, Ex.Ka.3. This witness also proved the two diaries of the victim, by stating that the same are in handwriting of her daughter vide Ex.5 and Ex.6. She also proved that the physical project report of B.Ed., recovered from the almirah of her daughter vide Ex.7 and Ex.8.

20. In cross-examination, this witness stated that after the cremation, he went to the house of one Balram, who is a brother of her extended family. His house is situated just after one or two house of Piyush.

21. This witness stated that after the marriage, her daughter came to her parental home on three occasions, when confronted

with her statement under Section 161 of Cr.P.C. She stated as under:

"पियूष का हमारे बेटों से कोई खास दोस्ताना नहीं था थोड़ा बहुत घूम फिर लेते थे। मेरी बेटी तीन बार मेरे घर आई तब कोई बात नहीं बताया। घटना के 15 दिन पूर्व विवाद वाली बातें बताई। मैंने 15- 20 दिन पहले बेटी द्वारा टेलीफोन पर बताई गई बात दरोगा जी को बताया था। यदि दरोगा जी ने मेरे बयान मे नहीं लिखा हो मै वजह नहीं बता सकती, स्वयम् कहा पुलिस मनीषा को बचाना चाहती थी। मैंने पुलिस को यह बात भी पुलिस को बताई थी, पानी सर के ऊपर आ चुका है, बर्दाश्त नहीं हो रहा है अब मैं सब खुल कर आपको बताऊंगी। यदि पुलिस ने मेरे बयान मे नहीं लिखा तो मै इसकी वजह नहीं बता सकती। मैंने दरोगा जी को बताया था कि पियूष बाथरूम मे भी जाता है तो मोबाइल लिये रहता है, मेरे से कोई रुचि नहीं लेता है। यदि पुलिस ने मेरे बयान मे नहीं लिखा तो मैं वजह नहीं बता सकती। मैंने घटना के 15 दिन पूर्व ज्योति ने मुझे टेलीफोन पर यह भी बताया था कि यह जो मोबाइल पर होने वाली बातें होती है वो बाजू मे रहने वाली गुटखे वाली की बेटी मनीषा से उसके affair है, पियूष उसी से बातें करता रहता है, उसके पीछे वह पागल हो चुका है, रात को गायब रहता है। यह बयान मैंने दरोगा जी को बताया था यदि दरोगा जी ने नहीं लिखा तो मैं वजह नहीं बता सकती। खुद कहा क्यों कि पुलिस मनीषा को बचा रही थी। मैंने हलफनामे पर किसी अधिकारी को इस बारे मे बयान नहीं दिया फिर कहा याद नहीं है। यह कहना गलत है कि मैं इस बात को जान बूझ कर छिपा रही हूँ कि मैंने हलफनामा दिया ही नहीं है। बल्कि मुझे याद ही नहीं है। मेरे पति ने मजिस्ट्रेट के सामने हलफ पर बयान दिया है, औरो के बारे मे नहीं मालुम, मैंने मजिस्ट्रेट के सामने बयान नहीं दिया। मैंने पुलिस को यह भी बताया था कि जब ज्योति का टेलीफोन आया था तो मैंने उससे कहा कि अपने सास ससुर, जेठ व बड़ी सास को बताओ। यह बातें बातें पुलिस को बताई थी। यदि पुलिस ने नहीं लिखा तो मै वजह नहीं बता सकती। मेरी बेटी ने यह बताया कि यह बात मै सब को बता चुकी हूँ सब को मालुम है। यह बात मैंने पुलिस को बताई थी यदि नहीं लिखा तो मै वजह नहीं बता सकती। मेरी बेटी ने मुझको टेलीफोन पर बताया था कि सास ससुर आदि कहते है कि आज कल के जमाने मे बच्चे यही करते हैं,। इसका issue मत बनाओ, बात को हलके मे लेकर छोड़ दो। पुलिस को बताया था यदि नहीं लिखा तो वजह नहीं बता सकती। पुलिस को यह बात भी बताई थी कि मेरी बातो मे किसी ने ध्यान नहीं दिया। यदि नहीं लिखा तो मै वजह नहीं बता सकती। "

22. In further cross-examination by A-2, this witness stated that she has informed to the Investigating Officer about name of

A-2 and if it is not mentioned, she cannot tell the reason. She denied a suggestion that she has given the name of A-2 for the first time in court.

23. PW-4- Hitesh Nagdev, younger brother of deceased- Jyoti also deposed on the same line and gave description of the mobile phone used by his family member. The operative part of statement read as under:

"ज्योति मेरी सगी बड़ी बहन थी। उसकी शादी 28-11-12 को हाजिर अदालत पियूष श्याम दसानी के साथ हुई थी। शादी के बाद वह बिदा होकर कानपुर अपनी ससुराल गई। ससुराल में जाने के बाद फोन द्वारा ज्योति से सम्पर्क होता रहता था। मेरे परिवार में और लोगों के पास फोन है। घर पर *Land Line* व *Mobile* दोनों हैं। *L/L* का नम्बर कोड नं० 0761 एवम् फोन नम्बर 2610340 है। दूसरा *L / L* का नम्बर 4042572 है। मेरे अपने मोबाइल का नम्बर 9926350009 तथा दूसरे मोबाइल का नम्बर 7415179254 है। मेरे अलावा मेरे परिवार में ज्योति से मेरे पिता शंकर नागदेव, मेरा मां कंचन मायादेवी नागदेव, बड़े भाई विशेष नागदेव और मेरे चाचा राज @ राजेश नागदेव व चाची श्रीमती सोनल नागदेव तथा बुवा मोनिका आशुदानी से भी बात होती रहती थी। मेरे भाई विशेष नागदेव का नं० 9425969999, चाचा राजा का नम्बर 9425154512, चाची सोनल का मोबा० नं० 9329845995 है। ज्योति के बारे में हुई घटना के बारे में मुझे 27/28 की रात 2 - 2 1/2 बजे सूचना मिली थी कि कानपुर से ज्योति के साथ घटना हो गई है। तब पिता ने बताया कि हम लोग कानपुर के लिये रवाना हो रहे हैं और कहा कि तुम अपने भाई के साथ यहीं रुको। दो घन्टे बाद मैं भी कानपुर के लिये रवाना हो गया क्योंकि ज्योति मेरी बड़ी बहन थी, मेरा लगाब था व बेचैनी हो रही थी मैं अगले दिन 28 तारीख को कानपुर पहुंचा। मैं कानपुर पियूष के घर पहुंचा। ये लोगों मेरे माता, पिता व चाचा दाह संस्कार के बाद कानपुर में मेरे चाचा बलराम के घर के लिये निकल रहे थे। मैं भी उन लोगों के साथ बलराम *Uncle* के घर गया जिनका घर पियूष के घर से एक दो घर छोड़कर है।

घटना के बारे में दरोगा जी ने बलराम *Uncle* के घर पूछताछ की थी। दिनांक 23-7-14 को मेरी आखिरी बात मेरी मोबाइल पर लगभग 11 बजे रात ज्योति से हुई थी। पहले तो बड़ी बहन के नाते सामान्य बात हुई थी फिर वह

बहुत घबराई हुई थी तब मैंने पूछा क्या हुआ। तब उसने कहा आज सच्चाई सामने आ गई है। उसने बताया कि पियूष का फोन बज रहा था मैंने उठा लिया, वह फोन मनीषा का था। मनीषा ने जल्दी जल्दी पियूष समझ कर यह बोला कि ज्योति को जल्दी निपटाओ, मेरे देखने वाले आ रहे हैं मेरी शादी कही और हो जायेगी। मैंने कहा कि घबराओ नहीं रक्षा बन्धन पर घर आ ही रही हो, सब ठीक हो जायेगा। घटना होने के बाद मैंने महसूस किया व मुझे लगा कि पियूष ने मनीषा के साथ षड्यन्त्र कर ज्योति की हत्या कराई।

मेरे बयान में दरोगा जी ने यह बात कि " दिनांक 23-7-14 को आखिरी बार मेरे मोबाइल पर रात लगभग 11 बजे ज्योति से हुई थी। पहले तो बड़ी बहन के नाते सामान्य बात हुई थी फिर वह घबराई हुई थी तब मैंने पूछा क्या हुआ तब उसने कहा आज सच्चाई सामने आ गई है। उसने बताया कि पियूष का फोन बज रहा था मैंने उठा लिया। वह फोन मनीषा का था। मनीषा ने जल्दी जल्दी पियूष समझ कर यह बोला कि ज्योति को जल्दी निपटाओ, मेरी शादी कही और हो जायेगी। मैंने कहा घबराओ नहीं, रक्षा बन्धन पर घर आ ही रही हो, सब ठीक हो जायेगा। घटना होने पर मुझे महसूस हुआ कि पियूष ने मनीषा के साथ षड्यन्त्र कर ज्योति की हत्या कराई नहीं लिखी हो तो मैं वजह नहीं बता सकता। "

24. In cross-examination, this witness also stated that he cannot tell if the Investigating Officer has not recorded this fact in statement under Section 161 of Cr.P.C., about the conspiracy between the A-1 and A-2.

25. PW-5- Triveni Shankar Dixit, an Astrologer of Kanpur, this witness has stated as under:

" मैंने ज्योति और उसके पति का जन्मपत्री देखकर बताया था कि इनका दाम्पत्य जीवन ठीक नहीं है। दाम्पत्य जीवन ठीक रखने के लिए उपाय बताया था कि सात मंगलवार गाय को गुड़ खिलाएं। आठवां मंगल छोड़कर फिर सात मंगलवार गुड़ खिलाएं और इसी क्रम में सात महीना गुड़ खिलाते रहे और मंगल देव की प्रार्थना करते रहे कि हमारा परिवारिक जीवन सुखमय हो। यह सुझाव मैंने ज्योति को दिया था। ज्योति को यह भी सुझाव दिया था कि पियूष की बुद्धि ठीक करने के लिए सुबह बुधवार को बुद्ध देव से प्रार्थना करे और गाय को हरी चीजे खिलाएं। उस समय यानी सुझाव देते समय परिवार का कोई सदस्य नहीं था। पूनम ज्योति की सास ने पियूष और ज्योति के सम्बन्ध में चर्चा की थी कि दोनों सम्बन्ध

अच्छे नहीं है कैसे ठीक होंगे। उनको भी यही उपाय बताया था। मैं उनके परिवार में 5-6 बार गया हूँ। मुझे परिवार से बाहर छोड़ने ज्योति आती थी। ज्योति ने मुझसे (sic) यह बात की कि मेरे पति से सम्बन्ध कैसे ठीक होंगे। उसने मुझे यह भी बताया कि मुझे अपने पति से खतरा है। मैंने उसके मन की शान्ति के लिए मोती की अंगूठी पहिने को कहा। इसके अलावा ज्योति ने और कोई बात नहीं की। मैंने जो अंगूठी अभिमंत्रित करते ज्योति को दिया था उसकी शिनाख्त स्वरूप नगर थाने में मजिस्ट्रेट के समक्ष मुझसे करायी गयी थी। वह उक्त अंगूठी वस्तु प्रदर्श - 3 आज मेरे सामने न्यायालय में है गवाह ने अंगूठी का शिनाख्त की यह अंगूठी सफेद धातु की है जिसमें मोती लगा है।”

26. This witness proved the statement recorded before the Magistrate under Section 164 of Cr.P.C. as Ex.Ka.4. In cross-examination, he gave vague replies to the question of various persons visiting his office by saying the he did not remember their names. In cross-examination by A-2, this witness stated that his statement for the first time was recorded on 19.8.2014, the operative part of the statement read as under:

“जब मैं मजिस्ट्रेट साहब को बयान देने आ रहा था उसके एक दिन पहले दिनांक 03-5-14 को मैं शंकर नागदेव व उनकी पत्नी से नहीं मिला था न उनके साथ रहा। मैं मजिस्ट्रेट साहब के सामने बयान देने अकेला आया था साथ में कौन आता है या नहीं आता है मुझे नहीं मालूम। मैंने यह बात पुलिस को नहीं बतायी थी। कि” उसका किसी लड़की से सम्बन्ध है लड़की का नाम मनीषा ... बताया जो उसके घर के सामने रहती है। मनीषा के कहने से उसका पति पीयूष कुछ भी कर सकता है। यह बात इसलिए नहीं बतायी थी कि अब तक यह बात मेरे संज्ञान में नहीं थी, बाद में मालूम हुई। ज्योति ने बताया था। मैं अखबार पढ़ता हूँ। जिस दिन से घटना हुई अखबारों में अक्सर मनीषा का नाम आता था। ज्योति से आखिरी बार मेरी मुलाकात घटना के 4-5 दिन पूर्व हुई थी।”

27. In cross-examination, this witness stated that he has given the statement to the I.O. that he has no knowledge about the relationship of A-1 and A-2 but later on he came to know about it. In further cross-

examination by A-1, he has stated that he has made statement to the I.O. about his ignorance of relationship between A-1 and A-2 and that he made a call to the victim 4-5 days prior to the incident but the same was not recorded by the I.O. and he cannot tell the reason.

28. Shankar Nagdev (PW-6), father of witness stated that his statement was recorded before the Magistrate under Section 164 Cr.P.C.. It is further stated that he has gone to identify the jewellery and out of some rings kept on the table, he identified three rings with the help of his wife. He stated that he is the owner of a factory in Jabalpur. Regarding matrimonial alliance between accused A1 and A2, this witness stated as under :

“करीब एक-डेढ़ माह वार्ता चलने के बाद विवाह तय हुआ था तथा उसके चार-पांच माह बाद विवाह हुआ था। विवाह की बातचीत से तय होने तक पियूष के परिवार वाले केवल एकवार आये थे। शादी तय होने के बाद व विवाह के पूर्व पियूष मेरे घर जबलपुर अकेले आया था और एकदिन रहा था। शादी की जब बातचीत शुरू हुई तब मैं कानपुर एक बार आया और उसके बाद पियूष का परिवार एक बार जबलपुर आया और शादी तय हो गई। जबलपुर की महिला मीना आहूजा मध्यस्थ थी जो Marriage Bureau चलाती हैं। मैंने कानपुर के अपने जानने वाले रिश्तेदारों से लड़के के परिवार वालों के बारे में जानकारी की थी व वलराम व चन्द्रा से भी उनके बारे में पूछा था। मैंने लड़के वालों के हैसियत के बारे में जानकारी की थी तो लोगो ने बताया था कि ठीक ठाक है। एक जानकारी और मिली थी कि लड़के का एक रिश्ता पहले तय होकर टूट चुका है। मुझे जानकारी हुई थी कि लड़की वालों ने रिश्ता तोड़ा था। दोनो पक्ष एक दूसरे पर आरोप-प्रत्यारोप लगा रहे थे। मैंने पियूष से भी रिश्ता टूटने के बारे में पूछा था कि आपका किसी अन्य लड़की से सम्बन्ध है, यह आरोप लड़की लगा रही है। तब पियूष ने बताया कि उसने उसका फोन नहीं उठाया था क्योंकि मैं फैक्ट्री व्यस्त था इसलिये शक कर लिया। मैंने गहराई से पता लगाया तो मुझे उस समय ऐसा कोई साक्ष्य नहीं मिला कि उसका किसी लड़की से सम्बन्ध है।”

29. This witness further stated that after he received the information of the

incident, for the first time, he met the police in the house of Balram where he stayed for two days. With regard to his confrontation with the statement under Sections 161 and 164 Cr.P.C., this witness stated as under:

“मैने पुलिस को 28.07.14 को यह वयान नहीं दिया था कि “पुनः दूसरी बार रक्षा बन्धन अगस्त 2013 में मेरे घर जवलपुर आई। मेरी पत्नी ने उससे पुनः काफी पूछने की कोशिश की क्योंकि वह इस बार पहले से ज्यादा घबराई हुई थी। मेरी पत्नी ने काफी कोशिश करने पर उससे पूछा तो उसने बताया कि मेरी Problem मैं खुद Solve कर लूंगी, आप लोग बार-बार मत पूछिये, पापा की तबियत खराब रहती है, आप लोग tention मत लीजिये। इस बार भी वह बाकी बातें टाल गई।” मैने अपने प्रथम बयान dt 28.7.14 में यह बात कि पहली बार मेरी विटिया जवलपुर आई, स्वास्थ्य गिर गया था मैने व मेरी पत्नी ने पूछा तो टाल गई यह वयान नहीं दिया था। लेकिन दरोगा जी को प्रथम बयान मे बताया था कि “यह इसलिये टाल गई थी कि उसका वैवाहिक जीवन सुखमय नहीं था।” यदि दरोगा जी ने न लिखा हो तो मैं वजह नहीं बता सकती। यह बात मैने दरोगा जी को 11.8.14 के वयान में यह बात बताई थी कि “जब मैने पूजा से पूछा कि तुम दुबली क्यों हो, जो पियूष की मौजूदगी मे पूछा, तो पियूष ने कहा कि नहीं पापा पूजा ने जिम join किया है और आजकल तो slim body का फैशन हैं और विटिया ने पियूष की बात का समर्थन किया और कहा कि जिम join कर लिया है।” मेरी विटिया ने मुझे बताया था कि उससे अपने ससुर भी तबियत के बारे में जब बात होती थी तो वह बताती थी और Normal बातचीत करती थी। जैसे अक्सर मुझसे कहती थी कि पापा जी (ससुर जी) तबियत खराब है आज जान लीजियेगा इत्यादि इत्यादि। मैने मजिस्ट्रेट साहब u/s 164 crpc के बयान मे यह बताया था कि “इस बार जब वह अन्तिम बार जवलपुर आई तब वह पिछली दो बार से ज्यादा परेशान व घबराई हुई थी।” यदि मजिस्ट्रेट ने नहीं लिखा तो वजह नहीं बता सकता। यह बात दरोगा जी को बताई थी या नहीं याद नहीं है। यदि नहीं लिखे तो मुझे याद ही नहीं है क्या कारण बताऊं। मैने पहले वयान मे दरोगा जी को पियूष द्वारा घन्टो मिली से छुप-छुप कर बात करने वाली बात बताई थी। यदि नहीं लिखा तो मैं वजह नहीं बता सकता। मैने अपने पहले दोनो u/s 161 crpc के वयानो मे यह बात बताई थी कि “आखिरी बार मायके से जाने के बाद वह मेरी पत्नी, पुत्रों व परिवार के अन्य सदस्यों से मोबाइल

पर पहले से अधिक बातें करने लगी थी।” यदि मेरे पहले वयान मे नहीं लिखा तो मैं वजह नहीं बता सकता।

मैने अपने पहले, दूसरे व u/s 164 crpc के वयानो मे यह कहा कि “घटना से 15-20 दिन पहले उसने मेरी पत्नी को बताया कि मैं अब आपको बताती हूँ। मैं अब क्यों परेशान हूँ। मेरी बेटी ने पत्नी से बताया कि वह मोबाइल पर छिप कर व वाथरूम मे व अन्य जगहों मे छिपकर किससे बात करता है। हमारे पड़ोस में रहने वाली गुटखा बनाने वाली की लड़की जिसका नाम मनीषा है उसके साथ उसके (पियूष) के अत्यधिक affair हैं। वह उसके चलते मुझे बहुत ही प्रताड़ित करता है व क्रूर व्यवहार कर रहा है वह उसके प्यार में पागल हो गया है।” यदि ये बातें मेरे तीनों बयान मे नहीं आई तो मैं वजह नहीं बता सकता।

Court obsevation:- Case diary के पर्चा नं0 19 बयान dt. 11.8.14 से वयान मे पृष्ठ-8 में विवेचक द्वारा साक्षी के बयान में 26 जुलाई दिन शनिवार रात को 10 बजे वार्ता के सम्बन्ध में यह बयान आया है कि “हमारे घर की वाजू में गुटखा बनाने वालों की सिन्धी लड़की रहती है जिसका नाम मनीषा है जिससे उसका affair चल रहा है। यह बात धारा 164 के बयान मे भी इसी प्रकार से अंकित है।”

30. In further cross examination, this witness stated that on 26.7.2014 at about 10.00 PM, it was Saturday and he was present in Bhagwan Shanidev Temple when he received a phone call from his daughter, victim-Jyoti alias Pooja. She was perturbed and asked whether he was in temple. When PW-6 stated that he is in the temple because of Shani Amawasya, the victim told him to light a lamp in her name. On further enquiry, the victim told that her husband is having affair with a girl named Manisha who belongs to a family, doing business of making Gutkha and is residing in their neighbourhood. She stated that for this reason, her husband i.e. accused A-1 is mentally and physically harassing her.

31. This witness further stated that in his first and second statements recorded under Section 161 and 164 Cr.P.C., he has

told that while understanding the difficulties faced by her daughter in matrimonial alliance, he was sure that Om Prakash, his wife-Poonam, brother-Suresh & Kamlesh, Manisha and Piyush, in conspiracy, have committed murder of his daughter, Jyoti alias Pooja and has registered a false F.I.R.

32. When confronted with the statement under Section 164 Cr.P.C. where he has informed the police about the fact that his sister, Monika Ashudani (PW-7) has informed her that victim Pooja made a phone call to her from the restaurant and she was apprehending threat to her life. However, if it is not so recorded in the statement, he cannot tell about the reason. He denied a suggestion that the story made up regarding relationship of A-1 with A-2 is an after made story.

33. Monika Ashudani (PW-7), the parental aunt (Bua of victim-Jyoti) stated that victim was named Pooja whose name was changed after marriage as Jyoti. She was her real niece and used to call her as Mona Didi. She gave her mobile nos. as 9427418629, 9426040838 and landline Number as 0792685017 and stated that Jyoti used to call on the aforesaid mobile number from her mobile number as 8960868686. She stated that Jyoti was married with accused A-1 on 28.11.2012 and for the first time visited parental home in February. When she used to ask about her matrimonial life, victim would avoid telling anything. This witness further stated as under :

“फिर जब मैं अप्रैल 2014 में पहली बार पूजा की शादी के बाद जबलपुर मे मिली तो मौका मिलने पर अकेले मे मैंने पूजा से पूछा कि पूजा जब भी मैं तुमसे फोन पर तुम्हारे वैवाहिक जीवन या पियूष के बारे में पूछती हूँ तो तुम हमेशा बात टाल देती हो। आज तू मुझे बता आखिर तुझे क्या

problem है। मेरा ऐसा पूछते ही वह फूट कर रोने लगी और पूजा कहने लगी मोना दीदी क्या बताऊँ, पियूष का व्यवहार मेरे साथ बहुत ही बुरा है। वह मुझे बात-बात पर चीखता चिल्लाता है। अपने सारे काम मेरे से कराता है और खुद सारा दिन मोबाइल पर किसी लड़की से बात करता रहता है। इस पर मैंने पूछा कि पियूष तुमसे कैसे काम कराता है तो पूजा ने बताया कि सबेरे *tooth brush* पर *paste* लगवाने से रात को अपने जूते उतरवाने तक को सारे काम करवाता है। पूजा ने कहा जब मैं पियूष से पूछती हूँ कि आखिर आप मेरे साथ ऐसा व्यवहार क्यों करते है तो वह मुझे जवाब देता है कि तुम मेरी पसन्द नहीं हो, मेरे मा-बाप ने मेरी शादी तुमसे जबरदस्ती कारवाई है। मैं जिस लड़की से प्यार करता हूँ उस लड़की से मेरी कुन्दली नहीं मिलने की वजह से लड़की के घर वालों ने उसकी शादी मेरे से नहीं करवाई और यह सब बताते हुये वह रोने लगी। मैंने उसे शान्तवना देते हुये चुप करवाया। दो-तीन घन्टे बाद मैंने फिर से पूजा से अकेले में बात की। मैंने पूजा से कहा कि पूजा अगर पियूष तेरे साथ ऐसा व्यवहार करता है तो तुम अपने सास ससुर को क्यों नहीं बताती हो। इस घर पूजा बोली मोना दीदी जब मैं अपनी सास को यह बात बताती हूँ तो या तो अनसुना कर देती है या हंस कर चली जाती है जिससे मुझे और दुःख होता है। और जब मैंने अपने ससुर से कही तो उन्होंने कहा कि पियूष का व्यवहार धीरे-धीरे ठीक हो जाएगा। ”

34. This witness further stated that she made victim understand that accused A-1 was having love affair with accused A-2, even before marriage and after some time, he will mend his ways as the victim is an adjustable and good wife and, therefore, she advised her not to feel disturbed. This witness further stated as under :-

“फिर घटना के कुछ दिन पहले पूजा ने मुझे फोन किया और कहने लगी मोना दीदी अब मेरे सन्न का बांध टूट रहा है और पियूष जिस लडकी के चक्कर में आकर मेरे साथ ऐसा व्यवहार करता है अब मुझे पता लग गया है कि पडोस में रहने वाली केसर गुटखा वालों की लडकी मनीषा है। इस पर मैंने कहा तू शादी को बहुत समय दे चुकी है अब तू जबलपुर आकर घरवालों को बता। इस पर वह बोली मोना दीदी मैंने जबलपुर में मम्मी को बता दिया है। मम्मी ने कहा है कि वैवाहिक रिश्ते नाजुक होते हैं, हम तुम्हे रक्षाबन्धन पर बुला रहे है और तुमसे बात कर के समस्या का समाधान जरूर निकालेंगे। मैंने कहा कि तू अपने सास ससुर से फिर

से बात कर अब तो तुझे पता चल गया है कि वह लडकी कौन है। इस पर पूजा बोली मोना दीदी मेरे सास ससुर पियूष की गतिविधियों से अच्छी तरह परिचित है और मुझे कहते हैं कि वह लडकी हमारे बेटे की पहली पसन्द है तुम्हारी पियूष से अब शादी हो चुकी है तुम *adjust* करो और घर पर इन बातों को लेकर *issue* मत बनाओ इस पर पूजा यह भी बोली मोना दीदी मैंने अपने सास ससुर की इतनी सेवा की है किन्तु आज घर में मेरा कोई साथ नहीं दे रहा है।

दिनांक 23 जुलाई, 2014 को रात करीब ग्यारह बजे पूजा ने मुझे फोन लगाया और घबराते हुये कहने लगी मोना दीदी पता है आज दोपहर में पियूष का मोबाइल फोन बज रहा था तो मैंने चुपके से उठा लिया तो दूसरी ओर से मनीषा थी और वह एक दम से कहने लगी पियूष ज्योति को जल्दी से निपटाओ नहीं तो मेरे घर वाले मेरी शादी कहीं और करवा देंगे और मुझे लडके वाले देखने भी आने वाले हैं। फिर पूजा बोली मोना दीदी यह सब सुन कर मैं बहुत घबरा गई और मैंने फोन काट दिया उस पर मैंने पूजा से कहा पूजा अब तू यह सब बातें जबलपुर में बताती रहना।

दिनांक 27.7.2014 को रात के लगभग साढ़े दस पौने ग्यारह बजे पूजा से मेरी आखिरी बार बात हुई थी। उस समय मैं अहमदाबाद में थी तथा पूजा कानपुर में एक रेस्टोरेंट में थी। घटना वाले दिन इससे पहले पूजा ने मुझे तीन-चार बार फोन किया था लेकिन मैं उसका फोन *attend* नहीं कर पाई थी। रात को करीब 10-1/2 बजे पूजा से मुझे *message* किया था कि मोना दीदी क्या कर रही हो। उसका *Message* पढ़ कर मुझे एकदम से एहसास हुआ कि आज पूरे दिन भर से पूजा मेरे से बात करना चाह रही थी घटना वाले दिन जब रात के लगभग 10-1/2 पौने ग्यारह बजे जब पूजा से मेरी फोन पर बात हुई तो पूजा ने मुझे बताया कि मोना दीदी आज सबेरे से पियूष का व्यवहार बड़ा अजीब सा है वह मुझे सबेरे कहना लगा कि आज अपन *Sunday* मनाने रात को चलेंगे और हमारे बीच जो *problem* चल रही है इसे *Solve* करेंगे। इस पर मैंने पूजा से पूछा कि पूजा तू अभी है कहां तो इस पर पूजा बोली मोना दीदी मैं पियूष के साथ *restaurant* आई हुई हूँ किन्तु पियूष मुझे *restaurant* में अकेला बिठाकर खुद मोबाइल फोन पर बात करता हुआ कहीं चला गया है। आज वह बड़ा *tention* में है और पता है आज वह किसी से फोन पर कह रहा था कि तू चिन्ता क्यों करती है आज काम हो ही जायेगा। पूजा बहुत घबराई हुई थी तो मैंने उससे बोला कि तू इतना क्यों घबरा रही है। तो पूजा बोली मोना दीदी आपने ठीक से सुना नहीं वह किसी लडकी से कह रहा था। मैंने आपसे तीन चार दिन पहले वाली बात भी बताई थी जब मैंने चुपके से मनीषा को फोन उठा लिया था फिर कहा पियूष का फोन उठाया था *call* मनीषा की थी। यह सब सुनकर मैंने पूजा को डांटा कि पूजा तू आज पियूष के साथ बाहर आई ही क्यों उस पर पूजा बोली जब मुझसे पियूष ने चलने को कहा तो मैंने तो उसे

मना कर दिया था किन्तु फिर मेरे सास-ससुर, पियूष व मुकेश भइया की *Room* बन्द करके कुछ बात हुई और फिर मेरे सास-ससुर मेरे पास आये और बोले आज तू हमारे कहने पर पियूष के साथ रात को जाना लेकिन मोना दीदी मैं यहां आई तो हूँ पर मुझे बड़ा अजीब से अहसास हो रहा है। ”

35. This witness stated that after the incident, she received a phone call from the Police officer from Kanpur and told her that since the last call made by victim was on the mobile of PW-7, therefore, the Police officer called her to record her statement. In cross examination, this witness stated that she gave description of above stated his mobile phones and that of the victim to the Investigating Officer but if it is not so recorded, in her statement, she cannot tell the reason.

36. She further stated that as he has told the Investigating Officer that she received a phone call from the Police officer to record her statement and if it is not so recorded, she cannot tell the reason.

37. She further stated that whenever the victim used to tell her about her problems, she never shared the same with her brother, sister and even with her husband because Jyoti has restrained her from doing so. But, later on, victim-Jyoti has told about her problem to her parents. On a question whether she made this statement to the Investigating Officer, which is not so recorded, this witness stated that she cannot tell the reason.

38. She further stated that she had given statement to the Investigating Officer that the victim informed her that the behaviour of Accused A-1 is becoming worse day by day as he is continuously in touch with the said girl and has also stated that she cannot bear the same any more. It is also stated that the fact that Jyoti

informed her about the name of Manisha, accused A-2, and it was informed to the Investigating Officer but if it is not so recorded, she cannot tell the reason.

39. She also stated that she had told the Investigating Officer that on 23.7.2014 she received a phone call from victim Pooja alias Jyoti who was very much disturbed and informed her that Manisha (Accused A-2) told Accused-A-1 that her family member are trying to settle her marriage as a boy is coming to meet her and, therefore, he should take immediate action. This fact was told to the Investigating Officer but if it is not so recorded, she cannot tell the reason.

40. PW-8- Sanjay Khan stated that on 27.7.2014, he was employed as a waiter in Varanda Restaurant. A man and a woman came at table no. 40, later on, he came to know that they are husband and wife. Thereafter, they shifted to table no. 35 where the man has ordered for snacks and hukka. Both were talking to each other and from their talk, the girl appeared to be very calm and she was not talking much. The boy was talking on phone and smoking. Next day, he has seen from the C.C.T.V. cameras and found that boy had gone out and thereafter, he came back after 8-10 minutes. In the meantime, the lady was talking on the phone.

41. PW-9- Mahesh Chandra Dube, Constable, stated that on receiving a complaint from accused-A-1, he registered the FIR No. 151 of 2014, under Sections 323, 147, 392, 364 I.P.C. against 7-8 unknown persons, the chik FIR is Ex.Ka.6.

42. PW-10- Shri Narayan, Constable, stated that vide G.D. No. 6 at 00:30 hours on 28.7.2014, Piyush Shyamdasani, Om

Prakash Shyamdasani and Abhinav Poddar came to the police station and submitted a complaint. It was scribed by Abhinav Poddar and signed by Piyush Shyamdasani. He proved the G.D. as Ex.Ka.7. This witness also proved G.D. No. 17 regarding arrival of Shambhu Singh, Home Guard with whom accused- A-1 was sent to the hospital for medical examination and it was reported that Piyush Shyamdasani stated that he will get his medical examination himself, which is Ex.Ka.8. In cross-examination, he stated that he has not seen any visible report on accused-A-1.

43. PW-11-Bholendra Chaturvedi, S.I., stated that on 5.8.2014, he along with team of investigators, headed by Shiv Kumar Singh Rathore, S.H.O., brought accused Renu, Sonu, Ashish, Awadhesh Chaturvedi and Piyush Shyamdasani in PCR to police station and also recovered a motorcycle no. UP78BY4588, used by Ashish. He has given the description of investigation conducted by the S.H.O. and recovery of motorcycle vide Ex.Ka.9 In cross-examination, he has given the description of the investigation and denied a suggestion that the investigation was done while sitting in the police station. In further cross-examination, he stated that the motorcycle was not sealed.

44. PW-12- Rajesh Kumar Shukla, S.I., stated that he has physically inspected and investigated about Honda Accord Car No. UP78BR5009. There was no mark of any scratch or dent on the body. On the rear seat and the place where footrest were kept are blood stained. He proved the photographs as Ex.Ka.10. In cross-examination, he denied a suggestion that photographs have not been taken correctly and stated that he has certificate of transport training centre. He denied a

suggestion that he has no knowledge about the vehicles and also denied that in the photographs, Ex.Ka.12 to Ex.Ka.17, dent and scratches are visible.

45. PW-13- Smt. Poonam Awasthi, Inspector, stated that she was a co-investigator and she has gone to Varanda Restaurant and recorded the statement of Hemant Poddar, who is son of the owner Prabha Poddar. She also recorded the statement of the PW-8- waiter who stated that Piyush Shyamdasani along with his wife used to visit their restaurant and on 27.7.2014, both came to the restaurant at about 10:30 PM and after having dinner, made the payment, Piyush Shyamdasani made a comment in the visitors' book 'Good' and gave his mobile number, the same was sealed along with copy of the bill as Ex.Ka.24. He further stated that he has taken the signature of the owner on the certificate as Ex.Ka.25 and proved the signatures as Ex.Ka.26. He stated that Piyush Shyamdasani has made an entry in the visitors' book by giving his Mobile No. 9956353535 by commenting 'Good' in the visitors' book vide Ex.10 and seal cover of restaurant as Ex.11. This witness further stated regarding the investigation and confession of the accused person as under:

“अभियोजन की प्रार्थना पर न्यायालय सील बण्डल मगाके 276- DOC-14 पुलिस अधीक्षक नगर पूर्वी कानपुर नगर खोला गया गया। विवेचना के मध्य दिनांक 31.7.14 को मुझे सहविवेचक द्वारा CD II किता की गयी थी। जिसमें मुझे सहविवेचक द्वारा मुकदमा उपरोक्त के मुख्य विवेचक थाना प्रभारी स्वरूप नगर श्री शिव कुमार राठौर से थाना स्वरूपनगर जाकर वर्ता की गयी उन्होंने जानकारी दी कि दिनांक 30.7.2014 को उन्होंने स्वरूप के आधार पर रपट संख्या 52 समय 20.20 बजे मुकदमा उपरोक्त में धारा 120B में पढ़ती, की किये जाने की जानकारी दी तथा बताया कि मुकदमा उपरोक्त में पियूष रहने मनीष के ड्राइवर अवधेश तथा पियूष श्यामदानी के पड़ोस में रहने वाली पियूष की महिला मित्र मनीषा भवुजा अवधेश के पश्चात वह उसके घर के पास

रहने वाले रेनू, सोनू व अशीष की संलिपता पता चली है। उन्होंने बताया दिनांक 30.7.14 रपट संख्या 63 समय 21.55 बजे पर उपरोक्त में अवधेश को लाया गया था अवधेश के बयान से उसके द्वारा अपने साथियों रेनू, सोनू, अशीष के सहयोग से पियूष श्यामदानी के कहने पर तथा मनीषा व पियूष द्वारा पैसा देने पर दिनांक 27.7.14 को ज्योति की पियूष की सहमित से उन्होंने ने चाकू से हत्या कर दी। थी। विवेचक द्वारा बताया गया कि उक्त में गिरफ्तार व्यक्ति थाना स्वरूप नगर हवालात में मौजूद है जिस पर मुझे विवेचक द्वारा स्वरूप नगर हवालात से निकाल कर अभियुक्त अवधेश चतुर्वेदी अभियुक्त रेनू उर्फ अखिल कनौजिया का विस्ता बयान अंकित किया गया तथा अन्य अभियुक्त गण अशीष व सोनू के बयान लेने पर उन्होंने अवधेश व रेनू द्वारा मुझे सहविवेचक को उस दिये गये बयानो की तस्दीक किया।

अवधेश ने अपने बयान में बताया कि वह दिनांक 21.7.2014 को -- ने तथा रेनू मोल (रेव मोती विसवाया) के अन्दर गयी तथा को पियूष के दिये पैसे से मैने व रेनू ने दो चाकू खरीदे थे। इससे पहले | पियूष के साथ जाकर मैने व रेनू ने 20 तारीख के पहले भी दो चाकू खरीदे थे --- वही गाड़ी खड़ी कर चालू कर चाबी पार्क में फेक दी रेनू व सोनू ने मुझे दो कान की छोटी बाली दिया उनके मैने इण्डिय आयल के सामने बिल? का गठ बना है उसमे डाल दिया है चलकर बरामद करा सकता हूँ। मारने में प्रयुक्त चाकू भी कैक दिया था।

अवधेश व रेनू व अन्य आरोपीगण के बयानो के मुझे सहविवेचक को ज्ञात हुआ कि घटना वाले दिन आरोपीगण लगातार पियूष के सम्पर्क में थे तथा पियूष उनसे मिलने अपनी पत्नी ज्योति को वराण्डा रेस्टोरेन्ट में डिनर के वक्त अकेला छोड़ कर आरोपी गण से मिलने नीचे उतर कर आया था वह उन्हे खुद से लगभग रात्रि 11.15 बजे तक दिनांक 27.7.14 डिनर समाप्त करने की सूचना दिया था। तथा फिर वापस रेस्टोरेन्ट में वापस चला गया। डिनर करने के बाद पियूष और ज्योति कार से आधमोड़ कम्पनी बाग से रावतपुर रोड पर आये जहाँ अन्य मुल्जिम मौजूद थे जिन्हे देखकर पियूष गाड़ी से नीचे उतर गया मुल्जिमो को गाडी दे दी अवधेश गाडी चलाने गया रेनू व सोनू ने पीछे (का०फटा) बैठकर उसका मुह पकड़ कर पीछे खींच लिया और (का०फटा) गोत कर मार दिया फिर यह लोग कल्यानपुर क्रेसिंग से पनकी की तरफ चले गये थे। और गाडी खड़ी कर दी थी। जब मुल्जिम को गाडी दी थी। तो अशीष रेनू की मोटरसाइकिल लेकर चला गया था।

मुझे यह बता दिया था कि पियूष का अभियुक्त मनीषा के साथ प्रेम प्रसंग था। और उसने मनीषा के पुराने ड्राइवर अवधेश से ज्योति को मारने की बात की थी और अपने मोबाइल नम्बर 9956353535 से तथा

8090766853 अवधेश को दिए पर फोन किया था। तथा एक बीस हजार एक बार दस हजार रूपया भी दिया था।”

46. This witness also stated that she collected the hard disk of C.C.T.V. cameras and proved as Ex.Ka.27, in which accused-A-1 was seen going downstairs at about 10:43 PM and victim Jyoti was found sitting alone in the restaurant. This witness further stated that during the search of the room of Piyush Shyamdasani and Jyoti, she recovered two diaries on which ‘good life’ is written and proved as Ex.Ka.28. She stated that at page no.6, which was written by Jyoti in a pencil, *‘just after married two good days second day 9am crying at night.’* A specific question was put to this witness, which is stated as under:

Q. Whether name of any girlfriend is mentioned?

A. In my entire conclusion, the name of the girlfriend of Piyush Shyamdasani is not written.

47. This witness stated that on 31.7.2014, she along with other Investigating Officers went to Rave Moti Mall Big Bazar as Awadhesh etc. has purchased knife on 21.7.2014 and has collected the C.C.T.V. footage and hard disk of the said date in which Awadhesh Chaturvedi and Renu @ Akhilesh Kanauiya were seen in the camera and subsequently, they were selecting knives with the help of a salesman and Awadhesh was seen carrying a knife. Thereafter, they were seen at the billing counter making payment. The C.C.T.V. hard disk was Ex.Ka.29. The sealed packet was opened and she identified her signature on the white cloth in which the C.C.T.V. hard disk was sealed as Ex.12 to Ex.14. A mark of FSL as accused-A-2 was already there, come out of the plastic bags, which is

Ex.15. Thereafter, the receipt of purchase of knife was obtained from the Rave Moti Mall, which was certified from the mall owner as Ex.Ka.30. This witness stated that confession on 13.7.2014, two knives were purchased by Awadhesh Chaturvedi from the same mall and the receipts were obtained which is Ex.Ka.32 to Ex.Ka.33 and these were certified by the owner of the mall and this witness has signed as Ex.Ka.34. Further on 9.8.2014, she recovered a black colour Nokia phone no. 8858758057 used by one Kamini and the same was Ex.Ka.36. This witness further stated that C.C.T.V. recording of Varanda Restaurant as Ex.16 to Ex.18, mobile as Ex.19 and box of plastic as Ex.20. She further stated that on 31.7.2014, the hard disk taken from Varanda Restaurant and Rave Moti Mall were seen and a technician Pradeep Verma gave a certificate that the same is not tampered in any manner. This witness has given complete details of the different cameras, showing the movement of Piyush Shyamdasani and Jyoti inside the restaurant in a different cameras. She also stated that she came to know about the involvement of Manisha Makheja, Awadhesh, Renu, Sonu and Ashish. She also came to know about the blurring of C.C.T.V. footage of Mall where accused Awadhesh and Renu were seen. However, she stated that it is correct that in none of the C.C.T.V. footages, either of the Varanda Restaurant or Rave Moti Mall Big Bazar, accused- Manisha, Awadhesh, Sonu or Ashish separately or collectively were seen with Piyush Shyamdasani. She denied a suggestion that she has collected the evidence to falsely implicate Piyush Shyamdasani. She also denied that Ex.Ka.29 was prepared while sitting in the police station. She further stated that while recording the statement of Awadhesh, she was not stated that Manisha has given any

money for committing the murder of Jyoti and denied a suggestion that Manisha has been falsely implicated.

48. PW-14- Abhinav Poddar stated that he has scribed the complaint on the asking of Piyush Shyamdasani as Piyush stated that he is nervous and cannot write. He stated that he was known to Piyush as he was providing raw material in the factory of Piyush.

49. PW-15- Harishankar Mishra, S.I. stated that he was also a co-investigator and was part of a joint team. On the disclosure of the accused, he has identified the place where they left the car after the incident and had thrown the key in bushes which was recovered. He also stated that accused stated that after committing murder of Jyoti, they have taken her jewellery and put it in a white handkerchief. The recovery was effected in pursuance to the confessional statement. Thereafter, he recovered a project file, one in Hindi and one in English, which was given by Maya Devi, mother of Jyoti by stating that these are in the handwriting of Jyoti after seeking signatures of Maya Devi, the said file were recovered vide recovery memo as Ex.2. Thereafter, from the St. Poles College, Dhawalpur in M.P., file of deceased Jyoti regarding her handwriting, was obtained the signature of the Principal of school, which is Ex.Ka.39. He also recorded the statement of the prosecution witnesses which are Ex.Ka.38, recovery memo of articles as Ex.21 and the polythene bag containing articles as Ex.22 to Ex.25. In cross-examination, this witness stated that he has not recorded in the statement of Vishesh Nagadev that Jyoti was perturbed when she made a phone call in a specific question whether PW-3- Maya Devi told him that 15 days prior to the incident, victim- Jyoti told her on telephone that Piyush Shyamdasani

had an affair with Manisha Makheeja, who is from the family of one Gutka manufacturer and talks to her. This witness answered that I was told that Piyush has an affair with a girl residing in his neighbourhood but her name was not disclosed by Maya Devi. In further lengthy cross-examination, this witness gives the complete details about the manner in which the investigation was conducted, recoveries were effected, the confessional statements of the accused persons were recorded and the statement of the prosecution witnesses were recorded. He denied a suggestion that nothing was recovered at the instance of the accused persons.

50. PW-16- Jitendra Mohan Singh, S.I. stated that he was also a co-investigator and on receiving the information of death of Jyoti, he reached mortuary and prepared the Panchayatnama in which accused Piyush Shyamdasani was also there. The Panchayatnama is Ex.Ka.41, letter written to C.M.O., the photographs of the dead body and the challans were Ex.Ka.42 to Ex.Ka.45. In cross-examination, he stated that no videography of the Panchayatnama was conducted.

51. PW-17- Shubham Poddar stated that he is son of late Prabha Poddar, who is owner of Varanda Restaurant. This witness has stated that on the asking of the I.O. he had provided the hard disk of 16 cameras, installed in the restaurant which were proved as Ex.Ka.46. He also stated that he has signed on the recovery memo.

52. In cross-examination, this witness stated that he cannot give the details of the persons who had dinner on that day.

53. PW-18- Akhilesh Kumar Gaur, S.I., another co-investigator, stated about the investigation conducted by him

regarding call details, the call location of various mobile numbers, the operative part of the statement giving call details of each and every number allegedly used by accused reproduced as under:

“साक्षी- उप निरीक्षक अखिलेश कुमार गोड वर्तमान तैनाती प्रभारी जन सूचना सेल मुजफ्फर नगर ने सशपथ ब्यान किया कि- वर्ष 2014 के माह जुलाई में काइम ब्रांच कानपुर नगर में उप निरीक्षक के पद पर नियुक्त था। नियुक्ति के दौरान श्रीमान वरिष्ठ पुलिस अधीक्षक कानपुर नगर के आदेश ST/18/SSP/2014 दिनांकित 28.07.14 को द्वारा थाना स्वरूपनगर में पंजीकृत मु0अ0सं0 151/14 धारा 323, 147, 364, 302, 201 की विवेचना में सह विवेचक की हैसियत से नियुक्त किया गया था। जिसमें आदेश के प्राप्त के पश्चात मेरे द्वारा दिनांक 28.07.14 को SCDI किता की गयी जिनमें श्रीमान वरिष्ठ पुलिस अधीक्षक के आदेश की नकल व एफ0आई0आर0 की नकल व अवलोकन किया गया तथा घटना में संदिग्ध व्यक्ति व अन्य की काल डिटेल एस0एस0पी0 महोदय के आदेश से प्रोपाइडर कम्पनी के मेल में जाकर काल डिटेल मोबाइल संख्या 9956353535 व मृतक के मोबाइल संख्या 8960868686 की काल डिटेल प्राप्त की गयी जिनके अवलोकन और विश्लेषण से मृतका ज्योती श्याम दासानी उर्फ पूर्वा के नम्बर से समय करीब 22.37 दिनांक 27.07.14 को अपने बुआ मोनी उर्फ मोजिना का मोबाइल नं0 9427418629 से वार्ता होना पाया गया। इसके पश्चात घटना वाले दिन पियूष श्याम दासानी व ज्योति श्याम दासानी अपने घर से समय करीब 9.26 सायं को अपने निवास पाण्डुनगर से निकले जिसकी लोकेशन मोबाइल से प्राप्त हुई तत्पश्चात समय करीब 22.37 पर अगली काल का समय उनकी लोकेशन बराण्डा रेस्टोरेन्ट दिनांक 27.07.14 को पाई गयी तथा उसी दिन मृतका द्वारा समय करीब 23.20 बजे अपनी सास पूनम श्याम दासानी के मोबाइल नं0 9838868686 से भी वार्ता होना पाया गया। तत्पश्चात मृतका के साथ घटना कारित होने के बाद उसकी अंतिम लोकेशन ब्लाक पनकी कानपुर नगर समय 23.54 पर पायी गयी जिसपर मो0 नं0 9956353535 से 29 सेकेंड बात होना पाया गया। इससे स्पष्ट होता है कि मृतका को उस दिवस की काल डिटेल से कोई अन्य संदिग्ध नं0 प्राप्त नहीं हुआ। उसके उपरांत मेरे द्वारा मोबाइल संख्या 9956353535 का विश्लेषण अवलोकन किया गया तो दिनांक 27.07.14 को समय 22.42 को मोबाइल में 8090766837 से करीब 7 मिनट की वार्ता होना पाया गया। जो उसकी नोक को मृतका के आवास के लोकेशन पर पाया गया। जो घटना संपूर्ण थी वार्ता पायी गयी थी। जिससे यह नम्बर संदिग्ध पाया गया।

इसी प्रकार एक अन्य नम्बर से जिसका नं0 8858758057 से मोबाइल नम्बर 9956353535 पर एसएमएस आना पाया गया जिससे प्रथम दृष्टया नम्बर संदिग्ध पाया गया है। जिसकी काल डिटेल हेतु सम्बन्धित कम्पनी को मेल भेजकर डिटेल प्राप्त करने की रिपोर्ट प्रेषित की गयी।

वरिष्ठ अधिवक्ता की मृत्यु के कारण वाद लंच अधिवक्ता न्यायिक कार्य से विरत है। मुख्य परीक्षण स्थगित की जाती है। मेरे द्वारा तत्पश्चात कम्पनी से काल डिटेल प्राप्त करके अवलोकन व विश्लेषण करते हुए संलग्न केस डायरी किया गया। जो पत्रावली में सामिल है जो क्रम संख्या 1053 लगायत 1070 है इसपर में लघु हस्ताक्षर है। लघु हस्ताक्षर पर सामूहिक रूप से प्रदर्श क-48 डाला गया है जो मृतका ज्योति श्याम दासानी उर्फ पूनम मोबाइल नं0 8960868686 है एवं सीडीआर पियूष श्याम दासानी के मो0 नं0 9956353535 संलग्न केस डायरी है जो पत्रावली में संलग्न है जो 1071 से 1193 तक है जिनपर मेरे सभी पर मेरे लघु हस्ताक्षर है जिसपर सामूहिक रूप से हस्ताक्षरों पर प्रदर्श क-49 डाला गया।

दिनांक 29/30.07.2014 को एससीडी-2 किता किया जिसमें नोडलअधिकारी द्वारा प्रेषित काल डिटेल मोबाइल संख्या 8858758057 व 8090766837 की काल विवरण प्राप्त कर अवलोकन व विश्लेषण करते हुए पियूष श्याम दासानी से जानकारी की गयी तो बताया कि यह नम्बर हमारी फौवटरी में काम करने वाली महिला कामिनी सचान का नम्बर 8858758057 है एवं पियूष श्याम दासानी ने बताया कि मेरे पास 9956353535 के अतिरिक्त अन्य कोई मो0नं0 नहीं है। इसके उपरांत मेरे द्वारा मो0नं0 8090766837 के बारे में पियूष से पूछा गया तो उसने बताया कि महिला मिस मनीषा मखीजा डी0/ओ0 हरीश मखीजा निवासी 117/618 पाण्डुनगर थाना काकादेव कानपुर नगर का है भी उसके द्वारा ही प्रयोग किया जा रहा है एवं पियूष श्याम दासानी ने बताया कि घटना वाले दिन दिनांक 27.07.2014 को मेरी करीब 7 मिनट बात समय 22.42 पर हुई है।

इस स्तर पर बचाव पक्ष की ओरसे यह आपत्ति की गयी की साक्षी के द्वारा ऐसा साक्ष्य को प्रस्तुत किया जा रहा है जो केस डायरी में अंकित नहीं है। न्यायालय द्वारा उस समय तक के समय विचार किया जायेगा।

तथा पियूष श्याम दासानी से पूछने पर की मनीषा के पास अन्य कोई नम्बर भी है क्योंकि यह नम्बर 8090766837 लगातार बंद जा रहा है। इसपर कोई स्पष्ट उत्तर नहीं दे सका। चूंकि 9956353535 व 8090766837 से आपस में परस्पर बहुत ज्यादा काल विवरण पाया गया इस पर पियूष ने बताया कि मनीषा मखीजा मेरी पड़ोस के रहने वाली है जिससे मेरे कई वर्षों से अंतरिम सम्बन्ध है फिर मेरे द्वारा पूछा गया कि

मनीषा मखीजा व कामिनी के अंतरिम सम्बन्धों के बारे में आपकी पत्नी ज्योति श्याम दासानी को जानकारी है तो पियूष ने उत्तर दिया कि मेरी पत्नी को प्रेम सम्बन्धों के बारे में सक था परंतु उसे यह स्पष्ट नहीं हो सका कि मैं अपना फोन लाक करके रखता था एवं घर के अन्य स्थानों से दिन रात में वार्ता करता था। जिसके काल डिटेल के अवलोकन से काल विवरण से स्पष्ट है।

तत्पश्चात् थाना स्वरूप नगर से मुख्य विवेचक व सह विवेचक श्रीमती पूनम अवस्थी व अन्य हमराहियों के साथ चलकर मोबाइल नं० 8858758057 के धारक कामिनी सचान के घर आकर परिवारी जनों को उपस्थिति में उसका मोबाइल नं० से अन्य नम्बरों से वार्ता के सम्बन्ध में बताया कि यह मेरा नम्बर है तथा पियूष के अपने सम्बन्ध की पुष्टि की मेरी व पियूष के मध्य एसएमएस व काल से वार्ता होती थी जिसमें मैंने दिनांक 27.07.14 को आखिरी एसएमएस के बारे में पूछा गया तो बताया कि मेरी बातें होती थी इसी आधार पर मैंने एसएमएस कर दिया था। जिसमें लवयू लिखा था। कामिनी से पूछा गया कि आप को जानकारी के मुताबिक पियूष श्याम दासानी के पास अन्य कोई नम्बर और भी है तो वादिनी ने बताया कि पियूष के पास 9956353535 के अतिरिक्त एक नम्बर 8090766837 और है जिससे मेरी कभी-कभी बात होती रहती है। कामिनी के मोबाइल नं० 8858758057 की काल डिटेल के अवलोकन से दिनांक 10.07.14 से एसएमएस आने तक वार्ता पायी गयी जिसकी काल डिटेल पत्रावली पर उपलब्ध है।

इसके उपरांत मैं व मुख्य विवेचक सह विवेचक उपस्थित के साथ चलकर मनीषा मखीजा पुत्र हरीश मखीजा धारक मो० संख्या 8090766837 के आवास पर उपस्थित आकर परिवारी जनों को उपस्थित में मनीषा मखीजा के उक्त मोबाइल के काल विवरण के सम्बन्ध में वार्ता की गयी तो बताया कि 8090766837 मेरा ही नम्बर है। मैंने इसे घटना वाला दिन दिनांक 27.07.14 को 22-42 मिनट पर करीब 7 मिनट की वार्ता की गयी। उक्त वार्ता के पश्चात् पियूष श्याम दासानी को पत्नी के साथ घटना घटित होती है। क्या इसकी जानकारी आप को है तो घटना की जानकारी होना बताया। 427 सेकेण्ड के वार्ता के बारे में पूछा तो पहले घबरा गये और घबराहट के कारण बताया कि सामान्य प्रति दिन की भांति वार्ता हुई तथा काल के मुताबिक सामान्य से ज्यादा एसएमएस होने पर बताया कि हम एक दूसरे के पड़ोसी होने के नाते जानते हैं एवं हमारे एक दूसरे के अंतरंग सम्बन्ध प्रेमी प्रेमिका की भांति हैं। इस सम्बन्ध के बारे में पियूष श्याम दासानी की पत्नी को शक एवं जानकारी थी। जिसके कारण पियूष और पियूष की पत्नी के आपसी सम्बन्ध ठीक नहीं थे तब मेरे द्वारा मनीषा से पियूष श्याम दासानी के अन्य नम्बर के बारे में पूछा गया तो बताया कि एक अन्य नम्बर 8090766837

व 9956353535 से मुझसे सम्पर्क किया जाता रहा तथा मेरे पास अन्य नम्बर भी है जिनको मैं समय-समय पर उपयोग किया जाता है। 1. 9839955320 2. 9651886868 3. 9999953030 4. 7897139393 से मेरे द्वारा पियूष के दोनों नम्बरों से बात हुई हो तथा मनीषा द्वारा बताया गया कि 8090766837 सिमकार्ड पियूष श्याम दासानी द्वारा लाकर दिया गया था। जो घटना वाले दिन के बाद बंद करने की बात पियूष ने 21.56 बजे दिनांक 27.07.14 को कहा था व ब्लैक बेरी फोन जिसकी आईएमआई 358567040242810 है जिसके मोबाइल नम्बर 8090766837 नम्बर का प्रयोग करता था। जो मुझे सायं 21.56 बजे के बाद वापस किया था। जो मैंने उसको 28.07.14 को फिर वापस कर दिया था व मेरे द्वारा उक्त ब्लैक बेरी मोबाइल का इस्तेमाल मो० सिम नं० 9651886868 पर किया गया था। अबतक उल्लेखनीय यह रहा कि पियूष श्याम दासानी द्वारा मोबाइल नम्बर 8090766837 प्रयोग (का०फ०) जाने की पुष्टि हो रही है। जिससे कि वह नम्बर पियूष श्याम दासानी द्वारा छिपाया गया जिससे यह नम्बर पूर्णतया संदिग्ध प्रतीत हो रहा है। उक्त नम्बर की डिटेल हेतु सम्बन्धित कम्पनी को मेल कर विवरण प्राप्त किया गया जिससे अवलोकन व विश्लेषण से यह नम्बर 8090766837 को घटना वाले दिनांक 27.07.17 को प्रातः 10.11 बजे चालू होकर रात्रि 21.56 बजे तक प्रयोग किया गया तथा पियूष श्याम दासानी के मुख्य मो० नं० 9956353535 के अवलोकन व विश्लेषण से स्पष्ट हुआ कि उसकी लोकेशन पार्वती बागवा रोड होटल बराण्डा पर पायी जाती है। इसी जगह पर मो० संख्या 8090766837 को 19.49.15 सेकेण्ड बजे की लोकेशन पायी जाती है।

न्यायालय समय शेष नहीं बचा मुख्य परीक्षण सीमित। इसी प्रकार 17.34 बजे भी इसी नम्बर की लोकेशन पनघी जहां पर मृतका ज्योती श्याम दासानी की शव गाड़ी समेत बरामद हुआ इस कारण फोन नम्बर 8090766837 का धारक पूर्णतया संदिग्ध व घटना में संलिप्त होने की पुष्टि व घटना में सम्मिलित होने की संभावना पाई जाती है। मेरे द्वारा घटना वाले दिन मो० संख्या 8090766837 की समस्त बी पार्टी की डिटेल प्राप्त किया जाना आवश्यक है। इस पर सम्बन्धित कम्पनी को मेल भेजकर बी पार्टियों की काल डिटेल व समस्त विवरण प्राप्त किया गया जिनका क्रमशः विश्लेषण किया गया है जिसमें पियूष श्याम दासानी के मोबाइल नं० 8090766837 विश्लेषण से संदिग्ध नम्बर 8127986342 का अध्ययन किया गया घटना वाले दिन 27.07.14 को यह नम्बर पियूष श्याम दासानी के मोबाइल नं० 8090766837 से समय 17.42 पर सम्पर्क किया गया व क्रमश रात्रि 21.55 बजे तक लगातार सम्पर्क में रहा। यही यह भी उल्लेखनीय है कि 21.15 बजे व इसके पूर्व की लोकेशन भी नवाबगंज घटनास्थल के आसपास पायी

जाती है। इसके कारण यह मो० नं० भी महत्वपूर्ण हो गया है।

इसी प्रकार संदिग्ध मो० नं० 8127986342 की काल डिटेल सम्बन्धित कम्पनी को मेल भेजकर प्राप्त की गयी। इसके विश्लेषण से घटना वाले दिन मो० संख्या 8090766837 का उपरोक्त नम्बर से प्राप्त 9.07 मिनट से सम्पर्क हुआ जो रात्रि 19.56 बजे तक सम्पर्क में रहा। इसप्रकार यह नम्बर भी संदिग्ध था। जिसका विवरण काल डिटेल का विश्लेषण किया गया तो 21.05 बजे से 21.55 बजे तक घटना स्थल बरामदा रेस्टोरेन्ट पार्वती बागवा नवाबगंज पाया गया। इसकी अन्य लोकेशन समय 23.02 मिनट पर घटनास्थल पर पायी जा रही थी संदिग्ध नम्बर 8090766837 की (बी) पार्टी में एक नम्बर 8687580730 भी पाया गया जो लगातार सम्पर्क में था। तत्काल मो० सं० 8687580730 की काल विवरण सम्बन्धित कम्पनी को मेल भेज कर प्राप्त किया गया जिसका अध्ययन व विश्लेषण किया गया तो यह नम्बर भी घटना स्थल के दिनांक 27.07.14 को पाण्डुनगर स्वरूप नगर पनकी व शव बरामदगी के स्थान पर उसी दिन का पाया गया था। यहां यह भी उल्लेखनीय है कि पियूष श्याम दासानी व ज्योती श्याम दासानी का आवास पाण्डुनगर में है। रात्रि में दोनों होटल बराण्डा वीआईपी रोड। पार्वती बगला रोड पर आते हैं। अतः मृतका ज्योति का शव सी ब्लॉक पनकी पाया जाता है। अतः यह नम्बर भी संदिग्ध व अतिमहत्वपूर्ण हो जाता है। यह नम्बर 8687580730 है जिसमें 5 के बाद व 8 के पहले 7 है वह सहवन लिखा गया है। जो प्रातः से सायं तक उपरोक्त नम्बरों के सम्पर्क में था। इसी प्रकार संदिग्ध नम्बर 8127986342 का अध्ययन व विश्लेषण किया गया तो उसमें एक नम्बर 7784987598 संदिग्ध प्राप्त हुआ जिसका अवलोकन किया गया तो मोबाइल नम्बर 8127986342 जो घटना वाले दिन मोबाइल संख्या 7784987598, 8853902938 व 8687580730, 8090766837 से सम्पर्क में व वार्ता होना पाया गया था। इसी क्रम में यह सारे नम्बर संदिग्ध व घटना में संदिग्ध सामिल है। मोबाइल नम्बर 8127986342 व 8090766837 के धारक के सम्बन्ध में पियूष श्याम दासानी का होना उसकी महिला मित्र मनीषा मखीजा व कामिनी का बताया गया है। उपरोक्त सभी मोबाइल नम्बर को थाने पर उपस्थित मुख्य विवेचक व पियूष श्याम दासानी के मुख्य नम्बर 9956353535 व अन्य संदिग्ध नम्बर से सम्पर्क में आने का एक चित्र के माध्यम से केंस डायरी में बनाकर दर्शाया गया है। इसमें उक्त सभी नम्बरों का उल्लेख मैंने किया है। जो ए, बी, सी, डी के क्रम में रखा गया है। पूछताछ में पियूष श्याम दासानी ने बताया कि मोबाइल नम्बर 8127986342 जो ए से दर्शाया गया है उसका प्रयोग कर्ता अवधेश चतुर्वेदी पुत्र गौरी शंकर निवासी ग्राम धारा थाना कोतवाली औरैया का है व मोबाइल नम्बर 8687580730 सोनू

कश्यप एस०/ओ० छोटेला कश्यप निवासी रामबरन की मड़ैया पाण्डुनगर द्वारा प्रयोग किया जा रहा था तथा मोबाइल नम्बर (सी) 8090615770 आशीष कश्यप एस०/ओ० कमलेश कश्यप निवासी रामचरन की मड़ैया पाण्डुनगर द्वारा प्रयोग किया जा रहा है। मोबाइल नं० (डी) 7784987598 रेनू कनौजिया एस०/ओ० रामबाबू कनौजिया निवासी रामबरन की मड़ैया थाना काकदेव कानपुर नगर द्वारा प्रयोग किया जा रहा था।

इस प्रकार संदिग्ध नम्बरों की डिटेल अपने प्रिन्टर से निकालकर संलग्न सीडी किया गया तथा उपरोक्त सारे संदिग्ध नम्बरों का आपस में परस्पर सम्पर्क कर एक मान चित्र बनाया था। जो सामिल मिसिल है। जिसपर मेरे हस्ताक्षर हैं। यह मानचित्र मेरे द्वारा तैयार किया गया है। इस पर प्रदर्शक-50 डाला गया।

मानचित्र में जिन नम्बरों ए, बी, सी, डी सम्पर्क पियूष श्याम दासानी से थे उनके नम्बर ए से मोबाइल नम्बर 8127986342 है जो संदिग्ध अवधेश चतुर्वेदी एस०/ओ० गौरी शंकर चतुर्वेदी का पाया गया था तथा बी मोबाइल नम्बर 8687580730 से जिसका धारक सोनू कश्यप एस०/ओ० छोटे लाल एवं डी मोबाइल नम्बर 7784987598 के धारक रेनू कनौजिया एस०/ओ० राम बाबू कनौजिया का पाया गया था। तथा सी मोबाइल नम्बर 8090615770 के धारक आशीष कश्यप एस०/ओ० कमलेश कश्यप का पाया गया था। दिनांक 1.08.14 को एससीडी-3 किता किया जिसमें नवाब अली दो अदद मोबाइल फोन की बरामदगी के फर्द दिनांक 1.8.14 कागज संख्या 614 सामिल मिसिल है जो मेरे द्वारा तैयार की गयी थी जो मेरे लेख व हस्ताक्षर में जिसपर प्रदर्शक-51 डाला गया तथा बयान सुश्री निकिता मखीजा के अंकित किये गये तथा बरामदा मोबाइल की आईएमईआई को अवलोकन व विश्लेषण किया गया तो मोबाइल संख्या 9999953030 व 9839955320 व 9651886868, 7897139393 व 8090766837 का विश्लेषण किया जिनका आईएमईआई नम्बर केंसडायरी में अंकित किया कमशः आईएमईआई दोनों फोन को अंकित कर प्रयोग किये गये मोबाइल नम्बरों को ए व पी से दर्शाते हुए मान चित्र केंस डायरी में मेरे द्वारा तैयार किया गया। जिनका विश्लेषण चार्ट तैयार किया गया था। वह चार्ट सामिल पत्रावली है जो कागज संख्या 778 पुस्त में अंकित है। यह चार्ट मेरे द्वारा तैयार किया गया था। जिसपर मेरे हस्ताक्षर हैं। जो कम्प्यूटर से तैयार किया गया था जिसे मैं आज प्रमाणित करता हूँ। इसपर प्रदर्शक-52 डाला गया।

दिनांक 7.8.14 को एससीडी-4 किता किया था जिनमें मेरे द्वारा दूर संचार कम्पनियों को रिपोर्ट तैयार करा कर उनके नोडल अधिकारी को देकर सीडीआर व नाम पता धारक प्राप्त कर संलग्न केंस डायरी किया गया।

दिनांक 10.08.14 को एससीडी-5 किता किया जिसमें उपनिरीक्षक संजय यादव द्वारा सेवकों कं० से प्राप्त डिटेल थाना स्वरूप नगर में दाखिल किया गया।

दिनांक 18.08.14 को एससीडी-6 किता किया जिसमें दूरसंचार कम्पनियों द्वारा 1.1.14 से 28.07.14 तक का काल विवरण की मांग की गयी वह प्राप्त हुई जिनके लिफाफो को खोलकर अवलोकन कर संलग्न सीडी लिया था।

जिसमें अभियुक्त पीयूष श्याम दासानी द्वारा प्रयोग किये जा रहे मोबाइल नम्बर 9956353535 व मोबाइल नम्बरों का अवलोकन किया गया तो अभियुक्त मनीषा मखीजा के विभिन्न नम्बरों से वार्ता में मोबाइल संख्या 7897139393 से एक काल का होना पाया गया तथा अभियुक्त मनीषा मखीजा के द्वारा प्रयोग किये जा रहे मोबाइल नं० 8090766837 पर 454 काल का आना पाया गया व 54 काल किया गया तथा 164 एसएमएस प्राप्त किये गये थे। 155 एसएमएस किये गये इसप्रकार कुल 418 बार वार्ता किया गया है तथा मोबाइल संख्या 9651886868 से भी 1448 बार वार्ता करना जिसमें 177 काल प्राप्त किया व 187 काल किया गया व 106 एसएमएस प्राप्त किये गये व 578 एसएमएस किया गया पाया गया था एवं मोबाइल संख्या 983995530 पर 34 काल प्राप्त करना व 69 काल किया जाना व 105 एसएमएस प्राप्त करना व 45 एसएमएस किया जाना पाया गया। मोबाइल नम्बर 9999953030 से 34 काल प्राप्त करना व 31 काल करना 94 एसएमएस प्राप्त करना 123 एसएमएस किया जाना पाया गया कुल 283 बार वार्ता का विवरण दिनांक 1.1.14 से 27.07.14 तक का विवरण अंकित किया गया जिसमें मेरे द्वारा एक चार्ट मोबाइल संख्या 9956353535 से वार्ता का चार्ट बनाकर संलग्न सीडी किय गया था। जो कागज संख्या 740 है सामिल मिसिल है। जिसपर मेरे हस्ताक्षर है। और मेरे द्वारा कम्प्यूटर से तैयार किया गया है जिसपर प्रदर्श क-53 डाला गया। इसी प्रकार अभियुक्त पीयूष श्यात दासानी के मोबाइल नं० 9956353535 से अभियुक्त अवधेश कुमार चतुर्वेदी द्वारा प्रयोग किये जाने वाले मो०नं० 8627986342 के अवलोकन से पाया गया कि बीस कॉल प्राप्त करना व बाईस कॉल किया जाना एवं आठ एसएमएस प्राप्त करना व एक एसएमएस किया जाना प्राप्त कॉल डिटेल दिनांक 01.01.14 से 27.07.14 तक का पाया गया। इसीप्रकार पीयूष श्याम दासानी में मो० नं० 9956353535 से अभियुक्त आशीष कश्यप के मो० नं० 8090615770 पर दो कॉल का आना पाया गया तथा अभियुक्त सोनू के मो० नम्बर से अभियुक्त पीयूष श्याम दासानी के मो० नम्बर 9956353535 से वार्ता होना नहीं पाया गया। दूरसंचार कम्पनी द्वारा प्राप्त कराया गया कस्टमर आई०डी० फार्म के अवलोकन से अभियुक्त पीयूष श्याम दासानी द्वारा प्रयोग किये जा रहे मो० नम्बर

9956353535 का नाम पता श्री रामजसनानी एस०/ओ० किशनदास जसनानी निवासी 1130 रतनलाल नगर थाना गोविन्दनगर का पाया गया जो संलग्नक केस डायरी किया गया। तत्पश्चात अभियुक्त मनीषा मखीजा के द्वारा प्रयोग किये जा रहे मो० नम्बर 7897139393 के कस्टमर आई०डी० फार्म के अवलोकन से स्वयं मनीषा मखीजा डी०/ओ० हरीश कुमार मखीजा निवासी 117/618 पाण्डुनगर कानपुर नगर के नाम से दिनांक 15.07.14 को कय किया जाना पाया गया। (19/1) इसमें अभियुक्त पीयूष श्याम दासानी के मो० नम्बर 9956353535 से एक कॉल का होना पाया गया। जिसकी सी.डी.आर संलग्नक सी.डी. किया गया जो न्यायालय में दाखिल है तथा अभियुक्त मनीषा मखीजा द्वारा प्रयोग किये जा रहे मो० संख्या 9651886868 का अपने फोन ब्लेकबेरी 9900 की आईएमईआई में दिनांक 09 जनवरी 14 से 15 जनवरी 14 तक प्रयोग किया गया व अपने मोबाइल सैमसंग जा 19152 की आईएमईआई संख्या 356893050247640 पर प्रयोग किया जाना पाया गया। अभि० पीयूष श्याम दासानी के अन्य नम्बर मो० संख्या 8090766853 से भी 181 कॉल किया जाना व 108 कॉल पाया जाना व 10 एसएमएस किया व 11 एसएमएस प्राप्त किया गया पाया गया तथा दूसरे मो० संख्या 9956353535 से अपने नम्बर 9651886868 से 177 कॉल किया व 187 कॉल प्राप्त किया। 506 एसएमएस किया तथा मोबाइल संख्या 8604351351 पर 1140 कॉल किया व 1339 कॉल प्राप्त किया। 121 एसएमएस किया गया व 173 एसएमएस प्राप्त किया गया जो मोबाइल संख्या उपरोक्त सायरा बानो डब्बू०/ओ० मुश्ताक के नाम से लिया गया जो संलग्नक सी.डी. किया गया था।

(19/2) इसी प्रकार अभियुक्त अवधेश कुमार चतुर्वेदी द्वारा प्रयोग किये जा रहे मो० संख्या 8127986342 के अवलोकन से अभियुक्त पीयूष श्याम दासानी में मो० नं० 9956353535 व 8604351351 एवं 8090766853 में अवलोकन से आपस में वार्ता की कॉल पायी गयी जिसकी कॉल डिटेल मेरे द्वारा संलग्न सी.डी. किया गया।

(19/3) इसी प्रकार अभियुक्त अवधेश कुमार चतुर्वेदी द्वारा प्रयोग किये जा रहे मो० संख्या 8127986342 से अभियुक्त आशीष कश्यप के मो० नं० 8090615770 से 54 कॉल का किया जाना व 29 कॉल का प्राप्त किया जाना एक एसएमएस प्राप्त किया जाना विश्लेषण से प्राप्त हुआ तथा अभियुक्त रेनू कनौजिया द्वारा प्रयोग किये जा रहे मो० संख्या 7784987598 पर 29 कॉल किया जाना व 47 कॉल प्राप्त किया जाना 03 एसएमएस किये गये और 07 एसएमएस प्राप्त किये गये का विवरण प्राप्त हुआ तथा रेनू कनौजिया के द्वारा प्रयोग किये जा रहे मोबाइल संख्या 8687145104 से एक कॉल का होना पाया गया तथा अभियुक्त अवधेश कुमार

चतुर्वेदी द्वारा प्रयोग किये जा रहे मोबाइल सं० 8127986342 से अभियुक्त सोनू कश्यप के मोबाइल नं० 8687780730 पर 61 कॉल का किया जाना व 80 कॉल प्राप्त किया जाना 3 एसएमएस का किया जाना व 31 एसएमएस प्राप्त किया जाना पाया गया तथा सोनू कश्यप के द्वारा प्रयोग किये जा रहे दूसरे नम्बर

इस स्टेज पर गवाह ने अपना मोबाइल देखकर सोनू कश्यप का मोबाइल नम्बर निकाला फिर मोबाइल बंद कर दिया। इस आपत्ति पर मेरे द्वारा तुरंत मोबाइल बंद किया गया।

पत्रावली में सामिल चार्ट प्रदर्शक 50 देखकर बताया कि सोनू का दूसरा नम्बर 8853902938 से 59 कॉल किया जाना व 11 कॉल प्राप्त किया जाना पाया व 2 एसएमएस प्राप्त किया जाना पाया गया। मोबाइल धारक का नाम पता प्राप्त हुआ अनिल कुमार एस०/ओ० सतीराम निवासी ंपबद्ध के नाम से कय किया गया है। जिसमें कस्टमर आई डी से फार्म से स्पष्ट है जो संलग्न सीडी है। सोनू कश्यप द्वारा दूसरा मोबाइल संख्या 8853902938 से अभियुक्त सोनू कश्यप द्वारा प्रयोग किये गये नम्बर का सिम श्रीमती मुन्नी देवी डब्लू०/ओ० छोटे लाल निवासी एच०एन० 1173 पाण्डुनगर कानपुर से कय किया गया था जिनका कस्टमर आई डी फार्म संलग्न केस डायरी किया गया।

दूर संचार कम्पनी वोडाफोन के नोडल अधिकारी से प्राप्त कॉल विवरण मोबाइल नम्बर 9839955320 व 9999953030 को कस्टमर आई डी के अवलोकन से अभियुक्त मनीषा मखीजा डी०/ओ० हरीष कुमार मखीजा निवासी 117/618 पाण्डुनगर के नाम से कय किया जाना पाया गया। तथा अभियुक्त पियूष श्याम दासानी के अरुन्य मोबाइल नम्बर 9956353535 व 8090766853 व 8604351351 से वार्ता होना पाया गया।

रिलाइंस दूर संचार कम्पनी द्वारा प्राप्त कॉल डिटेल का अवलोकन किया गया। इसमें अभियुक्त रेनू कनौजिया द्वारा प्रयोग किये जा रहे मोबाइल नं० 8687145104 के कॉल विवरण से दिनांक 1.1.14 से 28.07.14 तक अभियुक्त अवधेश कुमार चतुर्वेदी के मोबाइल संख्या 8127986342 से वार्ता होना पाया गया। इसी प्रकार अभियुक्त सोनू कश्यप द्वारा प्रयोग किये जा रहे मोबाइल 8687580730 से अभियुक्त पियूष श्याम दासानी के मोबाइल नम्बर 9956353535 व 8090766853 से वार्ता होना पाया गया तथा एसएमएस का भी होना पाया गया।

तथा रेनू कनौजिया द्वारा अपने मोबाइल से 8687145104 से अभियुक्त सोनू आशीष, पियूष से वार्ता होना नहीं पाया गया। इसी प्रकार सोनू कश्यप द्वारा प्रयोग किये जा रहे मोबाइल संख्या 8687580730 से अभियुक्त अवधेश चतुर्वेदी के मोबाइल नम्बर 8127986342 से वार्ता व एसएमएस का होना पाया गया।

इसी प्रकार दूर संचार कम्पनी यूनोनॉर द्वारा किये गये कॉल विवरण मोबाइल संख्या 8858758057 जो कामिनी सचान के द्वारा प्रयोग किया जा रहा था अभियुक्त पियूष श्याम दासानी के मोबाइल नम्बर 9956353535 व 8090766853 से दिनांक 5.7.14 से वार्ता का होना पाया गया।

अभियुक्त पियूष श्याम दासानी के द्वारा प्रयोग किये जा रहे मोबाइल नं० 8090766853 व 9956353535 व 8604351351 का चार्ट तैयार किया जो मेरे द्वार कम्प्यूटर से तैयार किया गया जिसमें अभियुक्त मनीषा मखीजा के विभिन्न नम्बरों से वार्ता होना पाया गया था। जो चार्ट पत्रावली पर उपलब्ध है। जो मोबाइल नं० 8090766853 व 8604351351 से सम्बन्धित है जो चार्ट पत्रावली में उपलब्ध जो कागज 779 व 781 है जिनपर मेरे हस्ताक्षर हैं जिनकी मेरे द्वारा तैयार किया गया है जिनपर कमशः प्रदर्श क- 54 व प्रदर्श क-55 डाला गया।

उपरोक्त घटना में गिरफ्तार सभी अभियुक्तों की आपस में वार्ता का एक रेखाचित्र फोटो लगाकर चार्ट तैयार किया गया मेरे द्वारा कम्प्यूटर से तैयार किया गया है जो सामिल मिसिल है फोटो पर संख्या 777 है इसपर मेरे हस्ताक्षर हैं मैं प्रमाणित करता हूँ इसपर प्रदर्श क-56 डाला गया। जिसमें अभियुक्तगण से आपस में बात चीत करने का दिनांक 1.1.14 से 28.07.14 तक का विवरण अंकित है।

अभियुक्त पियूष श्याम दासानी व अभियुक्त मनीषा मखीजा द्वारा घटना के दौरान आपस में प्रयोग किये मोबाइल की आईएमईआई का रेखाचित्र में अभियुक्त के सिम सेमसन जीटी 19152 में आईएमईआई संख्या 356893050247640 में मोबाइल संख्या 9651886868 दिनांक 15.01.2014 से 16.02.14 तक व मोबाइल नम्बर 9999953030 दिनांक 16.03.14 से 11.07.14 तक व मोबाइल संख्या 3839955320 दिनांक 16.02.14 से 6.3.14 तक व मोबाइल संख्या 8090766837 दिनांक 18.01.14 से 22.01.14 तक व पुनः 21.07.14 से 27.07.14 तक प्रयोग किया गया है तथा दूसरी सिम आईएमईआई संख्या 356893050247640 में मोबाइल संख्या 9651886868 दिनांक 16.02.14 से 16.03.14 तक व 9999953030 दिनांक 15.01.14 से दिनांक 16.03.14 तक व 9839955320 दिनांक 11.03.14 से 15.03.14 तक व पुनः 16.03.14 से 28.07.14 तक तथा मोबाइल नम्बर 8090766837 दिनांक 27.05.14 से 21.06.14 तक पुनः 22.06.14 से 21.07.14 तक प्रयोग किया गया।

इसी प्रकार अभियुक्त द्वारा प्रयोग किये जा रहे ब्लैकबेरी मोबाइल संख्या 9900 आईएमईआई संख्या 358567040242810 को अपने मोबाइल नम्बर 9651886868 को दिनांक 9.1.14 से 15.1.14 तक प्रयोग किया गया। जिसमें अभियुक्त पियूष श्याम दासानी द्वारा अपने मोबाइल नम्बर 8604351351 व 9956353535 व

8090766853 में आईएमईआई संख्या ब्लैकबेरी 358567040242810 को जनवरी 15 से सन् 2014 से 27.07.14 तक प्रयोग किया गया है।

न्यायालय समय शेष नहीं बचा मुख्य परीक्षा सीगित। दिनांक 28.08.14 को सीडी-7 किता किया जिसमें सीबीआई एकेडमी गाजियाबाद के प्रधानाचार्य से अनुमति प्राप्त कर निरीक्षक श्री संजय कुमार गौतम के द्वारा उपलब्ध कराये गये साफ्टवेयर व शिस्टम से घटना में प्रयुक्त किये गये मोबाईल नम्बरों की काल डिटेल लोड कर अभियुक्तों के बीच विभिन्न नम्बरों से आपस में की गयी परस्पर वार्ता का एक विश्लेषण चार्ट मेरे द्वारा तैयार किया गया था। वह पत्रावली पर पेपर नं० 775 है। इसमें नाम व मोबाईल नम्बरों का उल्लेख है इसपर मेरे हस्ताक्षर हैं जिसपर प्रदर्श क-57 डाला गया तथा चार्ट का दूसरा पेपर जिसका पेपर संख्या 776 पत्रावली में संलग्न है। फोटो द्वारा तैयार किया गया है। इसपर मेरे हस्ताक्षर हैं इसपर प्रदर्श क-58 डाला गया।

दिनांक 3.9.14 को सीडी-8 किता किया जिनमें तत्कालीन क्षेत्राधिकारी कल्यानपुर के अखिलेश सिंह मय हम राही फोर्स के स्वाती पारले बिस्कुट फैक्टरी दादानगर की रवाना तलाशी ली गयी जिनकी मोके पर तैयार किया गया। जो पत्रावली पर उपलब्ध है कागज संख्या 630 है मेरे लेख व हस्ताक्षर में है जिसपर गवाहान के हस्ताक्षर बने हैं। इसपर प्रदर्श क-59 डाला गया।

दिनांक 9.10.14 को सीडी-9 किता किया गया जिसमें पार्टनर स्वाती बिस्कुट श्री राम जसलानी द्वारा एक लिखित पर किया गया सामिल कंस डायरी किया गया एवं श्रीराम जसलानी पुत्र स्व० किशनचन्द्र जसलानी निवासी रतनलाल नगर गोरखपुर के बयान अंकित किये गये। तथा कामिनी सचान द्वारा प्रयोग किये गये मोबाईल सं० 8858758057 सीडीआर का अवलोकन कर संलग्न सीडी किया गया। तथा मेरे द्वारा सीडी-10 नहीं किता की गयी जो सहवन सीडी-10 पड़ गया।

श्रीराम जसलानी पर दिनांकित 9.10.14 सामिल मिसिल है जो पेपर संख्या 2574 जिस राम जसलानी हस्ताक्षर बने हैं। टाइपशुदा है।

विवेचना के दौरान दिनांक 6.8.14 को मेरे द्वारा दूरसंचार कम्पनियों के नोडल अधिकारी की व्यक्तिगत श्रीमान नोडल अधिकारी को भेजा गया था जिनकी कम्पनियों 1. वोडाफोन दूर संचार निगम पूर्वी 2. रिलाइंस दूरसंचार निगम पूर्वी 3. एयरटेल दूरसंचार पूर्वी 4. यूनोनॉर दूरसंचार पूर्वी 5. टाटा दूरसंचार पूर्वी हैं। इन सभी फोन पर मेरे हस्ताक्षर हैं जिन्हें पुलिस अधीक्षक पूर्वी से अग्रसारित कराकर भेजी गयी थी।

जो सामिल पत्रावली कागज संख्या 1913 से 1919 तक है। जिनमें एक संशोधित पत्र दिनांक 7.8.14 का है इन सभी पत्रों पर कमशः प्रदर्श क-60 लगायत प्रदर्श क-66 डाला गया।

मैंने जो नोडल अधिकारी टाटा टेली सर्विसेज लिमिटेड ने अर्पित श्रीवास्तव को पत्र भेजा था। उसका जवाब उनके द्वारा भेजा मुझे मिला था जो पत्रावली में संलग्न है जो सामान्य संख्या 1920 है। इसके साथ मोबाईल की काल डिटेल व आई डी संलग्न सीडी किया था। टाटा टेलीफोन सेफ लिमिटेड द्वारा भेजे गये पत्र में मोबाईल नं० 8090766853 व 8090766837, 8090615770, 80960868686 व 8604351351 से सम्बन्धित काल डिटेल का उल्लेख है। सम्बन्धित काल डिटेल जिसपर टाटा सर्विसेज की मुहर लगी हुयी है। पत्रावली पर उपलब्ध कागज संख्या 1922 से लेकर 2315 तक है। तथा एक आई.डी. में शंकर एस०/ओ० निखिल संलग्न पत्रावली है। जो पेपर नं० 1921 है। जिसपर टाटा कॉम सर्विसेज की मुहर लगी है। इसी क्रम में मेरे भेजे गये पत्र के जवाब में एयरटेल द्वारा मोबाईल नं० 9956353535, 9651886868, 7897139393, 8127986342, 8853902938 की कॉल डिटेल नोडल अधिकारी द्वारा उपलब्ध कराई गयी थी। कॉल डिटेल जिसपर भारतीय एयरटेल की मुहर प्रत्येक पेपर में लगी है तथा सभी पर दस्तखत बने हुए हैं। जिसपर कागज संख्या 1373 लगायत 1785 अंकित है। वोडाफोन दूर संचार कम्पनी द्वारा मोबाईल नं० 9839955320, 9999953030 का प्रमाण पत्र कम्पनी द्वारा दिया गया था जिसे मैंने संलग्न सी.डी. किया था। जिसपर कागज संख्या 1801 अंकित है। जिसपर वोडाफोन की मुहर व दस्तखत नोडल अधिकारी के हैं। वोडाफोन कं० के उपर्युक्त नम्बरों से सम्बन्धित कॉल डिटेल जो कागज संख्या 1786 से 1827 तक है। जिसपर वोडाफोन के नोडल अधिकारी के हस्ताक्षर मुहर लगी हैं।

रिलाइंस कम्प्यूनिक्शन को मेरे द्वारा भेजे गये पत्र के संदर्भ में रिलाइंस कं० के नोडल अफसर मधुबाला सुधा पत्र मुझे मिला था। जिसमें उन्होंने मोबाईल नं० 8687145104, 8687580730 को कॉल डिटेल मय कस्टमर आई.डी. अखिलेश कुमार सर्वेश कुमार का मुझे भेजा गया था जिसे मैंने कंस डायरी में संलग्न किया था। जो पत्रावली के कागज संख्या 1828 लगायत 1910 तक संलग्न है। जिसपर रिलाइंस कं० के नोडल अफसर के हस्ताक्षर एवं मुहर हैं।

मेरे द्वारा यूनियन कं० को दिनांक 6.8.14 को भी भेजी गयी उसके संदर्भ में मोबाईल नं० 8858758057 की कॉल डिटेल जो मुझे उक्त कम्पनी द्वारा प्राप्त हुआ था जिसमें कम्पनी की प्रत्येक पेपर पर मुहर अंकित है जो कि प्रपत्र संख्या 954 लगायत 1050 है को मेरे द्वारा संलग्न सी.डी. किया गया था।

मेरे द्वारा मोबाईल नं० 7784987598 जो एयरसेल कम्पनी द्वारा पत्र में पाने पर उनके द्वारा कॉल डिटेल एस०एस०पी० कार्यालय को मेल पर भेजा गया था उसकी हार्ड कापी निकाल कर मैंने संलग्न सी.डी. किया था। प्रत्येक पेपर पर मेरे हस्ताक्षर हैं जो कागज संख्या

1341 लगायत 1352 है। जो मेरे द्वारा संलग्न सी.डी. किया गया।

दिनांक 1.8.14 को अधिवक्ता से बरामद मोबाईल सेमसेन जीटी 19152 व आई फोन डाटा रिकवरी हेतु उप निरीक्षक श्री संजय कुमार यादव को देकर सैम्पोटच प्रा० लिमिटेड पटपरगंज इन्डस्ट्रल एरिया भेजा गया था। जिसकी कार्बन प्रति पत्रावली कागज संख्या 2461 है। जिसपर मेरे हस्ताक्षर हैं।

आज उपरोक्त केस से सम्बन्धित माल मुकदमा मोबाईल सीलबंद हालत में न्यायालय के समक्ष प्लास्टिक के दो डिब्बे खोले गये जो टांसपेरेंट हैं। डिब्बे की सील में मु०अ०सं० 15/14 धारा 323, 364, 147, 392, 302, 120बी/34 आई०पी०सी० थाना स्वरूपनगर कानपुर नगर तथा विवेचक मेरे हस्ताक्षर अंकित हैं। पहले डिब्बे से एक सफेद कागज की चिट निकली जिसमें अभियुक्त पियूष श्याम दासानी एस०/ओ० ओमप्रकाश श्याम दासानी उसका पता 117/एच 1/187 पाण्डुनगर काकादेव कानपुर नगर से बरामद फोन जिसका आईएमईआई नं० 358684055598280 तथा आईफोन एपिल लिखा है। तथा उसके अंदर से उक्त आईफोन निकला। आईफोन पर वस्तु प्रदर्श -27 डाला गया। तथा नाम पता लिखी हुई पर्ची पर वस्तु प्रदर्श-28 तथा प्लास्टिक के डिब्बे पर वस्तु प्रदर्श -29 डाला गया तथा दूसरा डिब्बा प्लास्टिक का टांसपेरेंट खोला गया जिससे सीलबंद है वह टेप है कपड़े का उसपर मु०अ०सं० 151/14 तथा उक्त धारा में अंकित है तथा मेरे हस्ताक्षर हैं। डिब्बे के अंदर से दो अदद मोबाईल फोन निकले जिसपर नाम व पते की एवं आईएमईआई की चिट बंदी मेरे द्वारा मोबाइल के पुश्त पर चस्पा की गयी है। जिसपर नाम मनीषा मखीजा डी०/ओ० हरीश मखीजा आर०/ओ० 117/एच 1/618 पाण्डुनगर काकादेव, कानपुरनगर दोनों मोबाइलों में अंकित हैं। 1. सेमसेन जीटी 19152 की आईएमईआई-356893050247640 अंकित है। 2. आईफोन एपल की आईएम ईआई- 013880007819949 अंकित है। जिनपर क्रमशः वस्तु प्रदर्श -30 वस्तु प्रदर्श -31 डाला गया तथा प्लास्टिक के डिब्बे वस्तु प्रदर्श क-32 डाला गया।

विवेचना के दौरान मैंने पियूष श्याम दासानी के पारिवारिक जनों द्वारा दिनांक 27.07.14 व 28.07.14 को टेलीफोन से आपस में किये गये वार्ता का काल डिटेल का चार्ट तैयार करा मुख्य विवेचक शिवकुमार राठौर को दिया गया था। वह चार्ट पत्रावली में संलग्न पेपर संख्या 772 लगायत 774 तक है। पेपर संख्या 772 पर मैंने अपने लेख में घटना के बाद से पूरे परिवार द्वारा 68 कॉल किये जाने का उल्लेख किया हो किन्तु इस लेख के नीचे अपना हस्ताक्षर करना सहवन भूल गये थे पेपर संख्या 772 पर जो मेरे लेख हैं। जिसपर प्रदर्श क-67 लेख पर डाला गया।

न्यायालय समय शेष नहीं बचा मुख्य परीक्षा स्थगित। आज सर्व मुहर प्लास्टिक का डिब्बा न्यायालय के समक्ष खोला गया डिब्बे पर कपड़े का टेप से सील है। उक्त टेप के उपर मु०अ०सं० 151/14 धारा 323, 147, 364, 392, 302, 201 120बी/34 IPC थाना स्वरूप नगर कानपुर नगर तथा मेरे हस्ताक्षर दिनांक 10.08.14 के हैं। तथा का० कुल भूषण यादव के इस पर हस्ताक्षर हैं।

डिब्बे के अन्दर से सफेद कागज की चिटबन्दी निकली जिसमें लिखा है मृतक ज्योती श्याम दासानी W/o पियूष श्याम दासानी निवासी 117/1+1/187 पाण्डु नगर थाना काकादेव पाण्डु नगर कानपुर नगर का फोन जो मृतक के पास से कार से वरामद हुआ मोबाइल फोन सेमसन S4.200M इसका EMEI No. 35698 505100865601 है। चिटबन्दी मेरी द्वारा तैयार की गयी थी चिटबन्दी पर वस्तु प्रदर्श 33 डाला गया। तथा एक अदद मोबाइल मृतक ज्योती का सेमसन कम्पनी का निकला उस पर वस्तु प्रदर्श 34 डाला गया। तथा प्लास्टिक के टांसपेरेंट डिब्बे पर वस्तु प्रदर्श 35 डाला गया।

गवाह ने देखकर मोबाइल को बताया कि यही मोबाइल जो मैंने मृतका के पास से लेकर पुलिस कब्जे में सील मुहर किया था।

मृतका के मोबाइल पर बार बार काल आ रही थी जब हमने उस नम्बर पर बात की तो ज्योती पता चला वह उसकी बुआ मोनिका ज्योती के फोन पर बात कर रही थी।

घटना के बाद मृतका का मोबाइल मेरे कब्जे में था। उसे अगले दिन जॉच के लिए उप निरीक्षक संजय सिंह को दिया था।

प्रश्न— जिस नम्बर से काल आ रही थी उस नम्बर पर आपने अपने मोबाइल से बात की थी या मृतका के मोबाइल से?

उत्तर— अपने मोबाइल से बात की थी।

प्रश्न— आपकी मोनिका से क्या बात हुई थी?

उत्तर— मेरी मोनिका से बात हुयी थी आप कौन बोल रही हैं। तब उन्होंने बताया कि मैं मोनिका बोल रही हूँ। मैंने कहा जिस नम्बर पर बार बार फोन कर रही हैं उनकी हत्या हो गयी है।

प्रश्न— विवेचना के दौरान पियूष श्याम दासानी का कोई फेक आई डी या फोन नम्बर आपने पाया था। उस सम्बन्ध में आपने क्या कार्यवाही की?

उत्तर— अभियुक्त पियूष श्याम दासानी द्वारा एक मोबाइल नं० 8090766853 व अभियुक्ता मनीषा नखीया द्वारा मोबाइल नं० 8090766837 का प्रयोग किया जा रहा था। जो गलत नाम पते से क्रय कर उपयोग किया जा रहा था। जिसके सम्बन्ध में मेरे द्वारा मुख्य विवेचक को नाम पता गलत प्रयोग किये गये की

मोबाइल नम्बरों के कय करने के सम्बन्ध मे एक रिपोर्ट प्रेषित की गयी थी। कय किये गये मोबाइल नम्बरों के नाम पता श्री शंकर एस/ओ डा0 निखिल कुमार 65/08 खौदा जिला बौदा का पाया गया।

इस स्तर पर अभियोजन द्वारा प्रा0पत्र दिया गया और निस्तारण दिनांक 09.11.17 को पेश हो। मुख्य परीक्षा इस स्तर पर स्थगित। घटना के दिन मृतका की अपने परिवारिक जनो से बात चीत अपनी बुआ व मायके मे मोबाइल नम्बर द्वारा से नं0 07614042572 से भी बात की गयी थी जिसका विवरण CDR में उपलब्ध है।

मुझे इलेक्ट्रानिक कार्य करने एवं कम्प्यूटर सीखलायी प्रशिक्षण के दौरान एवं अलग से भी कोर्स डाक्टर भीमराव अम्बेडकर एकादमी मुरादाबाद से प्राप्त किया है।

मैने दिनांक 08.11.17 को माननीय न्यायालय के समक्ष 65बी के सम्बन्ध मे प्रमाण पत्र जो पत्रावली पर कागज संख्या 307ख व 308ख दिखाया जो मेरे लेख व हस्ताक्षर मे है जिस पर अभियुक्तगण की तरफ से आपत्ति की गयी कि प्रदर्श नहीं डाला जा सकता है। तथा जि0 न्यायालय के आदेश पर प्रदर्श क-68 व प्रदर्श 69 डाला गया। जिस पर निर्णय के समय विचार किया जायेगा।

आज अभियोजन द्वारा पेपर संख्या 322ख प्रा0पत्र के साथ मय फेहरिस्त के साथ सत्यापित प्रतियाँ 324ख लगायत 326ख/2 दाखिल किया गया है। जिस मे पेपर संख्या 324ख/2 मेरी आख्या है जिसके आधार पर मुख्य विवेचक द्वारा मु0अ0सं0 158/14 धारा 420, 467, 468, 471IPC मे पंजीकृत किया गया था। मैने विवेचन के दौरान ग्राम प्रधान खौड़ा थाना तिंदवारी तहसील व जिला बौदा का प्रमाण पत्र प्राप्त किया था। जिसके अनुसार ग्राम खौड़ा मे शंकर पुत्र निखिल कुमार नाम का कोई व्यक्ति नहीं रहता है प्रमाण पत्र पर प्रधान के हस्ताक्षर व मुहर है।

x x x x by defence

अभियुक्तगण ओमप्रकाश, पूनम, मुकेश, कमलेश, पियूष की तरफ से श्री सईद नकवी एडवोकेट

x x x x by defence

इस केस मे मुख्य विवेचक ने मेरा ब्यान धारा 161बतच्च का लिया गया है। तारीख याद नहीं है। व समय याद नहीं है और स्थान भी याद नहीं है। और कितनी बार बयान किया यह भी याद नहीं है।”

54. In cross-examination, this witness has stated that mobile no. 9956353535 is not in the name of A-1 and is in the name of Sri Ram Jaslani, partner of his father and it was found that he was using this number. In this regard, he has recorded the

statement of Ram Jaslani. In further cross-examination, he stated that it is not specifically stated by Ram Jaslani that this mobile number was used by Piyush Shyamdasani. He further stated that from the call details record, it is not possible to identify who is using the said phone number and only with the help of IMEI of a mobile, it can be located. This witness further stated that mobile no. 8127986342 is also not in the name of Awadhesh and is in the name of one Anil Kumar and he had not conducted any investigation from said Anil Kumar in any manner. This witness further stated that mobile no. 7784987598 recovered from Renu @ Akhilesh Kanaujiya, which was registered in the name of Monu Sakay and he has not conducted any investigation from said Monu Sakay. Mobile no. 8687580730 recovered from Sonu Kashyap, is registered in the name of Sarvesh Kumar and again he has not conducted any investigation from said Sarvesh Kumar. Mobile no. 8090615770 of accused Ashish Kashayp, as per the call details record, had no calls with the mobile of Piyush Shyamdasani's no. 9956353535. He further stated that he has not seen the said mobiles, recovered from Awadhesh, Ashish Renu and Sonu and he has only collected the call details of the phone. From the accused Piyush Shyamdasani, one Black Berry mobile of IMEI no. 358567040242810 was scanned and old no. 8604351351 was found. He stated that he cannot recollect from whom this black berry mobile phone was recovered. He further stated that he has sent four phones to a private company SAMCO Touchscreen Services Pvt. Ltd. which recovers the data and he has no knowledge if the said company is registered with the government or not. He further stated that mobile nos. 8090766853 and 8090766837 are in the name of one Shankar Singh, s/o

Nikhil Kumar and he has not done any investigation from Shankar. This witness has also proved the CDRs (Ex. 49 and Ex.50) regarding the G.D. entry and call details record. In further cross-examination, this witness stated that he has drawn a self conclusion that the fake numbers which are not in the name of accused persons, were in fact used by them and on the basis of the same further investigation was conducted. This witness stated that during his investigation, only the details of phone call and SMS were collected, however, no transcript of any message was collected by him. He stated that during investigation, he found one SMS 'love you' from mobile nos. 8858758077 and 9956353535 and on investigation, it was found to be sent by one Kamini Sachan and she admitted relationship with him by stating that in routine daily SMS, such a message was sent. This witness further stated as under:

“मेरी सम्पूर्ण विवेचना मे मनीषा और पियूष के प्रेम सम्बन्ध हो यह कोई अभिलख साक्ष्य नहीं थी। मेरी विवेचना मे कामनी के **SMS** के अतिरिक्त अन्य **SMS** जिसके कोल डिटेल् निकाली गयी हो तो प्रेम सम्बन्धी **SMS** नहीं मिले।”

This witness further give the details of various recoveries of CDRs and the respective G.D. entries.

55. PW-19- Dr. Rajesh Kumar Agarwal, who conducted the post-mortem examination of the victim, recorded the following injuries on the dead body:

“26.2.2018 मे डा0 राजेश कुमार अग्रवाल वर्तमान तैनाती अपर मुख्य चिकित्सा अधिकारी कानपुर नगर (अवकाश) पर

सशपथ कथन किया—

1. दिनांक 28/7/14 को मै सामुदायिक स्वास्थ्य केन्द्र सरसौल मे सर्जन के पद पर कार्यरत था। उपरोक्त दिनांक पर मैने डा0 दिव्या द्विवेदी, डा0 आर पी0 तिवारी, डा0 अर्जुन ओझा व डा0 पुनीत अवस्थी के

संयुक्त बोर्ड मे मृतका ज्योतिश्याम देसानी पत्नी पीयूष श्याम देसानी नि0 117/41/187 पाण्डु नगर, पी0 एच0 काकादेव, कानपुर नगर आयु लगभग 27 वर्ष थी और जिसे सी/- 4625 अखिलेश कुमार व महिला कास्टेबुल 3870 अंजली यादव व होमगार्ड 1543 देवेन्द्र के सील बन्द शव को लेकर आये थे के शव का पोस्टमार्टम किया था। शव की शनाख्त उसे थाने वाले होमगार्ड व कान्स्टेबलो के द्वारा की गई थी।

2. सामान्य परीक्षण

मृतका की लम्बाई 146 से0मी0, औसत कद काठी की थी। शरीर की अकड़न उपरी व निचले एक्जट्री मिटीज मे ली तथा गर्दन से चली गयी थी। पोस्ट मार्टम स्टेनिंग पीठ के उपरी व निचले दोनो हिस्से पर थी। मृतका की आंखे बन्द थी मुंह थोड़ा सा खुला था। दोनो होठो के बाई तरफ नीलगू (कन्ट्र्यूजन) के निशान थे।

3. मृत्यु पूर्व आई चोटें—

1. खरोंच के साथ नीलगू घाव सिर के बाई ओर। आक्सीपीटल क्षेत्र मे दाये कान से 8 से0मी0 ऊपर। 6 से0मी0 गुणा 4 से0मी0।

2. खरोंच के साथ नीलगू घाव 4 से0मी0 गुणा 4 से0मी0 सिर पर सीधे फ्रन्टल क्षेत्र मे दाहिनी भौंह के ऊपर।

3. खरोच के साथ नीलगू घाव 2 से0मी0 गुणा 2 से0मी0, सीधे गाल पर दाहिनी आंख की नीचे बाहर की ओर।

4. खरोंच के साथ नीलगू घाव 1.5 से0मी0 x 1.5 से0मी0 ऊपरी होंठ के बाई तरफ।

5. खरोंच के साथ नीलगू घाव 1.5 से0मी0 x 1.5 से0मी0 नीचले होंठ के बाई तरफ।

6. खरोंच के साथ नीलगू घाव 3 से0मी0 x 1 से0मी0 गर्दन के बाई ओर चोट बेस आफ नेक से लोअर नेक तक लीनियर पोजीशन में थी।

7. कटा हुआ 10 घाव 1.5 से0 मी0 x 1.5 से0 मी0 से 3.0 से0मी0 x 1.5 से0मी0 के अलग अलग घाव थे जो दाहिने गाल से गर्दन की तरफ 10 गुणा 10 से0मी0 के क्षेत्रफल मे फैले थे मांसपेशी तक गहरे थे।

8. कटा हुआ घाव 4 से0मी0 x 1.5 से0मी0 गर्दन के सीधी तरफ केविटी तक गहरा। सीधी क्लेविकल से 2.5 से0मी0 से ऊपर था।

9. मल्टीपल कन्ट्र्यूज्ड एब्रेडेड घाव दाहिनी कंधे के टॉप पर, 8 से0मी0 x 6 से0मी0।

10. कटा हुआ घाव 4 से0मी0 x 2 से0मी0 छाती के सीधे भाग मे सीधे निपल से 12 से0मी0 नीचे। 6 'O' क्लोक पोजीशन पर। केविटी तक गहरा था।

11. कटा हुआ घाव 2 से0मी0 x 10 से0मी0 x मांस पेशी तक गहरा पीठ के दाहिनी ओर बेस आफ राईट एक्जिला के 18 से0मी0 नीचे।

12. कटा हुआ घाव 2 से0मी0 x 1 से0मी0 x मांसपेशी तक गहरा, बेस आफ बाई रिंग फिंगर आफ पाए।

13. कटा हुआ घाव 1 से0मी0 x 1 से0मी0 x मांसपेशी तक गहरा। बाये हाथ की रिंग फिंगर के टाप पर (पामा की तरफ)।

14. कटा हुआ घाव 2.5 से0मी0 x 1.5 से0मी0 हड्डी तक गहरा दाहिने तरफ क्षेत्र पर जो कि राईट एन्टीरियर सुपिरियर इलियक स्पाइन से 22 से0मी0 नीचे था।

4. आन्तरिक परीक्षण

गर्दन में ट्रेकिया कटी हुई थी। चेस्ट में खाने की नली (एसोफेगस) कटी थी जो कि चोट नं0 8 का परिणाम था। दोनों फेफड़े पेल थे। दोनों हृदय के चैम्बर खाली थे। दाहिनी तरफ की गर्दन की लार्ज वेसल्स कटी हुई थी।

पेरिटोनियम कैविटी में पेरिटोनियम फटा हुआ था और लगभग आधा लीटर खून मौजूद था। स्टमक कटा हुआ था। लीवर फटा हुआ था। बच्चे दानी को हिस्टो पैथोलोजिक परीक्षण हेतु भेजा गया। वैजाइना से मारलंड डिस्चार्ज सफेद रंग का उपस्थित था। इस डिस्चार्ज का स्लैब लिया गया। ओरल कैविटी में भी स्लैब लिया गया था।

5. हमारी राय में मृतका की मृत्यु का संभावित समय लगभग आधा दिन था। मृत्यु का कारण मृत्यु पूर्व आई चोटों के फलस्वरूप रक्तस्राव व सदमा था। चोट-नं01 से 6 किसी सख्त व कुन्द आले से आना संभव है। चोट सं0 7 से 14 तक (9 के अतिरिक्त) किसी धारदार व सख्त हथियार द्वारा आना संभव है। चोट सं0 9 किसी सख्त व कुन्द आले से आना संभव है।

6. जो नमूने लिये गये जार ए में स्टमक उपरी अर्तवस्तुओं? के टुकड़े व आंत के टुकड़े। जार बी में लिवर विद गाल ब्लैडर, स्प्लीन व दोनों किडनियों के टुकड़े। जार सी में पार्ट आफ युरेटस/स्लाइड स्लैब बरल कैविटी राईट एण्ट लैफ्ट निपल व वैजाइना। दोनों हाथों के नाखूनों में फंसे हुए बाल। प्यूविक हेयर। हृदय से डी0एन0ए0 टेस्ट के लिये ब्लड सैम्पल लिया था।

7. पोस्ट मार्टम रिपोर्ट डा0 सजीव कुमार ओझा ने मेरे सामने अपने हस्तलेख में तैयार कर के अपने हस्ताक्षर किये थे। उनके हस्ताक्षरों की मैं शनाख्त करता हूँ। पैनल के सभी डाक्टरों ने उक्त आख्या से सहमत होते हुए अपने अपने हस्ताक्षर किये थे और मैंने भी किये थे। सभी हस्ताक्षरों को मैं शनाख्त करता हूँ। पोस्टमार्टम रिपोर्ट पर प्रदर्श क-70 डाला जाता है। सम्पूर्ण पोस्टमार्टम की विडियोग्राफी भी हुई थी।

8. मृतका के शव से एक सलवार, एक ब्रा, एक पैन्टी, एक कुर्ता, एक दुपट्टा, दो हेअर विलप, एक प्लास्टिक बीड का ब्रेसलेट व दाहिने पैर का स्लीपर

बरामद किये गये थे। पोस्टमार्टम करने के बाद पोस्टमार्टम रिपोर्ट मूल मय 12 प्रपत्र। सील बन्द शव व सील बन्द कपड़े व आर्टिकल, सी/ नं0 4625 राकेश कुमार व महिला कान्सटेबल अंजली यादव के हवाले किये थे।

9. मृतका के शरीर पर मृत्यु पूर्व आई चोटें दिनांक 27.7.14 को रात्रि 11 से 12 बजे पहुंचाया जाना संभव है। मृतका के शरीर पर जो जो कटा हुआ घाव पाये गये थे वे धारदार चाकू से आना संभव है।”

56. In cross-examination, this witness stated that the deceased died due to excessive bleeding and shock. The post-mortem report was Ex.Ka.70.

57. PW-20- Arvind Srivastava, Deputy Manager/ Nodal Officer Tata Teleservices Ltd., provided the details of mobile nos. 8090768853, 8604251351, 8090766837, 8090615770 and 8960868686. He stated that the details were given to Akhilesh Kumar Gaud, I.O. by his predecessor Nodal Officer, Arpit Srivastava, who has attested the same. This witness identified the signature of Arpit Srivastava, who has attested the call details.

58. This witness also produced Ex.Ka.71, certificate issued by the company as Ex.Ka.72, the certificate regarding CDR and other certificate issued by the company, certified by him and also proved the document as Ex.Ka.73. On a court query, whether server data contestation remain in the security. This witness stated that there cannot be any human interference in the data feeding system. He further stated that Ex.Ka.73 was prepared by him.

59. PW-21- Rajeev Singh Sengar, Nodal Officer Bharti Airtel, stated that his predecessor Kaushlendra Tripathi has resigned and he has proved the call details prepared by Kaushlendra Tripathi and submitted to I.O. in pursuance to a letter

written by S.S.P. Kanpur, regarding mobile nos. 9651886868, 8853902938, 9956353535, 8127986342 and 7897139393 which proved as Ex.Ka.74 to Ex.Ka.84. In cross-examination, this witness stated that he has not cited as a witness by the I.O. He stated that he has no personal knowledge whether Kaushlendra Tripathi before issuing the certificate, has complied with provisions of Section 65B (4) of Evidence Act.

60. PW-22- Kaushik Ghosal from Vodafone appeared and stated that he has provided the details of the following four numbers are 9839037272, 9838868686, 9838202354, 9839031012. He proved the call details of the phone numbers as per the call details 9839037272, is registered in the name of Kamlesh Kumar and mobile no. 9838202354 is registered in the name of Mahadev Paper Mill through Sanjay Shyamdasani. Mobile No. 9838868686 is registered in the name of one Kamlesh. s/o Raj Mohan and mobile no. 9839955320 is registered in the name of Manisha Makheeja. This witness has provided the call details of all the four numbers which was Ex.Ka.86 to Ex.Ka.100. He further stated the call details of mobile no. 9839955320 in the name of Manisha Makheeja, is having the original call details as Ex.Ka.103 to Ex.Ka.115. This witness has also stated that as per his certificate issued under Section 65B of Evidence Act, there is no tampering with the computer data and the record is correct. In cross-examination, he has stated about how the call details were prepared and supplied to SSP Kanpur.

61. PW-23- Shashi Bhushan Mishra, the additional Investigating Officer stated about some newspaper cuttings on the basis of which, accused were arrested and people

praise the working of police authorities. This witness further stated that he has conducted the search of the factory of accused-A-1 and recovered four numbers C.P.U. In cross-examination, he denied a suggestion that the arrest of accused persons were wrongly shown.

62. PW-24- Dr. Praveen Kumar Srivastava, Scientific Officer, Forensic Field Unit, Kanpur Nagar stated that on receiving the information of murder from the S.H.O., P.S.- Swaroopnagar, he along with his field unit team had visited the place of occurrence and recovered one knife from the bushes and on benzidine test, blood was found. The same was sealed and sent to FSL, Lucknow. In his presence from the sealed packet, a knife was taken out and he stated that this is the same knife which is Ex.36 and the report is Ex.Ka.128. He also proved the certificate under Section 65B of Evidence Act under a signature as Ex.Ka.129 and regarding the videography of the recovery effected at the spot. He also proves the photographs as articles as Ex.37 to Ex.55. He denied a suggestion that he has not visited the spot and stated that he has done the investigation at the spot. He also denied a suggestion that he has manipulated the evidence.

63. PW-25- Vinod Kumar, Sr. Scientist, Forensic Science Lab, Lucknow stated that on receiving the information, he visited the spot and inspected the car from which the following recoveries were made. The operative part of the statement read as under:

“जहां मु.अ.सं. 151/14 धारा 323/147/392/364 आई.पी.सी. से सम्बन्धित घटनास्थल पर पहुंच कर घटनास्थल का निरीक्षण किया जहां से घटनास्थल पर खड़ी कार से निम्नलिखित साक्ष्यों को एकत्र किया गया (1) अदद

ब्लड सैंपल इन काटन स्वेब आगे की लेफ्ट शीट के पास (2) एक अदद ब्लड सेम्पल इन काटन स्वेब जो ड्राइवर सीट के पीछे वाली शीट के पास से (3) एक अदद सफेद स्माल रक्त रंजित कार की पीछे की शीट के पास से (4) एक अदद पाली वेग मे *hair sample* पीछे की शीट से (5) तीन अदद चाकू जिनकी लम्बाईयां क्रमशः 28, 28 तथा 32 सेमी० नापी गई- कार की पीछे की शीट से (6) एक अदद लेडिस सैण्डिल रक्त रंजित ब्लू कलर की कार की पीछे की शीट से (7) एक अदद कन्ट्रोल सेम्पल प्लेन काटन (8) फ्रिगर प्रिन्ट कार्ड एक पर पांच अदद अंगुल चिन्ह जिसे Q1 से Q5 से डीनोट किया गया। जो उक्त कार की शीसो से मिले थे। गाड़ी का नं. UP 78 BR.5009 घटनास्थल पर खड़ी थी जिसे उपरोक्त चीजो प्राप्त हुई थी मेरे द्वारा सघन निरीक्षण कार का किया गया था। और मेरे द्वारा उससे जो उपरोक्त साक्ष्य एकत्रित किया गया था वह विवेचक को सुपुर्द किया था। निरीक्षण के समय मेरे निर्देशन मे फोटो ग्राफर आन्ना कुमार शर्मा से घटना स्थल की फोटो ग्राफी कराई थी। फोटोग्राफी तीन शीटो पर कराई थी जो कुल सं० मे 36 है।

जो मेरे निर्देशन मे कराई थी जो शामिल पत्रावली है। पत्रावली मे उपलब्ध कागज सं. 707 व 708 व 709, 710 व 712 है। कागज सं. 707 फर्द चालान नं. 708 व 709 घटनास्थल निरीक्षण ही मेरे लेख व हस्ताक्षर मे है फर्द चालान पर प्रदर्श क 130 डाला गया। घटना निरीक्षण संयुक्त रुप से रिपोर्ट रिपोर्ट पर प्रदर्श क 131 डाला गया। कागज सं. 710 व 711 व 712 पर कुल 36 फोटो ग्राफ है जो मेरे द्वारा पत्रावली मे समिलित है। जो विवेचक को मेरे द्वारा दिया गया था। जो शामिल पत्रावली है जिस क्रमशः प्रदर्श वस्तु 56 लगायत 92 डाला गया।

इस स्तर पर-

अभियुक्त अवधेश, सोनू व रेनू के विद्वान अधिवक्तागण द्वारा उपरोक्त छायाप्रति फोटो पर वस्तु प्रदर्श डालने से पहले यह आपत्ति की कि निगेटिव दाखिल नहीं है और मूल नहीं है। और कहा कि इनको साक्ष्य मे नहीं पढ़ा जावेगा और प्रदर्श नहीं डाला जावेगा।

न्यायालय आदेश- गवाह द्वारा बताया गया कि डिजिटल कैमरे से फोटो खींचा गया है। इस सम्बन्ध मे यह सभी फोटो ग्राफ पठनीय है। या नहीं है। वह बहस के समय देखा जावेगा। अभी इन पर वस्तु प्रदर्श डाला जावे।

मै अपने साथ 65B भारतीय? साक्ष्य अधिनियम 1872 का प्रमाण पत्र प्रस्तुत कर रहा हूँ। यह प्रमाण पत्र मेरे लेख व हस्ताक्षर मे है। आपत्ति- यहां पर अभिगण के विद्वान अधिवक्तागणो ने आपत्ति कि 65B का प्रमाणपत्र विवेचक को नहीं दिया इस स्तर

पर नहीं दिया जा सकता। यह प्रमाण पत्र लिगल प्रमाण पत्र नहीं है। और बाद मे बनाया गया है।

न्यायालय आदेश- प्रमाणपत्र साक्ष्य जारी रहेगा तथा इसकी वैधता के सम्बन्ध मे बहस। निर्णय के वक्त देखा जावेगा।

मेरे द्वारा मेरी देखरेख मे डिजिटल कैमरा व कम्प्यूटर व प्रिन्टर का प्रयोग करके फोटो निकालिये। उपकरण सही थे। और फोटो मे कोई छेड़छेड़ नहीं की गई। प्रमाण पत्र पर प्रदर्श क 132 डाला गया।

आज मुकदमे से सम्बन्धित सील मोहर बण्डल खोला गया जिसमे मु०अ०सं० 151/14 सरकार V/S पीयूष शायमदसानी आदि विवरण अंकित है। सील मुहर हालत मे दोनो पक्षो के उपस्थित मे दोनो पक्षो के सामने न्यायालय के समक्ष खोला गया।

बण्डल के अन्दर से एक सफेद ट्रान्सपेरेंट पन्नी के अन्दर कागज मे लपेटे हुये तीन आदद चाकू निकले जिनमे से दो चाकू की लम्बाई 8 सेमी व एक चाकू की लम्बाई 32 सेमी. है। तीनों चाकुओं पर क्रमशः 32 सेमी पर वस्तु प्रदर्श 93 तथा 28-28 सेमी पर वस्तु प्रदर्श 94 व 95 डाला गया। तथा जिन कागजो पर चाकू लिपटे हुये थे। उन पर वस्तु प्रदर्श 96 से 98 डाला गया तथा पादर्शी पन्नी पर वस्तु प्रदर्श 99 डाला गया। तथा जिस कपड़े पर तीनों चाकू निकले उस वस्तु प्रदर्श 100 डाला गया। इस कपड़े पर अ.सं. 151/14 धारा 147/323/364/392/302/201/412/120B/34 आई.पी.सी. थाना स्वरूपनगर बनाम पीयूष श्यामदसानी आदि अंकित है। बड़े बण्डल सील से उपरोक्त वस्तु प्रदर्श चाकू निकाले गये थे। ”

64. In cross-examination, he stated that the articles recovered which were having blood stains were duly marked. He denied a suggestion that the certificate under Section 65B of Evidence Act is a fake document. He also denied a suggestion that articles are not sealed in his presence or that he has made shown the recovery of articles while sitting in the police station.

65. PW-26- Dharmprakash Shukla, another co-investigator, stated about the deposit of the articles with FSL. He also stated about the fingerprints taken at the spot and sent to the FSL for examination. This witness stated that vide diary no.6, he recorded statement of Sagar Ratnani who

stated that he had gone to the house of Manisha Makheeja in relation to a matrimonial proposal while confronting his statement, under Section 161 of Cr.P.C. and Section 164 of Cr.P.C, he denied a suggestion that subsequent statement was recorded in order to cover up the discrepancies in the previous statements. He stated that from 24.7.2014 to 28.7.2014, Manisha and Sagar Ratnani were sending message to each other, however, he has not collected the transcript. He stated that he has no knowledge whether in the previous statement under Section 161 of Cr.P.C., Sagar has told about her relation with Manisha Makheeja.

66. PW-27- Gopi Chandra Yadav, Inspector, stated that on 28.7.2014, he received an information through wireless set about abduction of lady in Honda Accord Car No. UP78BR5009 and while searching for the same, he found the car parked near Shanti Medical Store and then he gave information to S.O., Swaroop Nagar, who also reached there and thereafter, the higher officials and field unit dog squad also reached there. The field unit team broke the window pane of the car and took out the injured lady and sent her to the hospital. During the inspection of the spot by field unit, one white colour blood stained handkerchief, three knives which were blood stained, hair, sandals etc. were recovered which were sealed. He deposited the same in the police station vide G.D. No.7. In cross-examination, he stated that no mobile was found inside the car and denied a suggestion that the proceeding was ante-time and prepared at the police station.

67. PW-28- Amit Kumar Sharma, Nodal Officer Reliance Communication Ltd., stated that his predecessor, Madhu

Balusu has prepared a covering letter on which he identified a signature and proved the documents as Ex.Ka.133 to Ex.Ka.134. He stated that mobile no. 8687580730 was issued in the name of Sarvesh Kumar and also stated that while preparing the call details record, no tampering was done with the computer and certificate of Section 65B was issued. In cross-examination, he denied a suggestion that the call detail record is not correct and for providing the certificate of Section 65B, no summon was issued from the court.

68. PW-29- Kulbhushan Singh, S.I., also stated that he had gone to the office of Aircell and therefore, he could not collect the original CDR of mobile no. 7784987598, however, from the mobile ID of the company, the call details were retrieved which are Ex.Ka.145 to Ex.Ka.147 and in this regard, certificate under Section 65B was issued which is Ex.Ka.148. This witness further denied a suggestion that the documents produced by him are fake.

69. PW-30- Rajeev Dwivedi, Inspector, stated that he has received the envelope from the doctor for sending it to the FSL, Lucknow and proved the DNA report from Hyderabad. He stated that S.I., Reena Gautam arrested accused Manisha Makheeja and while in custody, statement of Piyush Shyamdasani and Manisha Makheeja was recorded while they were asked to sit in front of each other. He recovered the details of Black Berry mobile phone which was provided from the company. The operative part of details read as under:

“कम्पनी के पत्र के अनुसार IMEI No. 358567040242816, Email ID दि० 17.9.2011 को manisha05@hotmail.com व 2.10.2012 को

Email id Piyush shyam jesani@yahoo.com से activate हुआ था। इस mbl. set पर आखिरी IMEI नं. 405045017477576 दि० 3.7.14 को हुई थी जिससे mbl. No. 8090766853 जो कि पीयूष का नम्बर है, Activate हुआ।”

70. This witness also stated about the recovery of CCTV footage hard disk of Rave Moti Mall and Varanda Restaurant. He also stated about the inspection of the Honda Accord Car by HCP-MT- Rajesh Shukla and inspection of the other suspected places. He also produced the location chart of Piyush Shyamdasani, Awadhesh, Renu, Sonu and Ashish. With regard to the call details, witness stated as under:

“जिसके अनुसार पीयूष ने Mbl. No. 8090766853 से अवधेश के Mbl. No. 8127986342 पर 21.05 पर वार्ता की। इस समय अवधेश की Location Varanda restaurant थी। इसके उपरान्त अभियुक्त रेनू द्वारा अपने Mbl. No. 7784987598 से आशीष के Mbl. No. 8090615770 पर 21.08 पर वार्ता की। इस समय रेनू की Location पार्वती बागला? Road, Varanda Restaurant के पास थी। पीयूष द्वारा अवधेश को पुनः 21.17 पर, 21.55 पर Call की गई। अवधेश की Location Varanda restaurant थी। रेनू द्वारा आशीष को समय 22.13. Mol. पर Call की गई। दोनों की Varanda restaurant के पास मौजूद थे। इसी क्रम में आशीष द्वारा सोनू को समय 22.23, 22.25 बजे Call की गई। Location घटना स्थल पार्वती बागला Road है। सोनू द्वारा आशीष को 23.37 पर Call की गई। सोनू की Location कम्पनी बाग से Rawatpur Road पर मिली। इसी Location पर पीयूष द्वारा Honda कार गाड़ी मृतका ज्योती को अवधेश और उसके साथियों के सुपुर्द कर दिया। इसके उपरान्त सोनू द्वारा आशीष को लगातार Call की गई। जिसमें इनकी Location पनकी क्षेत्र में है जहां से Honda कार व मृतका का शव गाड़ी के अन्दर बरामद हुआ था। सोनू द्वारा आशीष को 28.7.14 समय 00.05 बजे Call की गई है इनकी Location पनकी क्षेत्र में गाड़ी और शव मिलने के स्थान पर हुई। आशीष द्वारा सोनू और रेनू को मो० साइकिल से घर छोड़ा गया। इसी दौरान पीयूष द्वारा मनीषा को समय 22.42 पर Call की गई।

पीयूष Varanda restaurant से नीचे आकर अवधेश व साथियों से मिलकर घटना की तैयारी के विषय में जानकारी करता है। सह विवेचक द्वारा पीयूष के Mbl. No. 9956353535 के उपलब्ध कराये गये Chart से घटना पूर्णतः स्पष्ट है। पीयूष द्वारा प्रयुक्त दूसरा Mbl. No. 8090766853 से 21.55 बजे अवधेश को Ph. किया। 21.56 बजे मनीषा को Call किया।”

71. This witness further stated that he has shown the location of all the mobile numbers of the accused excluding Manisha Makheeja on a google map which is Ex.Ka.152. The exhibition of the google map was objected by the defence side, however, the court observed that regarding overruling the aforesaid objection, a separate order is passed. This witness by relying upon this map, told about the locations of the accused persons except Manisha Makheeja on 27.7.2014, immediately before the occurrence and subsequent to the occurrence. This witness further stated that on a previous occasion, i.e. on 13.7.2014, an attempt was made, thereafter, another attempt was made on 27.7.2014 and in this regard, this witness stated that he has collected the call details of Piyush Shyamdasani, Renu, Sonu, Ashish. The operative part of the statement read as under:

“इसके पूर्व हत्या के प्रयास रविवार के दिन है, गूगल नक्शे पर है। दि० 13.7.14 को हत्या की बनायी गई योजना सचेण्डी स्थित oriant resort से वापसी के समय बनाई गयी थी जिसका Invitation Card उपलब्ध है, दि० 20.7.14 की बनाई गई योजना गंगा वैराज के आस पास बनाई थी जो कि वारिश के कारण सफल नहीं हो पायी जिसका Chart संलग्न है।

दि० 13.7.14 को योजना सफल न होने पर पीयूष द्वारा अपने मो० से रेनू को समय 00.15 बजे व समय 00.18 बजे Call की गई। 00.50 पर अवधेश से वार्ता की थी। दि० 20.7.14 को हत्या की योजना सफल न होने पर पीयूष द्वारा रेनू के Mbl. पर 22.29 बजे व 22.23 बजे वार्ता की गई तथा अवधेश के Mbl. पर SMS भेजा गया। 22.38 बजे मनीषा को call की। इस

प्रकार दि० 20.7.14 को पीयूष, अवधेश से समय 20.27 से लेकर 22.25 बजे तक लगातार सम्पर्क में रहा। समय 21.07 बजे अवधेश व पीयूष दोनों की Call का Location Miston Road का है जो कि बड़े चौराहे के पास स्थित है जिसके अभियुक्तगणों द्वारा Z square पर मिलने की पूर्व दिये गये वयानों की पुष्टि होती है। दि० 21.7.14 को भी 21.41 व 21.43 बजे पीयूष की Location Rev Moti काकादेव क्षेत्र में, अवधेश की Location 21.38, 21.53 बजे काकादेव क्षेत्र में, व अभियुक्त पीयूष से वार्ता भी हो रही है। रेनू की लोकेशन 21.36 बजे काकादेव क्षेत्र में Rev Moti के पास व अवधेश से वार्ता भी हो रही है। इस विवरण से अवधेश, रेनू द्वारा 21.7.14 को Rav Moti Big Bazar से चाकू खरीदने और पीयूष के वहां उपस्थित होने की तथ्य की पुष्टि होती है। इस प्रकार अभियुक्तगण द्वारा प्रयुक्त Mbl. नम्बरों के दि० 13.7.14, 20.7.14, 27.7.14 के उपलब्ध Call विवरण व Location को एक साथ नक्शे पर दर्शाकर विश्लेषण करने के उपरान्त यह पूर्णतः प्रमाणित होता है कि सभी अभियुक्तगण द्वारा योजनाबद्ध तरीके से मृतका ज्योती के दो बार हत्या के असफल प्रयास व तीसरी बार हत्या करके शव को छिपाया गया।”

72. This witness further stated about the call details between the accused persons on different dates. He also collected the details of IMEI number used by Ashish. He gave complete details of the scientific investigation regarding the recovery memo of the mobile phones, SIM numbers and IMEI numbers used by all the accused persons. This witness stated that as per his investigation, the incident was done neither with a motive for taking away the car nor for making any physical or sexual assault with the lady. The phone of the deceased was lying in the car on which a call was received during the incident. He further stated that during investigation, this fact came on record that mobile no. 8090766837 is of Manisha Makheeja, who is friend of Piyush Shyamdasani and another mobile no. 8858758057, is of an employee, namely, Kamini Sachan who worked in his factory. He stated that he gave complete details of the various phones made on the date of incident between the

two numbers and concluded that both accused, A-1 and A-2 were in touch with each other before the incident. It was also found that Awadhesh Chaturvedi is a former driver of Manisha Makheeja, was using mobile no. 8127986842 and knew about their love relationship. This witness stated that on the basis of the evidence, it was concluded that Piyush Shyamdasni in conspiracy with Awadhesh, Sonu, Ashish and Renu in a collective manner committed the murder of his wife by paying ransom to the co-accused. He also stated about recording the scene of occurrence which suggest that the murder was committed in a brutal manner. This witness also stated about the call details, CCTV footage, purchasing of knives and recovery of the diary of the victim.

73. This witness further stated that during investigation, it was found that Piyush Shyamdasani was not having such an intimate relationship with Kamini Sachan that he may commit murder of his wife- Jyoti whereas such evidence came against accused- Manisha Makheeja. This witness also proved the sealed articles which were sent to FSL, Lucknow and were produced before the court by opening the seal, the mobile phones etc. are Ex.103 to Ex.106. In cross-examination, regarding the chart vide Ex.Ka.152, he stated that it was prepared in crime branch and only bears his signatures. He denied a suggestion that google map has been prepared just to create evidence. In further cross-examination, he gave details of the call made between the accused persons regarding the google map. He stated that he had taken the copy from the satellite google map and has shown the location by his own with colours. In further cross-examination, he stated that Piyush Shyamdasani did not get his medical examination.

74. PW-31- Reena Gautam, S.I., stated that she was also an additional investigator and recorded the statement of witness, Manisha under Section 161 of Cr.P.C. At that time, she was not arrested. Manisha told that she is having relationship with Piyush Shyamdasani before his marriage and as Jyoti was objecting to the same, a conspiracy was hatched for murdering Jyoti. This witness stated that she did not suggest the I.O. for recording the statement of Manisha under Section 164 of Cr.P.C. When confronted with her own statement, this witness stated that she has told to the I.O. that Manisha has told her that she was having relationship with Piyush Shyamdasani prior to the marriage and hatched a conspiracy to kill Jyoti. However, in this regard, she cannot tell the reason why it was not recorded. This witness stated that she arrested Manisha on 30.7.2014.

75. PW-32- Karan Kumar Singh, Constable, stated that in his presence, S.O., Shiv Kumar has done the investigation regarding accused- Sonu, Renu, Awadhesh Chaturvedi and Ashish Kashyap. He recovered the blood stained clothes of Sonu and Renu and he had prepared the G.D. entry as dictated by Shiv Kumar Singh, which was Ex.109 to Ex.110. The sealed packet of the clothes was opened in the court and the clothes worn by Sonu and Renu as articles were Ex.111 to Ex.114 and he proved the recovery as Ex.Ka.154. In cross-examination, he denied a suggestion that the entire proceeding is fake.

76. PW-33- Sagar Ratnani stated that a matrimonial proposal regarding Manisha Makheeja came to his family and he along with his family members came to Kanpur, in the morning of 24.7.2014 by train. He stated that all of them had lunch at the

house of Manisha Makheeja and at that time, parents, grand-parents and one mediator, Suresh Nahlani was there. He and Manisha Makheeja had talk while sitting separately. He stated that the girl was uncomfortable because of her short height and told him that it will not look good, if she said no, therefore, suggested him that he should refuse and therefore, he refuse to get married to Manisha Makheeja. This witness stated that he returned to New Delhi on 25.7.2014 and up to 28.7.2014, he had chatting with Manisha Makheeja. He proved a statement recorded under Section 164 of Cr.P.C. as Ex.Ka.155. When confronted with the statement, Manisha suggested him to say no, is not recorded in his statement under Section 164 of Cr.P.C., This witness stated that he cannot tell the reason why the Magistrate has not recorded it.

77. PW-34- Shiv Kumar Singh Rathore, the main Investigating Officer and S.H.O., P.S.- Mangalpur, gave a complete details of the investigation starting from the information given in the police station for recording of the FIR.

78. He deposed about the investigation conducted by the FSL field unit, the statement of the witnesses, the recovery effected at the spot, the arrest of the accused persons, their confessional statement recorded by the police, he gave a complete details of the confession of all the accused persons. He also gave the details of the mobile phones, the SIM cards, IMEI numbers, call details records received from the various mobile companies, the conclusion drawn by the co-investigating officials.

79. In a lengthy cross-examination summing into 100 pages, this witness gave

each and every detail of investigation, information supplied by the prosecution witnesses and all the documents which already stands exhibited in the statement of other prosecution witnesses. In cross-examination, this witness denied a suggestion that all the documents have been prepared while sitting in the police station. In cross-examination by accused- Manisha Makheeja, he stated that he recorded the statement of Manisha Makheeja on three occasions and she was arrested on 30.7.2014. In lengthy cross-examination, the defence counsels put all the questions which were already put to the co-investigating officials and he denied a suggestion that he has collected fake CDR and electronic evidence.

80. PW-35- Om Prakash, Head Constable proved about the recovery of the motorcycle from accused Ashish as well as the knife used in the commission of offence. He was a witness to the same which is Ex.Ka.171. In cross-examination, this witness denied that he has not visited the spot and no recovery was effected in his presence.

81. PW-36- Brij Kishore Dixit, Head Constable, has proved certain G.D. entries prepared by him as well as other police officials as Ex.Ka.173. In cross-examination, this witness also denied a suggestion that the same G.D. entries are prepared in the police station and the signatures of the witnesses have been obtained later on.

82. PW-37- Ram Prakash, Inspector stated that he has prepared *Naksha Najari* as Ex.Ka.174 and Ex.Ka.175. In cross-examination, again this witness was given suggestion that he has not

prepared the site plan at the spot and no recovery was effected at the spot.

83. Thereafter, CW-1- Madha Balusu was examined, who proved a certificate CAF, which was downloaded from the computer system regarding the CDR of phone nos. 8687145104 and 868758730.

84. CW-2- Tej Bahadur Singh, Head Constable, stated that accused Om Prakash Shyamdasani died on 28.10.2018 and proved his death certificate as Ex.Ka.156.

85. CW-3 – Shiv Kumar Rathore (PW-34) was re-examined.

86. Thereafter, the trial court recorded the statements of all the accused persons under Section 313 of Cr.P.C and put all incriminating evidence to them, identical questions were put to all accused persons, they denied the same and stated that these are false evidence, created against them. The accused persons stated that they have been falsely implicated and they are innocent. Accused- Piyush Shyamdasni in his statement, recorded under Section 313 of Cr.P.C., has stated that the informant side is highly politically connected as one of them is a sitting MLA at Jabalpur and he has been falsely implicated whereas he has given the correct information in the police station. He stated that the mobile number assigned to him, was not on his name. He also stated that accused- Manisha Makheeja is residing near to his house but he has no love relationship with her and family of Manisha has also participated in his marriage with Jyoti. He stated that Shankar Nagadev was demanding money from his family and had taken Rs.50,00,000/- from demand draft, Rs.10,00,000/- from cheque and Rs.40,00,000/- in the shape of jewellery and also demanded

Rs.10,00,000,00/- for settling the case but the accused was not in a position to pay. He further stated that PW-5, Triveni Shankar Dixit was produced under the influence of aforesaid Shankar Nagdev and recovery of ring is fake.

87. In her statement under Section 313 of Cr.P.C., accused Manisha Makheeja was also confronted with similar questions and she denied the same. In reply to question no.105 whether she was having thick relation with the Piyush Shyamdasani, whether this fact was known to accused-Awadhesh and whether in a criminal conspiracy, all the accused persons committed murder of Jyoti, she denied all facts.

88. In reply to question no.108, PW-31- Reena Gautam, S.I. has stated that when she recorded the statement of Manisha under Section 161 of Cr.P.C., she told her that she was in relationship with Piyush Shyamdasani prior to his marriage and Jyoti was a hurdle, therefore, they all conspired to commit murder of Jyoti. This accused-A-2 stated that this is all fake and concocted story made with due deliberation and she has been falsely implicated. This witness also made a statement under Section 313(5) of Cr.P.C., stating that she had no relationship with Piyush Shyamdasani who was younger to him by few years. She wanted to perform marriage with Sagar Ratnani and therefore, she was in touch with him even after 24.7.2024, when she met with him at her residence and in this connection she was making SMS and Whatsapp call to him. She stated that her marriage proposal broke down because she was involved in the present case and police has spoiled her life. This witness stated that her D.O.B is 5.11.1987 and Piyush Shyamdasni is much younger to her

in age and therefore, the allegation of love relationship is false. She also stated that she was arrested after the sun set by PW-31-Reena Gautam and even an attempt was made by moving an application before the court to get her pregnancy test just to defame her. She further stated that police was influenced by the media report and has prepared fake evidence against her.

89. Thereafter, the case was fixed for defence evidence of the accused person.

90. DW-1- Ajeet Kashyap stated about the plea of *Alibi* set up by accused- Ashish Kashyap and stated that on 27.7.2014, Ashish Kashyap was with him at Pandu Nagar crossing.

91. DW-2- Suraj Kashyap stated that he is cousin of Ashish Kashyap and on 27.7.2014, they were together at Pandu Nagar crossing.

92. DW-3- Mukesh Shyamdasani, brother of accused- A-1 stated that Piyush's marriage was performed with Jyoti on 28.11.2012 and he produced the marriage album and other photographs. He stated that after marriage, both Piyush and Jyoti went for honeymoon for Singapore and Malaysia for 15 days and they returned happily. He also produced certain photographs of the honeymoon. This witness further stated that both Piyush and Jyoti celebrated their first marriage anniversary in Kanpur club and programme was organized in which photography was done and all the prosecution witnesses were present and they were seen happy at that time. He produced the photographs as Ex.Kha.1 to Ex.Kha.107. In cross-examination, he stated that after marriage, Piyush and Jyoti were staying happily and had no dispute. He came to know that the

family of Jyoti is very miser and used to put pressure on Jyoti to bring money from her in-laws. He stated that on 27.7.2014, he was going to Delhi by train and after some time Piyush called from his phone no. 9956353535 to his phone no. 7408211111 and informed that Jyoti has been kidnapped and he was very perturbed and weeping. He gave the description about the manner she was kidnapped, when they had come out of Varanda Restaurant after taking meals.

93. He stated that his father made a phone call at Number 100 and asked Piyush to reach P.S.- Swaroop Nagar and thereafter, the complaint was given. He produced the copy of the railway ticket as Ex.Kha 108 and Ex.Kha.109. He stated that Shankar Nagdev was continuously blackmailing them and was demanding crores of rupees to close the case and his family has given Rs.60,00,000/- by demand draft and cheque and Rs. 1,00,000,00/- in cash. He further stated that his family has been involved on the pressure exerted by Chief Minister of Madhya Pradesh. He denied a suggestion that no money was paid or that his family was demanding money.

94. DW-4- Dr. S.K. Juneja stated that the patient by the name of Jyoti visiting her as she could not bear a child and he has given certain prescription which are Ex.Kha.111 to Ex.Kha.113. In cross-examination, she stated that in a medical investigation, certain deformities were found and she was advised medicine for the same.

95. DW-5- Shabab Haidar, Assitant in District Jail, Kanpur Nagar, produced the entries regarding the accused person in District Jail Kanpur.

96. Thereafter, the trial court vide impugned judgment of conviction and

order of sentence convicted the accused, A-1 to A-6 whereas accused, A-8 to A-10 were acquitted. Accused A-7 Om Prakash Shyamdasani died during trial.

97. As at the time of hearing of second bail applications, in light of order of the Supreme Court in Special Leave to Appeal (Crl.) No(s). 12641 of 2023 dated 20.2.2024., all the learned Senior Counsels for appellants and informant agreed and, therefore, the arguments on main appeal was heard over for 6 days.

98. Sri V.P. Srivastava, learned Senior Advocate has argued on behalf of accused A-1 Piyush Shyamdasani that the marriage of accused-A-1 was solemnized with victim- Pooja @ Jyoti on 28.11.2012 and there was no motive on the part of the appellant to commit murder of his wife.

(a) Learned Senior Advocate has argued that as per FIR version which is recorded in the statement of A-1 itself on 27.7.2014 at about 11:30 p.m., when he and his wife (victim) was travelling in Honda Accord Car No. UP78-BR-5009, 7-8 persons on four motorcycles had come in front of his car and hit it from front side, when he protested, they gave him beating and forced him out of car and 3-4 persons including, one by driving the car took it away while his wife was sitting in the same and, therefore, he came to the police station and reported the matter at 12:30 a.m. on the intervening night on 27/28.7.2014 with a allegation that his wife has been abducted.

(b) Learned Senior Advocate has next argued that later on the victim was found lying in a pool of blood inside the car by the police and her jewellery etc. was taken away by the assailants and, therefore, it was a case of abduction and looting. It is next argued that even as per medical

evidence, there are injuries on the body of the victim suggesting that she protested against the action of the assailants and, therefore, she was given brutal injuries and as the assailants could not succeed in abducting her because of the protest shown by her, by causing injuries, the assailants took away all the valuable belonging like rings and tops etc.

(c) It is argued that accused-A-1 has given a natural version in the FIR which is corroborated by the postmortem suggesting that the victim had protest injuries on her body. It is next argued that the entire evidence of prosecution is based on circumstantial evidence that the accused A-1 was having love relationship with accused-A-2 (Manisha Makheeja) and in furtherance of conspiracy, they killed the victim, wife of accused-A-1, by engaging four other accused persons, namely, Renu @ Akhilesh Kanaujiya, Sonu Kashyap, Ashish Kashyap and Awadesh Chaturvedi.

(d) Learned Senior Advocate has argued that only on the basis of call details, the police has come to the conclusion that it was a conspiracy amongst all six accused persons and other accused persons i.e. accused-A-7 and A-8 who are parents of A-1 and A-9 and A-10 maternal uncle and aunt of A-1 had no knowledge about the conspiracy. The accused A-8 to A-10 were acquitted by the Trial Court as no such evidence came on record.

(e) Learned Senior Advocate has argued that the prosecution has failed to prove the motive against the appellant A-1 to A-6 despite the fact that the witnesses of facts i.e. PW-2, PW-4 and PW-6, when confronted with their statement made under Section 161 Cr.P.C. have stated that they disclosed about the extramarital affair of accused A-1 and A-2 to the investigating officer and if the same is not recorded in their statement, they cannot give any

reason. It is next argued that for the first time, all the witnesses of fact have made drastic improvement in the Court by making out the story of criminal conspiracy, ill behaviour of A-1 towards his wife-victim (Pooja @ Jyoti) and illicit affair between A-1 and A-2.

(f) Learned Advocate has argued that there is no consistency in the statement of all the witnesses of facts to establish either motive or conspiracy to commit the murder of victim Pooja @ Jyoti

(g) Learned Counsel has argued that the statement under Section 161 Cr.P. recorded of all the witnesses of fact could not be looked into in the light of the judgment of Supreme Court in **Mahaveer Singh Vs. State of Haryana, (2001) 7 SCC 148**. Para nos. 11 to 14 of the said judgment read as under : -

“11. The omission in Ext. DA (the statement ascribed under Section 161 of the Code by PW 1 dated 14-10-1991) regarding the role attributed to A-2 to A-4 relates to a very material aspect and hence it amounted to contradiction. When any part of such statement is used for contradicting the witness during cross-examination the Public Prosecutor has the right to use any other part of the statement, during re-examination, for the purpose of explaining it. The said right of the Public Prosecutor is explicitly delineated in the last part of the proviso to Section 162(1) of the Code. The first limb of the proviso says that any part of the statement (recorded by the investigating officer) may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act. The next limb of the proviso reads thus:

“[A]nd when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of

explaining any matter referred to in his cross-examination.”

Explanation added to the section is also extracted below:

“Explanation.—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.”

12. The said explanation was inserted into the statute-book when Parliament approved the legal position propounded by a Constitution Bench of this Court regarding the legal implication of an omission to state any fact in the statement under Section 161 vide *Tahsildar Singh v. State of U.P.* [AIR 1959 SC 1012 : 1959 Cri LJ 1231]

13. If a Public Prosecutor failed to get the contradiction explained as permitted by the last limb of the proviso to Section 162(1) of the Code, is it permissible for the court to invoke the powers under Section 172 of the Code for explaining such contradiction? For that purpose we may examine the scope of Section 172 of the Code. That section deals with the diary of proceedings in investigation. Sub-section (1) enjoins on the investigating officer to enter in a diary the time at which he began and the place or places visited by him during the course of investigation. Such entries should be made on a day-to-day basis. Sub-sections (2) and (3) of Section 172 read thus:

“172. (2) Any criminal court may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.”

14. A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction.”

(h) It is next argued that one of the circumstances relied upon by the Trial Court for convicting the accused-A-1 to A-6 is that victim Pooja @ Jyoti, 2-3 days

prior to the incident, had picked up the ringing mobile phone of her husband -A-1 and heard that on the other end accused A-2 presuming that the call is picked up by A-1 hurriedly stated that her marriage is going to be fixed soon, as boy is coming to meet her and, therefore, A-1 should eliminate the victim. It is argued that this is a hearsay reason of prosecution.

(i) Learned Senior Advocate has argued that if the victim Pooja @ Jyoti has alarmed about this incident to her parents and other witnesses of fact who are the family members, they could have risen to the situation promptly but they never tried to ask accused-A-1 whether this statement made by the victim is correct or not.

(j) Learned counsel has argued that rather it is the case of prosecution that they told the victim that she is coming on the occasion of Raksha Bandhan after 12-14 days, they will discuss this issue with accused-A-1 and, therefore, no such alarming situation informed by the victim which is a made up story after incident.

(k) Learned counsel has argued that in ordinary situation, the parents of the girl on receiving such a alarming situation would have immediately responded and in absence of the same, this story is built up after the incident just to involve the accused-A-1. It is next argued that the noting made by the victim- Pooja @ Jyoti in her diary, material Exhibit M-5 and M-6 nowhere establish that she has any ill feeling towards appellant-A-1, or about the strained husband-wife relationship which suggest that both accused A-1 and A-2 were conspiring to commit her murder.

(l) Learned counsel has argued that that the noting in the diary only reflects trifle issues in the day today matrimonial life of A-1 and the victim. It is also argued that there is no indication in the noting that the accused-A-1 and A-2 were having any

relationship and, therefore, the theory set up by the prosecution regarding the conspiracy and motive to murder victim Pooja @ Jyoti is not proved. It is next argued that in the entire evidence of witnesses of fact, nothing has come on record that at any point of time after the marriage of victim with A-7 till the time of incident which has a gap of about eighteen months, any of the witness of fact have stated that either victim Pooja @ Jyoti or they have ever confronted accused A-1 about his extramarital affair with accused A-2 or about any verbal altercation between accused A-1 with his wife (victim) highlighting that the victim was agitating about extramarital affair of A-1 with accused A-2. It is thus argued that in absence of any such evidence, the element of conspiracy is not at all proved. It is next argued that there is no direct evidence led by the prosecution to establish any illicit intimacy between A-1 and A-2 which would result into a motive to conspire for committing murder of Pooja @ Jyoti.

99. Learned counsel has argued that only the evidence in this regard is the call details and exchange of SMS/ Whatsapp messages between them for a long period of more than six months and, therefore, the prosecution has wrongly drawn an influence that the accused A-1 and A-2 were having intimacy and with a motive, they hatched the conspiracy to kill the victim.

100. Learned Senior Advocate has drawn a reference to the statement of PW-18, Sub Inspector Akhilesh Kumar Gaud, wherein he has stated that during his investigation, he could not find any evidence that accused A-1 and A-2 were having such relationship. It is next argued that it has come in the statement of witness

of fact i.e. PW-33 – Sagar Ratnani that prior to the marriage of A-1 with victim-Pooja @ Jyoti, there was a proposal of marriage between A-1 and A-2 but due to mismatch of horoscope, the matrimonial alliance could not mature. It is next argued that in such situation, there is no such occasion for either A-1 and A-2 to proceed in the manner of conspiracy that if the victim-Pooja @ Jyoti is eliminated, their matrimonial alliance between A-1 and A-2 can again mature. It is next argued that the prosecution has wrongly interpreted the statement of PW-33 Sagar Ratnani who has stated that on the matrimonial proposal sent by the family of A-2, he had come to meet her on 24.7.2014, however the alliance could not mature because of short height of A-2. Learned counsel submits that the statement of this witness rather suggest the version of the defence that after the marriage of A-1 with his wife-victim (Pooja @ Jyoti), the family of A-2 was in fact planing for her marriage through a mediator.

101. Learned counsel has placed reference to the statement of this witness i.e. PW-33 Sagar Ratnani who has stated that after meeting A-2, he had gone back and for 4-5 days, both of them had chat with each other. As per his statement, he last chatted with A-2 on 28.7.2014 i.e. a date subsequent to the date of incident which suggest that A-2 was looking forward for a arranged marriage proposal with PW-33 and this proposed alliance could not mature for short height of A-2.

102. Counsel submits that it has come in the statement of PW-33 that on 24.7.2014 when he had gone to meet Manisha Makheeja he was having SMS/Whatsapp chat with her till late evening of 28.7.2014 whereas the

occurrence has already taken place in the night of 27.7.2014. Counsel submits that this witness also stated that thereafter he came to know about the involvement of Manisha Makheeja from the newspaper and, therefore, he stopped further chatting.

103. Counsel submits that this witness has proved the defence version that Piyush and Manisha Makheeja were not having any such relationship that they may hatch a conspiracy to commit murder of Jyoti so that they may perform marriage with each other. A reference has also been drawn to the statement of Manisha Makheeja recorded under Section 313(5) Cr.P.C wherein she has given her date of birth by stating that she is few years older than Piyush and, therefore, there was no occasion for her to perform marriage with Piyush.

104. Counsel submits that from the evidence of the prosecution, no inference either of conspiracy or motive on the part of appellant A-1 is proved. A reliance is placed on the judgment of the Supreme Court in case of **Ravindra Singh Vs. State of Punjab, (2022) 7 SCC** which read as under :-

“..8. The case of the prosecution herein has remained that the trial court and the High Court have rightly convicted A-2 since the prosecution could successfully establish that there was a motive for the murder. It is contended that the call details produced relating to the phone used by A-1 and A-2 have established that they shared an intimate relationship, which became the root cause of offence committed herein. It is further submitted that the last seen theory, the arrest of the accused, the recovery of material objects and the call details produced, would conclusively

establish the guilt of the accused persons in conspiring the murder of the children of PW 5.

9. We have heard the learned counsel for the parties at length and have perused the record.

10. The conviction of A-2 is based only upon circumstantial evidence. Hence, in order to sustain a conviction, it is imperative that the chain of circumstances is complete, cogent and coherent. This Court has consistently held in a long line of cases [see *Hukam Singh v. State of Rajasthan* [*Hukam Singh v. State of Rajasthan*, (1977) 2 SCC 99 : 1977 SCC (Cri) 250] ; *Eradu v. State of Hyderabad* [*Eradu v. State of Hyderabad*, AIR 1956 SC 316] ; *Earabhadrapa v. State of Karnataka* [*Earabhadrapa v. State of Karnataka*, (1983) 2 SCC 330 : 1983 SCC (Cri) 447] ; *State of U.P. v. Sukhbasi* [*State of U.P. v. Sukhbasi*, 1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] ; *Balwinder Singh v. State of Punjab* [*Balwinder Singh v. State of Punjab*, (1987) 1 SCC 1 : 1987 SCC (Cri) 27] and *Ashok Kumar Chatterjee v. State of M.P.* [*Ashok Kumar Chatterjee v. State of M.P.*, 1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]] that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

10.1. In *Bhagat Ram v. State of Punjab* [*Bhagat Ram v. State of Punjab*, AIR 1954 SC 621] , it was laid down that

where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offence home beyond any reasonable doubt.

10.2. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.* [*C. Chenga Reddy v. State of A.P.*, (1996) 10 SCC 193 : 1996 SCC (Cri) 1205] , wherein it has been observed that : (SCC pp. 206-07, para 21)

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.” (emphasis supplied)

11. Upon thorough application of the above-settled law on the facts of the present case, we hold that the circumstantial evidence against the present appellant i.e. A-2 does not conclusively establish the guilt of A-2 in committing the murder of the deceased children. The last seen theory, the arrest of the accused, the recovery of material objects and the call details produced, do not conclusively complete the chain of evidence and do not establish the fact that A-2 committed the murder of the children of PW 5. Additionally, the argument of the respondent that the call details produced relating to the phone used by A-1 and A-2 have established that they shared an intimate relationship and that this relationship became the root cause of offence is also unworthy of acceptance.

12. The High Court fell in grave error when it fallaciously drew dubious inferences from the details of the call records of A-1 and A-2 that were produced before them. The High Court inferred from the call details of A-2 and A-1 that they shared an abnormally close intimate relation. The Court further inferred from this, that unless they had been madly in love with each other, such chatting for hours would not have taken place. The High Court eventually observed that : (Anita case [State of Punjab v. Anita, 2011 SCC OnLine P&H 17671] , SCC OnLine P&H para 8)

“8. ... We have to infer that the unusual attraction of A-2 towards A-1 had completely blinded his senses, which ultimately caused the death of minor children. It is quite probable that A-2 would have thought that the minor children had been a hurdle for his close proximity with A-1.” (emphasis supplied)

The above inferences were drawn by the High Court through erroneous extrapolation of the facts, and in our considered opinion, such conjectures could not have been the ground for conviction of A-2. Moreover, the High Court itself observed that “there is no direct evidence to establish that A-1 and A-2 had developed illicit intimacy” and in spite of this observation, the Court erroneously inferred that the murder was caused as an outcome of this alleged illicit intimacy between A-1 and A-2.

13. When a conviction is based solely on circumstantial evidence, such evidence and the chain of circumstances must be conclusive enough to sustain a conviction. In the present case, the learned counsel of the appellant has argued that conviction of A-2 could not just be upheld solely on the ground that the prosecution has established a motive via the call

records. However, we hold that not only is such conviction not possible on the present scattered and incoherent pieces of evidence, but that the prosecution has not even established the motive of the crime beyond reasonable doubt.

14. In the present case, the fact that A-1 and A-2 talked on call, only proves that they shared a close relationship. However, what these records do not prove, is that the murder was somehow in furtherance of this alleged proximity between A-1 and A-2. The High Court's inference in this regard was a mere dubious conclusion that was drawn in absence of any cogent or concrete evidence. The High Court itself based its inferences on mere probability when it held that “It is quite probable that A-2 would have thought that the minor children had been a hurdle for his close proximity with A-1”. Moreover, the prosecution has also failed to establish by evidence the supposed objective of these murders and what was it that was sought to be achieved by such an act. The Court observed that the act of A-2 was inspired by the desire to “exclusively possess” A-1. However, it seems improbable that A-2 would murder the minor children of PW 5 and A-1 to increase or protect his intimacy to A-1 rather than eliminate the husband of A-1 himself. Hence, the inference drawn by the High Court from the information of call details presented before them suffers from infirmity and cannot be upheld, especially in light of the fact that there is admittedly no direct evidence to establish such alleged intimacy and that the entire conviction of A-2 is based on mere circumstantial evidence. We cannot uphold a conviction which is based upon a probability of infatuation of A-2, which in turn is based on an alleged intimacy between him and A-1, which has

admittedly not been established by any direct evidence."

105. It is next argued that there is no evidence led by the prosecution to prove that accused A-1 had either hired or paid any ransom to accused A-3 to A-6 in furtherance to the conspiracy for committing murder of his wife. It is argued that PW-34, main Investigating Officer has admitted in cross examination that during course of investigation he could not find any evidence to suggest that any money was transacted to any of the assailants and therefore, the deposition of PW-34 itself is contrary to the investigation conducted by the other co-investigating officers.

106. It is next argued that simple motive cannot be a proof of conspiracy and has relied upon the judgment of the Supreme Court in case of **Saju Vs. State of Kerala, (2001) 1 SCC 378** which read as under :

"12..... Even otherwise, motive by itself cannot be a proof of conspiracy. In Girja Shankar Misra v. State of U.P. [1994 Supp (1) SCC 26 : 1994 SCC (Cri) 214 : AIR 1993 SC 2618] though it was found that there were serious misunderstandings between the deceased and the appellant because of the illicit relationship between the appellant and the wife of the deceased, yet the Court held that despite the fact that the appellant had a motive, he could not be held responsible for hatching a conspiracy."

107. Counsel submits that the offence of conspiracy as per section 120-A of Evidence Act, 1872 cannot be established on mere suspicion or inference if it is not supported by cogent and legal evidence.

108. It is next argued that the trial court has wrongly recorded a finding that there is delay in reporting the incident of abduction of wife of appellant A-1.

109. Counsel submits that the incident is of 11:30 pm and appellant A-1 who was perturbed with the incident, had reached the police station immediately and within one hour, FIR was registered at 00:30 hours.

110. It is argued that even as per the prosecution evidence, the appellant A-1 and his wife deceased Jyoti had left the Varanda Restaurant at 11:42 pm and after the incident, he made first call to his mother at 12:01 pm to report to the police by dialling 100 number and a call was also made by his brother Mukesh Shyamdasani at number 100 at 12:04 hours i.e. within 3 minutes of giving information. The appellant promptly called his friend Abhinav Poddar and reached the police station without any delay.

111. It is next argued that the finding recorded by the trial court that appellant even has made a phone call to his wife (deceased) Jyoti in order to confirm from A-3 to A-6 if job is done, was in fact a call made from the police station to find out her location and even PW-34 the main Investigating Officer has also made a phone call on the phone of Jyoti while lodging the FIR. This fact is stated by PW-34 in his statement and, therefore, the trial court has taken a contrary view in an illegal manner.

112. Counsel next argued that another finding recorded that no injury was found on the body of A-1, it is argued that in the FIR (Ex-Ka-6), the accused A-1 has nowhere stated that he was hit by any weapon or suffered a visible injury when he

was forced out of the car. It is submitted that this version is consistent with his initial statement recorded under Section 161 Cr.P.C. by PW-34 the main Investigating Officer. Even in Section 313 Cr.P.C. statement A-1 stated that when PW-34 took her to the Government Hospital, there was no doctor and after waiting for some time he came back as he suffered some internal injury and he was in a shock of traumatic incident.

113. It is next submitted that trial court held that appellant acted in cowardly manner by not showing any protest against assailants when they forced him out of the car. Counsel has argued that appellant took it to be incident of abduction of his wife and incident of being hit himself, he tried to save her by contacting police and family members and this finding is wrongly recorded that the appellant had not shown courage for saving the life of his wife.

114. Counsel submits that another finding recorded by the trial court is that there is no scratch on the car though it is stated by appellant A-1 that motorcycle came in front of his car and hit his car. Counsel submits that primary evidence i.e. car was never produced before the trial court and only on the secondary evidence i.e. photographs, the trial court has recorded such finding.

115. Counsel next submitted that the certificate under Section 65B of Evidence Act issued by the Nodal Officer of the mobile company do not satisfy the requirement of Section 65-B of the Evidence Act. A reliance is placed on the judgment of the Supreme Court in case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal**, (2020) 7 SCC 1 which read as under : -

“.....60. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a “responsible official position” in relation to the operation of the relevant device, as also the person who may otherwise be in the “management of relevant activities” spoken of in sub-section (4) of Section 65-B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, **Section 65-B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the “best of his knowledge and belief”.** [Obviously, the word “and” between knowledge and belief in Section 65-B(4) must be read as “or”, as a person cannot testify to the best of his knowledge and belief at the same time.]

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in **Anvar P.V.** [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , and incorrectly “clarified” in **Shafhi Mohammad** [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] . Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in **Taylor v. Taylor** [Taylor v. Taylor, (1875) LR 1 Ch D 426] , which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.+”

116. It is submitted that all the witnesses have stated that they have not recorded the finding on the certificates that they are issued to the best of their knowledge or belief and therefore, the same cannot be read in evidence.

117. It is argued that the trial court has failed to prove original cell phones and the call details which formed the basis of conviction of the appellants, in fact, recovered from the accused and were registered in their name.

118. Counsel submits that PW-34 has stated that there is no seizure memo regarding recovery of Black Berry mobile which was in the name of the accused A-1 and there is no identity of his mobile device with IMEI number. It is argued that PW-30, Sub Inspector, Rajiv Dwivedi, in his memo Ex-Ka-61 has stated that there was three different IMEI numbers used on this mobile phone though it supports only one IMEI number and therefore, no legal evidence has come on record.

119. It is argued that even in the statement recorded under Section 313 Cr.P.C., no specific question of recovery or use of Black Berry mobile device by appellant A-1 was put to him and therefore, this evidence cannot be relied. It is next argued that main Investigating Officer (PW-34) has stated that no mobile phone was recovered from Awadhesh Chaturvedi at the time of his arrest but the prosecution tried to cover up this lacuna by GD entry KA-147 and recording statement after final argument were heard by the trial court, which proves that this evidence was created later on to fill up the lacuna.

120. Counsel submits that the accused A-1 is assigned another mobile with a fake

SIM number 8090766853, on the basis of an interrogation of a girl Kamini Sachan, who had sent message of 'Love You' by her mobile number 9996353535.

121. Counsel submits that the statement of Kamini Sachan under Section 161 Cr.P.C. cannot be used to prove that the appellant was using aforesaid mobile number : 8090766853 as Kamini Sachan was never cited or examined as prosecution witness in the Court and therefore, it breaks the vital link of the prosecution story that appellant was using this mobile number. It is also argued that as per PW-18, S.I. Akhilesh Kumar Gaud, it has come that the fake cell number used by the accused persons were, in fact, belonging to third party which according to his investigation were in the name of different persons. However, this witness has clearly admitted that he has not examined any person, in whose name mobile numbers were issued and therefore in the absence of the same, it is not legal to rely upon the statement of PW-18 that as per his investigation, fake numbers were used by accused A-1 to A-6 to hatch the conspiracy.

122. It is next argued that the prosecution has tried to prove that on two different occasions, the appellant A-1 had gone with accused A-3 to A-6 for purchase of two sets of knives and the 4 knives were used in commission of offence. It is argued that the trial court has relied upon the statement of PW-34 which is completely inadmissible in law and is based on the confessional statement of accused A-1 and A-3 to A-6 regarding purchase of the knives. A reliance is place on the judgment of the Supreme Court in case of **Randeep Singh Rana @ Rana & Anr Vs. State of Haryana & Ors in Criminal Appeal No. 297 of 2024** which read as under :

“16. A perusal of the deposition of PW-27, which we have quoted above, shows that he attempted to prove the confessions allegedly made by the accused to a police officer Criminal Appeal No.297 of 2024 Page 13 of 18 when they were in Police custody. There is a complete prohibition on even proving such confessions. The learned Trial Judge has completely lost sight of Sections 25 and 26 of the Evidence Act and has allowed PW-27 to prove the confessions allegedly made by the accused while they were in police custody. PW-27 stated that the appellant “suffered disclosure statement at Exhibits ‘P55’ and ‘P56’ respectively”. Obviously, he is referring to disclosure of the information under Section 27 of the Evidence Act. The law on disclosure under Section 27 is well settled right from the classic decision of the Privy Council in the case of **Pulukuri Kotayya & Ors. v. KingEmperor**². In the case of **K. ChinnaSwamy Reddy v. State of A.P.**³, this Court relied upon the decision of the Privy Council and in paragraph 9 held thus:

“9. Let us then turn to the question whether the statement of the appellant to the effect that “he had hidden them (the ornaments)” and “would point out the place” where they were, is wholly admissible in evidence under Section 27 or only that part of it is admissible where he stated that he would point out the place but not that part where he stated that he had hidden the ornaments. The Sessions Judge in this connection relied on **Pulukuri Kotayya v. King-Emperor** [(1946) 74 IA 65] where a part of the statement leading to the recovery of a knife in a murder case was held inadmissible by the Judicial Committee. In that case the Judicial Committee considered 2 1946 SCC OnLine PC 47 : AIR 1947 PC 67 3 1962 SCC OnLine SC 32 Criminal Appeal No.297 of

2024 Page 14 of 18 Section 27 of the Indian Evidence Act, which is in these terms:

“Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

This section is an exception to Sections 25 and 26, which prohibit the proof of a confession made to a police officer or a confession made while a person is in police custody, unless it is made in immediate presence of a Magistrate. Section 27 allows that part of the statement made by the accused to the police “whether it amounts to a confession or not” which relates distinctly to the fact thereby discovered to be proved.

Thus even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under Section 27. The Judicial Committee had in that case to consider how much of the information given by the accused to the police would be admissible under Section 27 and laid stress on the words “so much of such information...as relates distinctly to the fact thereby discovered” in that connection. It held that the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It Criminal Appeal No.297 of 2024 Page 15 of 18 was further pointed out that “the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact”. It was further observed that— “Information as to past

user, or the past history of the object produced is not related to its discovery in the setting in which it is discovered.” This was exemplified further by the Judicial Committee by observing— “Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. If however to the statement the words be added ‘with which I stabbed A’, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.” (emphasis added)

Section 27 is an exception to Sections 25 and 26. It permits certain parts of the statement made by the accused to a police officer while in custody to be proved. Under Section 27, only that part of the statement made by the accused is admissible, which distinctly relates to the discovery. It becomes admissible Criminal Appeal No.297 of 2024 Page 16 of 18 when a fact is discovered as a consequence of the information received from the accused. What is admissible is only such information furnished by the accused as relates distinctly to the facts thereby discovered. No other part is admissible. By Exhibits ‘P55’ and ‘P56’, it is alleged that the accused showed the places where the deceased was abducted, where he was murdered and where his body was thrown. In this case, even the inadmissible part of the statement under Section 27 of the Evidence Act has been incorporated in the examination-in-chief of PW-27. The learned trial judge should not have recorded an inadmissible confession in the deposition. A confessional statement made by the accused to a police officer while in

custody is not admissible in the evidence except to the extent to which Section 27 is applicable. If such inadmissible confessions are made part of the depositions of the prosecution witnesses, then there is every possibility that the Trial Courts may get influenced by it.”

123. It is thus argued that section 27 of the Evidence Act is exception to Sections 25 and 26 of the Evidence Act and is totally inadmissible evidence which has been relied upon by the trial court in convicting the appellants.

124. It is argued that in the recovery effected by PW-24, In-Charge, leading team of Forensic Unit, no bloodstains were found on the three knives recovered and therefore, the same were not used in the commission of offence.

125. It is next argued that FSL report and the DNA report cannot be relied as the same is not proved in accordance with law.

126. It is argued that these reports are only tendered in evidence during the trial proceedings. It is also argued that the prosecution has failed to explain how the blood was found by the lab of FSL on the 3 knives when at the time of recovery, no detection of the blood on the knives was found. It is also argued that these reports were never tendered in evidence and, therefore, the evidence counsel were not in position to confront the Investigating Officer with regard to the same.

127. It is also argued that in absence of these reports being put to the accused persons while recording his statement under Section 313 Cr.P.C., the same cannot be used against them.

128. Learned Senior Counsel has relied upon judgment of the Supreme Court in ***Sharad BirdhiChand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116***, the operative part of the judgment read as under:

“...152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of

the accused and it must be such as to show that within all human probability the act must have been done by the accused.’’

129. It is argued that the prosecution has failed to prove the five principles laid down in ***Sharad BirdhiChand’s Case (supra)*** and therefore, the fact what apparent is liable to be set aside. The counsel has further relied upon the judgment of the Supreme Court in ***Devi Lal Vs. State of Rajasthan, (2019) 19 SCC 447***, to submit that even if the prosecution evidence raises some suspicion towards accused but has failed to elevate the case from realm of ‘may be true’ to ‘must be true’ as indispensably required for conviction of criminal charge and therefore, the suspicion, however grave, cannot be a substitute proof. The operative part of the judgment read as under:

“....11. It is true that an extra-judicial confession is used against its maker but as a matter of caution, advisable for the court to look for a corroboration with the other evidence on record. In Gopal Sah v. State of Bihar [Gopal Sah v. State of Bihar, (2008) 17 SCC 128 : (2010) 4 SCC (Cri) 466] , this Court while dealing with extra-judicial confession held that extra-judicial confession is, on the face of it, a weak evidence and the Court is reluctant, in the absence of a chain of cogent circumstances, to rely on it, for the purpose of recording a conviction. In the instant case, it may be noticed that there are no additional cogent circumstances on record to rely on it. At the same time, Shambhu Singh (PW 3), while recording his statement under Section 164 CrPC, has not made such statement of extra-judicial confession (Ext. D-5) made by accused Babu Lal. In addition, there are no other circumstances on record to support it.

12. The other connecting evidence on which reliance was placed by the prosecution was that accused Babu Lal had given information of handing over the torn leaf of bahi obtaining signatures of deceased Dharam Chand to accused Devi Lal. Accused Devi Lal got the said leaf recovered by giving information to the investigating officer. There is no justifiable explanation available which came on record as to how the torn leaf came in the possession of Devi Lal as the said paper was torn from the Bahi (Article 27) which was recovered from the accused Babu Lal, which has been matched by FSL report. There was also no justification which came forward from the prosecution as to how the torn Bahi paper of Babu Lal containing the signatures of deceased Dharam Chand with black ink came to him. Pen was recovered on the information of accused Babu Lal, by which handwriting found on the leaf recovered from accused Devi Lal. The further circumstance was recovery of Rs 11,200 on the information given by the accused Babu Lal but from where this money had come to Babu Lal, was not clarified by the prosecution. The other circumstances completing the chain was that accused Devi Lal had not given any clarification with regard to the fact that by which information Devi Lal had come to Babu Lal which had been indicated in the diary recovered from accused Devi Lal under Section 27 of the Evidence Act. Accused Babu Lal was arrested on 13-2-1999 and accused Devi Lal was arrested on 15-2-1999 for the alleged incident of 7-2-1999 which came to the knowledge of the informant on 8-2-1999 and report was lodged on 11-2-1999 and the alleged recovery of torn page of Bahi, which obtained signature of the deceased along with the diary of 1999 (Ext. P-79), under Section 27 of the Evidence Act was made

on 24-2-1999. The Bahi, as such, was never produced. Apart from non-production of Bahi, to prove the provenance of the torn piece of blank paper, the similarity of the ink on this torn piece of paper and ledger was extremely doubtful in view of the objection by the FSL and response lead to it which the investigating officer (PW 33) has also admitted in the cross-examination.

13. What was relied upon by the High Court was that the paper, Article 7 recovered on disclosure of appellant accused Devi Lal (from "Darraj" to Barsot") was one which was torn away from Bahi recovered on information at the instance of the appellant Babu Lal. Secondly, that piece of paper had lower portion which had signatures of deceased Dharam Chand and other than that, the paper was blank.

14. Summarily, the circumstances in totality apart from the extra-judicial confession which has been noticed by the High Court [Babu Lal v. State of Rajasthan, 2009 SCC OnLine Raj 333] are referred to as under: (SCC OnLine Raj)

"(1) Appellant Devilal wanted to purchase half portion of "Bara" from deceased for which he actively pursued.

(2) On February 7th, in morning, around 9-10 a.m., deceased left for Bhagwanpura, not a very distant village.

(3) Around 10-10.30 a.m., he telling of going to house of Babulal for receiving money went towards and to house ("Nohra") of Babulal.

Going to house of Babulal then never seen alive.

(4) Jeep of Shambhu hired by Babulal on February 6th for use in evening of 7th for going to Village Dhikiya.

Then in evening of 7th around 8 p.m. Babulal and two others carried weighty drum which was left at an isolated

site, body of deceased found in a dry well like pit, near the place drum was left.

(5) *On information of Babulal, his own concealed clothes recovered from his house, also were bloodstains on compound wall and soil of his "Nohra". On clothes of Babulal and clothes of deceased blood 'A' group.*

Stains found on the floor of "Nohra" of 'A' group.

Stains on wall of "Nohra" of human blood.

(6) *On information of Babulal that is from his possession, recovered a "Bahi" — of the "Bahi" a leaf about 7-8" × 6-7" was torn away.*

(7) *Babulal informed that above half torn leaf is with Babulal.*

(8) *On information and at the instance of Devilal, that is from his possession, found above half torn leaf of "Bahi" recovered from "Darraj", that is a narrow space between frame of door and surrounding wall.*

(9) *On this torn away leaf at lower side, are signatures of Dharam Chand, otherwise blank is the paper."*

15. *Without going into detailed scrutiny of the facts on record under consideration, the circumstances which emerged and taken note of under the impugned judgment in itself gives a suspicion in completing the chain of commission of crime beyond doubt, being committed by the appellant-accused.*

16. *The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable to the decision of the Court in Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] . The relevant excerpts from para 153 of the*

decision is assuredly apposite: (SCC p. 185)

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] where the observations were made: (SCC p. 807, para 19)

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

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

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

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

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

probability the act must have been done by the accused.

17. *It has further been considered by this Court in Sujit Biswas v. State of Assam [Sujit Biswas v. State of Assam, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] and Raja v. State of Haryana [Raja v. State of Haryana, (2015) 11 SCC 43 : (2015) 4 SCC (Cri) 267] . It has been propounded that while scrutinising the circumstantial evidence, a court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straitjacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused. ”*

130. Learned counsel has also relied upon the judgment of the Supreme Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others, (2020) 7 SCC 1**, to submit that there is a clear distinction between primary and secondary evidence qua electronic records/documents. It is argued that the certificate required under Section 65-B (4) of Evidence Act is condition precedent to the admissibility of secondary evidence by way of electronic record. The operative part of the judgment read as under:

“...60. It may also be seen that the person who gives this certificate can be

anyone out of several persons who occupy a “responsible official position” in relation to the operation of the relevant device, as also the person who may otherwise be in the “management of relevant activities” spoken of in sub-section (4) of Section 65-B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65-B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the “best of his knowledge and belief”. [Obviously, the word “and” between knowledge and belief in Section 65-B(4) must be read as “or”, as a person cannot testify to the best of his knowledge and belief at the same time.]

61. *We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , and incorrectly “clarified” in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] . Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426] , which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.*

62. *In view of the above, the decision of the Madras High Court in K.*

Ramajayam [K. Ramajayam v. State, 2016 SCC OnLine Mad 451 : 2016 Cri LJ 1542], which states that evidence aliunde can be given through a person who was in charge of a computer device in the place of the requisite certificate under Section 65-B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled.”

131. The counsel has also relied upon another judgment of the Supreme Court in *Anvar P.V. Vs. P.K. Basheer and others, (2014) 10 SCC 473*, wherein it has held that the copy of the statement pertaining to electronic record is not original electronic record and there is mandatory pre-requirement that it should be proved by certificate under Section 65-B(4) of Evidence Act but proven record like C.D., pen drive etc. and in the absence of proving the certificate, the same is not admissible. The operative part of the judgment read as under:

“.....8. Section 22-A of the Evidence Act reads as follows:

“22-A. When oral admission as to contents of electronic records are relevant.—Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.”

9. Section 45-A of the Evidence Act reads as follows:

“45-A.Opinion of Examiner of Electronic Evidence.—When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79-A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.—For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.”

10. Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

“59.Proof of facts by oral evidence.—All facts, except the contents of documents or electronic records, may be proved by oral evidence.”

11. Section 65-A reads as follows:

“65-A. Special provisions as to evidence relating to electronic record.—The contents of electronic records may be proved in accordance with the provisions of Section 65-B.”

12. Section 65-B reads as follows:

“65-B.Admissibility of electronic records.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as “the computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried

on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and

references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied

to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.”

These are the provisions under the Evidence Act relevant to the issue under discussion.

13. In the Statement of Objects and Reasons to the IT Act, it is stated thus:

“New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business.”

In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic

record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) *There must be a certificate which identifies the electronic record containing the statement;*

(b) *The certificate must describe the manner in which the electronic record was produced;*

(c) *The certificate must furnish the particulars of the device involved in the production of that record;*

(d) *The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and*

(e) *The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if

requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In *State (NCT of Delhi) v. Navjot Sandhu* [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows : (SCC p. 714)

“150. According to Section 63, “secondary evidence” means and includes,

among other things, 'copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed [Ed. : Reference is to State v. Mohd. Afzal, (2003) 71 DRJ 178] at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held

that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

*132. The counsel has also relied upon the judgment of Supreme Court in **Ramanand alias Nandlal Bharti vs. State of Uttar Pradesh, AIR 2022 SCC 5273**, to submit that whether the extra-judicial*

confession is made after the arrest by an accused person for pointing out the recovery of weapon used in the commission of offence, will not suggest that the accused indicted his involvement. It is submitted that there is a clear distinction between the judicial confession made before the Magistrate or court and extra-judicial confession made before a police officer during the investigation, arrest of an accused and in case, extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful. The counsel submits that finding recorded by the trial court that accused-A-1 was having relationship with A-2 and wanted to settle with her, was the motive of committing the offence is not at all proved. The reference is drawn to relevant part of judgment **Ramanand alias Nandlal Bharti vs. State of Uttar Pradesh (supra)**, which is read as under:

“....87. It is a settled principle of criminal jurisprudence that in a case based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. This Court in various decisions has laid down the principles holding that motive for commission of offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of offence is available. It is equally true that failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. However, it is also well settled and it is trite in law that absence of motive could be a missing link of incriminating circumstances, but once the prosecution has established the other incriminating circumstances to its entirety, absence of motive will not give any benefit to the accused.

88. Having regard to the nature of the evidence on record, there is something to indicate that the accused appellant had illicit relationship with Manju and wanted to settle in life marrying Manju. As noted above, in the past accused appellant had got engaged with Manju and was on the verge of getting married. At the relevant point of time when the accused appellant got engaged with Manju, it appears that one and all including the deceased Sangeeta were consenting parties. There is nothing on record to indicate that at the time of engagement of accused appellant with Manju, the deceased Sangeeta had raised hue and cry or had opposed such decision of her husband. Of course, this is something which is very personal. If at all we believe the illicit relationship of the accused appellant with Manju, then it is possible that the deceased Sangeeta might be an absolutely helpless lady and could not have done anything in that regard. However, the moot question is should this motive by alone be held sufficient to convict the accused appellant for the alleged crime and sentence him to death.”

133. The counsel has also relied upon the judgment of the Supreme Court in **Subramanya Vs. State of Karnataka, AIR 2022 SCC 5110**, to submit that it is held by the Supreme Court that extra-judicial confession by a co-accused, after lapse of time of the alleged incident, can be used only in support of evidence but cannot be made on foundation of conviction. It is again held by the Supreme Court that recovery of weapon on the statement given by accused while in custody did not suggest that he has indicated himself about his involvement in the offence as mere discovery, cannot be interpreted sufficient to infer the concealment by the person who

discovered the weapon. It is also held in this case that motive in the facts and circumstances of the case, creates a strong suspicion against accused but suspicion howsoever strong, cannot be a substitute for proof of guilt of accused beyond doubt. If the evidence regarding motive of the accused to commit crime was hearsay in nature, the same is not proved.

134. Learned Senior Counsel submitted that the trial court has recorded the conviction on the basis of the hearsay evidence as PW-7- Monika Ashudani stated that the deceased on her phone, informed that she has picked up the phone call from A-2 coming on phone of accused-A-1 and she told that her marriage is going to be finalised soon, therefore, he should do away with the deceased, cannot be made a basis of conviction of appellant.

135. Learned counsel for the appellant-A-2 has argued that the conviction of the appellant-A-2 is based on a non-admissible evidence which is in the shape of hearsay. It is argued that Manisha Makheeja is three years older to accused-A-1, Piyush, and it is the case of the prosecution itself that prior to the marriage of A-1 with the victim- Jyoti, a matrimonial alliance was proposed between A-1 and A-2. However, due to mismatch of horoscope, the same could not mature. It is also submitted that the marriage of Piyush with Jyoti was an arrange marriage and they were living happily as it is proved from the photographs by DW-3. The counsel submits that after the marriage, the couple was living happily as they had gone for their honeymoon and all the prosecution witnesses of fact have stated that Jyoti visited her parental home on three occasions. Though, it is stated by the prosecution witnesses that at the first

instance, she did not tell anything about the behaviour of her husband-A-1, however, in the second meeting, she stated that his behaviour is not good and he used to ask her to do lot of things like a servant. The counsel further argued that it is only for the first time that the prosecution has made out a story that a few days before the incident, Jyoti has informed her paternal aunt (Bua)-PW-7- Monika Ashudani about picking up the phone of Manisha Makheeja in which she was inspecting the accused- Piyush and understand that accused A-1 was having love affair with accused A-2 even before marriage.

136. Learned Senior Counsel has further submitted that once as per the prosecution, the marriage of accused A-1 and A-2 could not mature because of mismatch of Horoscope much before the marriage of accused A-1 with Jyoti, therefore there was no occasion for accused A-2 to think about marrying accused A-1, after he commits murder of his wife Jyoti. It is next argued that the parents of A-2 in a natural way were looking for a matrimonial match of A-2 and in that connection, the boy who appeared as PW-33- Sagar Ratnani stated that the talks of his marriage started on 18.7.2014 through a mediator and he along with his family members came to Manisha's house on 24.7.2014. He stated that all of them had lunch at the house of Manisha Makheeja and he and Manisha Makheeja had talk while sitting separately. He found that the girl was uncomfortable because of her short height and told him that it will not look good, if she said no, therefore, suggested him that he should refuse the proposal and therefore, he refuse to get married to Manisha Makheeja. The counsel submits that PW-33 proves the fact that family of Manisha Makheeja was looking for a suitable match

for her marriage and PW-33 was called through a Mediator but it could not mature due to mismatch of height and this incident cannot be taken as part of conspiracy. The counsel submits that prosecution witnesses have stated that the family of Manisha is residing in neighbourhood of accused-A-1 where Jyoti was residing for about 18-19 months after her marriage and it is not possible that she did not know about any such relationship, and in fact in order to complete a chain of circumstances, Manisha was used as a tool because she was on talking terms with A-1 and had exchanged certain messages, transcription of which was never produced on record. It is next argued that the very fact that despite PW-2 and PW-7 stating that Jyoti told them that Manisha was telling to Piyush to get rid off (the deceased) and on this they told her after 12-14 days on the occasion of Raksha Bandhan, both Piyush and Jyoti will come to Jabalpur and they will talk to each other and tried to find out a solution, is not a normal behaviour of the family of the victim. It is argued that if it was such a grave situation, as alarmed by Jyoti that accused, A-1 and A-2 are conspiring to kill her, as a natural human being, they would have immediately responded and rose to the situation and would have come to Kanpur to meet and confront Piyush with the said allegation but no such action was taken by them which proves that after the incident took place, they have concocted the version of telephone call made by accused-A-2 or such information given by deceased Jyoti to PW-6 and PW-7.

137. Learned counsel submits that another important aspect for which the prosecution has failed to investigate is that PW-3, mother of deceased and PW-6, father of the deceased have stated that after the incident, they went to the house of one

Balram, who was the cousin of PW-3 and was residing one or two house away from house of Piyush and Jyoti. They stayed there for 2-3 days, where the police recorded their statement. Learned counsel submits that if this person was immediate neighbour of Piyush and Jyoti and was first cousin of mother of Jyoti, it is improbable to believe that if there was any emergent situation in the matrimonial life of Jyoti, she would not have approached him to intervene and even as per PW-7, when she received a phone call from Jyoti, 3-4 days prior to the incident regarding the alleged conspiracy between A-1 and A-2 to kill her, they would have immediately call to Balram to intervene and find out what is truth. However, during entire investigation, neither Balram is cited as a witness nor the I.O. tried to find out about the relationship of accused A-1 with Jyoti from him.

138. It is next argued that even role of PW-5 who was an Astrologer, is mischievous. This witness has stated that he has told the victim Jyoti that her marriage with Piyush will not pull on and he has advised her certain remedies including giving her a ring with a pearl to wear it. It is argued that in fact this witness for the sake of his astrology, on finding a rich client, had sown the seed of suspicion in the mind of Jyoti so that she started believing that her relationship with husband-A-1 will never be cordial. The counsel submits that this witness, PW-5 has admitted in a statement that he had no knowledge about any such relationship of A-1 and A-2 but later on he came to know the same. It is thus argued that the involvement of A-2 is not proved from the statement of PW-5.

139. Learned counsel for the appellant has further argued that all the witnesses of

fact had relied upon the hearsay evidence that victim-Pooja @ Jyoti told them on telephone about the accused A-1 and A-2 conspiring to kill her. It is next contended that neither any complaint in writing was given to any authority after receiving such call nor her husband(A-1) was confronted with the same at any point of time which shows that the story of conspiracy is cooked up only after murder of victim Pooja @ Jyoti.

140. Learned counsel further submitted that even in first statement recorded under Section 161 Cr.P.C., no such story was brought forward before the police about involvement of Manisha Makheeja about any conspiracy with accused A-1 (Piyush Shyamdasani). It is submitted that for the first time drastic improvements have been made while deposing in court and when confronted, all the witnesses of facts have stated that they cannot tell the reason why the Investigating Officer has not recorded so in their statement under Section 161 Cr.P.C.

141. Learned counsel has further submitted that the statement of PW-6, the father of the victim, was recorded before the Magistrate much after the incident and in a calculated manner, in order to create an evidence of conspiracy for the first time, he has given the name of accused- Manisha Makheeja.

142. Learned counsel has further argued that it has come in the statements of all the six Investigating Officers / Assistant Investigating Officers that though as per record, the SIM cards in mobile phones were issued in the name of different persons but they never interrogated those persons as to how the mobile numbers issued in their name were used by accused

persons. Even none of such persons, in whose name the SIM cards were found to be issued by the concerned mobile companies, were cited as a witness to prove that in fact accused persons were using those phone numbers and, therefore, on a mere assumption that the calls are being made from one number to another number, the trial court has wrongly held that accused Manisha Makheeja was also part of conspiracy.

143. Learned counsel has further submitted that as per prosecution evidence, accused A-3 to A-6 in conspiracy with accused A-1 had purchased two knives from Rave Moti Mall, on two occasions i.e 13.7.2014 and 21.7.2014 when two unsuccessful attempts were made to eliminate victim Pooja @ Jyoti. It is next contended that even as per PW-7, when victim Pooja @ Jyoti told her on mobile phone that she has heard A-2 saying that A-1 should eliminate her (deceased – Pooja @ Jyoti) is relating to a date much after the first attempt made by A-1 in conspiracy with A-3 to A-6. Learned counsel thus submits that therefore, the story of conspiracy which is set up between A-1 and A-2, even as per the prosecution is after the first unsuccessful attempt was made to eliminate the deceased also prove that in fact there was no conspiracy between them and it is only an afterthought story made after the death of Pooja @ Jyoti.

144. Learned counsel has relied upon the judgment of **Sharad Birdhichandra Sharda (supra)** to submit that it is well settled principles of law that mere suspicion howsoever strong cannot be taken as a ground to prove the conspiracy. It is next argued that the evidence of conspiracy against accused -A-2 is not

made out and she should be acquitted of the charge.

145. Learned counsel appearing on behalf of accused Ashish Kashyap has submitted that he was not present at the spot on the date of incident i.e. 27.7.2014 as two of the witnesses, DW-1 and DW-2 have stated that at the relevant time, he was present with them at a different place in Kanpur.

146. Learned counsels appearing on behalf of accused- Renu @ Akhilesh Kanaujiya, Sonu and Ashish have argued that they have been falsely implicated and they have no role in the commission of crime.

147. On the other hand, learned counsel for the informant has argued that prosecution has led sufficient evidence. Firstly, the matrimonial relationship between accused- A-1 and deceased- Jyoti were not cordial because of the extra-marital affair of accused-A-1 and A-2. It is submitted that all the accused made the first attempt to murder Jyoti on 13.7.2014, however, the same could not mature. The second attempt was made on 20.7.2014, again it could not mature.

148. The counsel submits that on the fateful day i.e. 27.7.2014, the accused Piyush took Jyoti to Varanda Restaurant and after they have dinner, he took her into his Honda Accord Car when accused A-3 to A-6 in furtherance to the conspiracy, stopped the car, abducted Jyoti and later on committed her murder. The counsel has referred to the statement of the prosecution witnesses who have proved the record of call details of the phone call as well as the recoveries effected from the car immediately after the incident, the recovery

of knives and another weapon of offence used by the accused in pursuance to their confessional statement.

149. Learned Senior Counsel has submitted that it is proved from the statement of PW-34, the main I.O. that immediately after the incident, he located the car using the location of the deceased's mobile phone and reached the spot and found that the deceased was lying in a pool of blood. She was taken out by breaking the window pane of the car and took her to Hallet Hospital, where the doctor declared her dead. The counsel submits that in post-mortem as many as 14 wounds were found which proved that she was brutally murdered.

150. Learned counsel has further argued that one another circumstance which proves the conspiracy is that PW-7 has stated that few days before the incident, the victim told her that she has picked up the phone of accused-A-1 by receiving a call from A-2 and heard that she was saying that her marriage is being fixed soon and therefore, accused-A-1 should eliminate the victim. The counsel submits that from this statement, even the victim was sure that the same conspiracy is being hatched to kill her.

151. The counsel has next argued that the electronic evidence i.e. the record of call details of all the mobile phones which were collected during the investigation, the hard disk of the CCTV footage has been duly proved as all the Investigating Officers in their statement has stated that they have received the requisite certificate under Section 65B of the Evidence Act from the Nodal Officers of the concerned mobile companies. It is argued that all the Nodal Officers have appeared as

prosecution witnesses and have stated that the requisite certificate were issued by them and there was no tampering of the computer data while preparing the certificates and therefore, the scientific evidence, corroborate ocular version of the prosecution witnesses. The counsel has next argued that the involvement of accused-A-1, A-3 to A-6 in committing the murder is also proved from the Forensic Science Lab Report which proves that on the recovered knives, bloodstains were found which matched with the blood of the deceased. It is argued the evidence of FSL is admissible under Section 293 of Cr.P.C. and it was duly put to all the accused persons while recording the statement under Section 313 of Cr.P.C. The counsel has relied upon the judgment of the Supreme Court in **Sharad Birdhichandra's Case (Supra)** to submit that complete chain has been proved by the prosecution. The counsel has also relied upon the judgment of the Supreme Court in **Shafi Mohammad Vs. State of Himachal Pradesh, (2018) 2 SCC 801**, to submit that the Supreme Court has held that Sections 65A and 65B of the Evidence Act, cannot be held to be a complete code on the subject of proving an electronic evidence and the threshold admissibility of the electronic evidence cannot be ruled out on any technical ground if it is relevant. It is held that requirement of certificate under Section 65B (4) of Evidence Act being procedural can be relaxed by the court, wherever interest of justice so justifies and therefore, the requirement of certificate under Section 65-B (4) of Evidence Act is not always mandatory. The counsel has also relied upon the judgment of the Supreme Court in **Balbir Singh Vs. State of Uttarakhand, (2023) Live Law SC 861**, to submit that accused- A-1, Piyush failed to discharge is obtained under Section 106 of the Evidence

Act as the defence set up by him stands falsified from the prosecution evidence that some unknown persons have abducted his wife.

152. It would be relevant to FSL report regarding weapon of offence as under:-

"विधि विज्ञान प्रयोगशाला, उत्तर-प्रदेश, महानगर, लखनऊ

प्रेषक,

संयुक्त निदेशक

विधि विज्ञान प्रयोगशाला, उ०प्र०,

महानगर, लखनऊ- 226006.

सेवा में,

पुलिस अधीक्षक नगर (पूर्वी),

कानपुर नगर।

पत्रांक 2009-SERO-14 L/W 2222-

SERO-14 जिला: कानपुर नगर

अपराध सं०: 151/14 राज्य बनाम: पीयूष श्याम दसानी

धारा: 302/201/412/120B IPC थाना: स्वरूप नगर।

आपका पत्र संख्या:

चिकित्सा अधिकारी

कानपुर नगर

प्रेषक संदर्भ

उपरोक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनांक 25.08.14 को विशेष वाहक द्वारा प्राप्त हुआ।

सील का विवरण

एक वस्त्रावृत समुद्रित पार्सल जिस पर (S.B.Y.U.P.P मुद्रानमूनानुसार) की छाप अक्षत थी।

प्रदर्शों का विवरण

1. रुमाल	एक सर्वमुहर बंडल से
2. रुई खूनालूद	एक सर्वमुहर बंडल से (पीछे की सीट से)
2. रुई सादा	एक सर्वमुहर बंडल से
3. स्वैब काटन	एक सर्वमुहर बंडल से (आगे की लेफ्ट सीट से)
4. सैण्डल लेडीज	एक सर्वमुहर बंडल से (पीछे की सीट से)
5. चाकू	एक सर्वमुहर बंडल से

6. चाकू
 7. चाकू
 8. रूमाल एक सर्वमुहर बंडल से (अभि० सोनू से)
 9. चाकू एक सर्वमुहर बंडल से (अभि० रेनू से)
 10. सलवार एक सर्वमुहर बंडल पी०एम०नं०
 2095/14 से
 11. कुर्ता
 12. पैन्टी
 13. ब्रा
 14. दुपट्टा
 15. सैण्डल
 16. हेयर क्लिप
 17. ब्रासलेट
 18. जीन्स पैन्ट एक सर्वमुहर बंडल से
 19. टी-शर्ट (अभि० सोनू से)
 20. जीन्स शर्ट एक सर्वमुहर बंडल से
 21. टी-शर्ट (अभि० रेनू से)
 22. लाल ड्रव एक सर्वमुहर लिफाफा पी०एम० नं०
 2095/14 से

परीक्षण परिणाम

वस्तु (1) से (22) के बड़े भागों पर रक्त पाया गया।
 वस्तु (10) (12) व (20) पर सबसे बड़े धब्बे की लम्बाई क्रमशः लगभग 28, 10 व 10 से०मी० थी।
 रक्त के लिये प्रारम्भिक बेजिडीन परीक्षण सकारात्मक पाया गया तथा स्पेक्ट्रमीय परीक्षण द्वारा रक्त की पुष्टि की गयी।
 वस्तु (3) से (7) (9) से (18) (20) व (22) पर मानव रक्त पाया गया वस्तु (1) (2) (8) (19) व (21) पर रक्त (वियोजित) डिसइन्टीग्रेटेड रक्त का मूल निर्धारण जेल प्रसरण विधि द्वारा किया गया।

नोट- रक्त के वर्गीकरण/डी.एन.ए परीक्षण से सम्बन्धित आख्या अलग से प्रेषित की जायेगी।

प्रतिहस्ताक्षरित

ह०अपठनीय

निदेशक

विधि विज्ञान प्रयोगशाला उ०प्र०

लखनऊ।

ह०अपठनीय

डा० राजकुमार

उप-निदेशक सीरो

विधि विज्ञान प्रयोगशाला, उत्तर-प्रदेश, महानगर, लखनऊ

प्रेषक,

संयुक्त निदेशक

विधि विज्ञान प्रयोगशाला, उ०प्र०,

महानगर, लखनऊ- 226006.

सेवा में,

पुलिस अधीक्षक नगर (पूर्वी),

कानपुर नगर।

पत्रांक 2009-SERO-14 L/W 2222-

SERO-14 जिला: कानपुर नगर

अपराध सं०: 151/14 राज्य बनाम: पीयूष

श्याम दसानी

धारा: 302/201/412/120B IPC

थाना: स्वरूप नगर।

उपरोक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में

दिनांक 25.08.14 को विशेष वाहक द्वारा प्राप्त हुए।

सील का विवरण

एक वस्त्रावृत समुद्रित पार्सल जिस पर

(S.B.Y.U.P.P मुद्रानमूनानुसार) की छाप अक्षत थी।

प्रदर्शों का विवरण

1. रूमाल एक सर्वमुहर बंडल से
2. रुई खूनालूद एक सर्वमुहर बंडल से (पीछे की सीट से)
2. रुई सादा एक सर्वमुहर बंडल से
3. स्वेब काटन एक सर्वमुहर बंडल से (आगे की लेफ्ट सीट से)
4. सैण्डल लेडीज एक सर्वमुहर बंडल से (पीछे की सीट से)
5. चाकू एक सर्वमुहर बंडल से
6. चाकू
7. चाकू
8. रूमाल एक सर्वमुहर बंडल से (अभि० सोनू से)
9. चाकू एक सर्वमुहर बंडल से (अभि० रेनू से)
10. सलवार एक सर्वमुहर बंडल पी०एम०नं०
2095/14 से
11. कुर्ता
12. पैन्टी
13. ब्रा
14. दुपट्टा
15. सैण्डल
16. हेयर क्लिप
17. ब्रासलेट
18. जीन्स पैन्ट एक सर्वमुहर बंडल से

19. टी-शर्ट (अभि० सोनू से)
 20. जीन्स शर्ट एक सर्वमुहर बंडल से
 21. टी-शर्ट (अभि० रेनू से)
 22. लाल ड्रव एक सर्वमुहर लिफाफा पी०एम० नं० 2095/14 से

परीक्षण परिणाम

प्राप्त चिन्हित प्रदर्श (1) से 22 का डी एन ए परीक्षण किया गया।

प्रदर्श (5) से (7) व (9) पर उपस्थित स्रोत स्त्री मूल का पाया गया एवं स्रोत प्रदर्श (10) से (12) व (22) (मृतका से) में समानता पायी गयी।

प्रदर्श (18) व (19) (सोनू से) तथा प्रदर्श (20) व (21) (अभि० रेनू से) के स्रोत में आंशिक डी एन ए प्रोफाइल जेनेरेट होने के कारण स्रोत प्रदर्श (10) से (12) व (22) से मिलान के सम्बन्ध में अभिमत दिया जाना संभव न हो सका।

प्रदर्श (2) से (4) (13) व (14) में आंशिक डी एन ए प्रोफाइल जेनेरेट हुआ।

प्रदर्श (1) (8) व (15) से (17) में डी एन ए निष्कर्षण न हो सका।

डी एन ए परीक्षण में जेनेटिक एनालाइजर व जीन मैपर सोफ्टवेयर का प्रयोग किया गया। उक्त परीक्षण में मानक विधियां प्रयोग में लाई गईं।

नोट: 1 सीरोलोजी परीक्षण सम्बन्धी आख्या केस क्रमांक 2009-SERO-14 तथा डीएनए परीक्षण से सम्बन्धित आख्या केस क्रमांक 2222-SERO-14 के द्वारा पूर्व से अलग से प्रेषित की जा चुकी है।

2. समस्त प्रदर्शों को परीक्षणोंपरांत एक सर्वमुहर बण्डल में वापस लौटाया जा रहा है।

3. कृपया परीक्षित प्रदर्शों की वापसी की शीघ्र व्यवस्था करें।

अग्रसारित	
ह० अपठनीय	ह० अपठनीय
निदेशक	उप निदेशक
विधि विज्ञान प्रयोगशाला उ०प्र०	विज्ञान प्रयोगशाला उ०प्र०
लखनऊ।	लखनऊ। ”

153. The counsel for the informant has argued in an appeal filed under section 372 that accused Mukesh Shymdasan, Kamlesh

Shyamdasani, and Smt. Poonam Shyamdasani were wrongly acquitted by trial court though sufficient evidence of conspiracy and concealment of evidence has come again them.

154. After hearing the counsel for the parties, the following questions arises for determination in the present appeal as under :

(A) Whether the deceased Jyoti Shyamdasani was murdered between 11.33 (23.33) on 27.07.2014 and 01.30 a.m. on 28.07.2014?

(B) Whether accused Piyush Shyamdasani, accused Manisha Makheeja, accused Awadhesh Chaturvedi, Renu alias Akhilesh Kanaujia, Sonu Kashyap and accused Ashish Kashyap had conspired with common intention to kidnap deceased Jyoti Shyamdasani and in furtherance of criminal conspiracy committed her murder.

(C) Whether under the said criminal conspiracy accused Piyush, accused Awadhesh Chaturvedi, Renu alias Akhilesh Kanaujia, Sonu Kashyap and Ashish Kashyap formed a common intention to cause the murder of the deceased and for fulfillment of the said common intention, accused Piyush, accused Awdhesh Chaturevedi, Renu @ Akhilesh Kanaujia have caused the death of deceased Jyoti?

(D) Whether the said accused persons attempted committed the murder by leaving the deceased in the car in a secluded place with the intention of escaping the punishment for the said crime?

(E) Whether accused Avdhesh Chaturvedi, Renu Alias Akhilsh Kanaujia, Sonu Kashyap dishonestly misappropriated the jewellery in the possession of the deceased at the time of her death?

(F) Whether accused Piyush Shyamdasani gave false information to police about the incident?

155. With the assistance of learned Senior Advocates appearing for the appellant along with the assisting counsels as well as learned Senior Counsel appearing for the informant and learned AGA for the State, the entire paper book and evidence is re-scrutinized. The file of material exhibits was also requisitioned and with the assistance of learned counsel for the parties, the same was also re-scrutinized and the entire evidence was re-appreciated as the arguments of learned Senior Counsels for the parties was heard for a period of more than six days.

156. After hearing the counsel for the parties, we find no merit in the appeals filed by accused-A-1, Piyush Shyamdasani, A-3- Awadhesh Chaturvedi, A-4- Renu @ Akhilesh Kanaujiya, A-5- Sonu Kashyap and A-6- Ashish Kashyap, for the following reasons:

(i) The prosecution has proved by primary evidence that on the date of incident i.e. 27.7.2014, accused A-1 took his wife- victim, Jyoti to Varanda Restaurant for dinner where he has made an entry in the visitors' book by stating 'Good' and gave his own mobile no. 9956353535. This fact is disclosed by accused A-1 in the FIR itself that he and his wife Jyoti after having dinner at Varanda Restaurant left at around 11:43 PM. Even PW-8- Sanjay Khan, a waiter of the Varanda Restaurant has also proved that both appellant- A-1 and the victim visited their restaurant and had dinner there. It is also stated by this witness that during the intervening period for 8 to 10 minutes, the accused A-1 went downstairs and the

victim was sitting alone at the table. Though an objection is raised by the counsel for the appellants that the hard disk of the CCTV footage is not proved by a valid certificate under Section 65B (4) of the Evidence Act, forever the same being a corroborative evidence to the primary evidence, duly proved the fact that the accused A-1 with his wife- Jyoti left the restaurant around 11:43 PM on that night.

(ii) The version given by accused A-1 in the FIR as well as in the statement under Section 313 of Cr.P.C. that on way, 7-8 persons on four motorcycles waylaid his Honda Accord Car by hitting it from the front side and they forcibly took him out by causing injury on his hand and then one of the assailants drove the car and three other persons sat in the car, whereas his wife was there and abducted her, is not the true version as per the prosecution investigation and evidence.

(iii) The trial court has rightly recorded the finding that it is unnatural for a husband not to protest when some unknown assailants were trying to abduct his wife, by forcing him out of the car and instead of speeding away the car or showing any protest, he has virtually surrendered before the said persons. His own version that he was hit by some pointed weapon on his hand, is not proved by any medical evidence.

(iv) It has come in the statement of Shambhu Singh, Home Guard, that he was deputed by the SHO to take accused A1 to hospital for his medical examination, but he escaped from that place by saying that he will get it done later on, also proves that accused A-1 did not suffer any injury and is gave incorrect statement in the FIR that he was given injuries by the assailants. Therefore, **question no. F** is decided against accused A-1 as he gave false information to police.

(v) All the witnesses of fact i.e. PW-1 Rajesh @ Raja Nagdev, the uncle of deceased, PW-2- Vishesh Nagdev, brother of the deceased, PW-3- Maya Devi, mother of the deceased, PW-4- Hitesh Nagdev, another brother of deceased, PW-6- Shankar Nagdev, father of the deceased and PW-7- Monika Ashudani, aunt of the deceased have clearly stated that immediately after the marriage, Jyoti was complaining about the unresponsive and cruel behaviour of her husband-accused A-1 and their testimony could not be shattered despite lengthy cross-examination.

(vi) The circumstance proved by the prosecution that immediately after the incident, the victim was found in an injured condition in car of A-1 and then she was shifted to hospital where she was declared dead, also proved that accused Piyush Shyamdasani has not given the correct version to the police and has failed to discharge burden under Section 106 of Evidence Act.

(vii) A perusal of the post-mortem report reflects that the deceased suffered as many as 14 incised wound injuries out of which injuries nos. 1 to 6 are the scuffle wounds, as the deceased had tried to save her life. Injuries nos. 7 to 14 are the incised wound which shows that she was brutally injured with sharp edged weapon like knife. Injury nos. 12 and 13 also are the defensive wounds as there were on the hand of the victim and the manner in which the injuries are caused to the victim, also suggest that it is not a case of abduction and motive was to commit murder.

(viii) From the prosecution evidence, it is proved that the motive to commit the offence was not dacoity as there is no evidence of looting the money or personal belongings as nothing was taken away from Piyush Shyamdasani. As per his

own version, he was forced out of the car and in such eventuality, the assailants would have taken his mobile phone and valuable belongings. Even the mobile phone of the victim was not taken away as it was found inside the car. There was no motive of committing rape or ravishing the victim as it has come on record, in the post-mortem report that there is no evidence of molestation or rape with the victim. Even the motive given in the FIR by accused- A-1 that his wife is kidnapped, is not proved that as in such eventuality the assailants would not have killed the victim and they may have demanded ransom at a subsequent stage.

(ix) Even the motive regarding any enmity has not come on record as the accused A-1 was left scratch less and he had not attributed any enmity with any of the assailants even during the investigation. Therefore, the motive as per the prosecution evidence is proved that accused A-1, in conspiracy with accused A-3 to A-7 committed murder of victim Jyoti. As per the FIR, accused A-1 stated that by hitting his car, the assailants who were on four motorcycles, stopped his car, however, as per the prosecution evidence i.e. PW-12 who has conducted the physical verification of the car and has taken the photographs, has stated that no dent or scratch, was found on the body of the car and therefore, even this version given by the accused A-1 in the FIR is false.

(x) The appellant A-1 was found using mobile no. 9956037000 which was in the name of an employee of his company and mobile no. 9956353535 is admittedly used by accused himself. In the FIR itself, the accused has given both these numbers and undisputedly, he was using these two numbers as per the FIR version itself.

(xi) Even on the date of incident, one of the number was mentioned in the

visitors register of Varanda Restaurant as accused A-1 has given a comment 'Good' by mentioning his mobile no. 9956353535.

(xii) The police started the investigation by taking the call details of these two numbers and subsequently unfold the entire story of conspiracy.

(xiii) Though as per the prosecution evidence, the call details of accused Manisha Makheeja with the accused A-1 show that they used to talk to each other, however, there is no call details of her mobile number with other accused persons A-3 to A-6. In the statement of PW-13- Poonam Awasthi, PW-18- Akhilesh Kumar Gaud and PW-34, Shiv Kumar Singh Rathaur, the main I.O., it is clearly stated that from their investigation, they could not collect any information about the name of Manisha Makheeja.

(xiv) The police has also recovered the two diaries of the deceased and proved her handwriting by way of FSL report as these were compared to her admitted handwriting taken from her school diaries. However, the entries in the diary suggest that she was not happy with the marriage but there is nothing recorded that she has written anything about the extra-marital relation between accused A-1 and A-2.

(xv) All the witnesses of facts have clearly deposed that Jyoti was complaining about the behaviour of her husband-A-1 so much so the extent that he was mentally harassing her as explained in the detailed statement of prosecution witnesses, PW-1, PW-2, PW-3, PW-4, PW-6 and PW-7.

(xvi) It has come in the statement of PW-34, the main I.O. that on receiving the information, he got the location of the deceased in mobile phone and reached there with accused A-1 and found Honda Accord Car which was identified by Piyush

and by breaking open the glass, the victim was taken out of car and was taken to the hospital where she was declared brought dead. As per the post-mortem report proved by PW-19, total 14 scratches and cut injuries were found on the body of Jyoti, which were caused by hard, blunt weapon and the fatal injuries were caused by sharp edge weapon like knife. The time of the causing injuries were found to be between 11 and 12 PM on 27.7.2014 and the cause of death was that deceased died due to excessive bleeding and shock and hemorrhage as a result of ante-mortem injuries.

(xvii) The defence counsels, could not rebut in the cross-examination of the prosecution witnesses regarding the causing of injuries to the victim, the post-mortem report and the nature of weapon used, therefore, the trial court has rightly recorded the finding that the deceased died due to the ante-mortem injuries on her body. The number and nature of injuries caused on the body of the victim clearly shows that the assailants were made sure that the victim did not survive the injuries and therefore, the prosecution has proved that the death of deceased Jyoti Shyamdasani was of homicidal in nature and she was murdered.

(xviii) Accordingly, **question nos. A and C** are decided against appellants A-1 and A-3 to A-6 and in favour of the prosecution that the deceased Jyoti Shyamdasani was murdered on the intervening night of 27.7.2014 and 28.7.2014 in conspiracy with each other.

(xix) The arguments raised on behalf of the accused persons are that there is no eye-witness to the incident and the entire case is based on circumstantial evidence only and the entire chain of the circumstances is not proved, is also not acceptable.

(xx) As noticed above, the incident was reported by accused A-1 Piyush Shyamdasani himself to the police and police started the investigation by taking the call detail records of the two mobile numbers given by him in the FIR, the CCTV footage of Varanada Restaurant which was also mentioned in the FIR and the statement of PW-8- Sanjay Khan, a waiter working in the restaurant, PW-17- Shubham Poddar, the owner of the restaurant who provided the DVR of 16 CCTV cameras installed in his hotel along pendrive and a certificate, proves that the accused A-1 while the victim was sitting on the table, had gone downstairs for 8-9 minutes and came back. The hard disk of CCTV camera produced in the pendrive were duly proved by PW-17- Shubham Poddar, owner of Varanda Restaurant and he has given certificate that no tampering was done with the same. Therefore, the same are duly proved under Section 65B of the Evidence Act, as per the judgment in **Shafi Mohammad's Case (supra)**. The co-investigator, PW-13- Poonam Awasthi has also given the complete details of all the cameras, in which the accused and deceased Jyoti were seen coming down from the stairs.

(xxi) It has come in the evidence of prosecution that in the intervening period, accused A-1 made call to accused A3 to A6. The FSL, Lucknow in its report dated 28.12.2014, is also proved that men and women were seen in the cameras. Even otherwise, it is own case of PW-1, as per the FIR that after visiting the Varanda Restaurant, he along with deceased were going in Honda Accord Car where the incident took place.

(xxii) The statement of PW-7- Monika Ashudani, paternal aunt of the victim that at the relevant time when the victim was present in the Varnada

Restaurant, she received a call from victim who told her that she was very tensed, she also told that Piyush had gone downstairs of restaurant while talking on the phone and he was telling someone that the work will be done today and therefore, the victim was having strange feeling of fear, proved that there was a conspiracy between Piyush and other accused persons, A-3 to A-6.

(xxiii) PW-13- Poonam Awasthi, co-investigator has proved the call details of all the mobile phones and the CCTV footage of the Varanda Restaurant.

(xxiv) Another evidence proved by the prosecution is that after the assailants have taken away the car of appellant-A-1 in which victim was sitting, a call was made by accused A-1 on her mobile number which was recovered from the car. This call was made by accused A-1 to make sure that the assailants have carried out the murder of Jyoti.

(xxv) PW-18- SI Akhilesh Kumar Gaud who collected and proved the call details of accused Awadhesh Chaturvedi, Sonu Kashyap, Ashish Kashyap, Renu @ Akhilesh Kanaujiya who were using mobile nos. 8127986342, 8687580730, 8090615770 and 7784987698, respectively, were found to be in contact with each other as they were continuously talking to each other as per the call detail records. He has also proved the location of this mobile phones at the scene of incident. Though, this witness has prepared a chart of the mobile phone on a map which has been objected by the defence side, however, even if the map is not there, in the deposition, this witness has stated that has given complete details of locations of all these accused persons. Even the location of the mobile phone of the accused persons was found around 00:05 hours at the place where the Honda Accord Car was found, in which the injured victim was recovered.

Thus, all these facts prove that accused A-1 and A-3 to A-6 were in continuous conversation with each other.

(xxvi) PW-16- Jitendra Mohan Singh and PW-18- Akhilesh Kumar Gaud have also given details of the calls made by accused A-1 to accused A-2, Manisha Makheeja having long conversation out of which one call was made while accused was present in the Varanda Restaurant, to prove that even A-2 was part of the conspiracy, is not proved by the statement of other co-investigators.

(xxvii) Therefore, **question nos. D & E** are decided against the accused persons holding that accused A-1 and A-3 to A-6 in criminal conspiracy, has caused murder of deceased Pooja @ Jyoti in a car and left her in a secluded place with intention of escaping the punishment and accused A-3 to A-6 conceal the jewellery in possession of the deceased at the time of death to destroy the evidence. Therefore, the finding of Trial Court in this regard is upheld. The only evidence against Manisha Makheeja except the evidence that she was having continuous conversation with accused A-1 on the date of incident. Nothing has come on record that he had talked to accused A-3 to A-6 in furtherance of any conspiracy.

(xxviii) It has come in the statement of PW-30- Rajeev Dwivedi that he collected the information regarding the conversation and location of the mobile phone of accused A-1, A-3 to A-6 which show that accused A-1 talked to all the four accused. At the time when accused A-1 was present in Varanda Restaurant, he made a call on the phone of accused A-3 and even the location of accused A-3 was at the Varanda Restaurant. At that time accused Renu @ Akhilesh and Ashish called each other at about 22:13 hours and location of other mobile numbers was also

near the Varanda Restaurant in the same sequence. Ashish called Sonu at 22:23 hours and at that time Sonu's location was at the place of incident. The call details record of all the phones which were used by the accused persons, were proved by the statement of PW-20, PW-21, PW-22, PW-28 and CW-1, Nodal Officers of the respective mobile companies who have duly proved the certificates under Section 65B of the Evidence Act by stating that there was no tampering with the computers where the data is stored and no one can have access to the same unless he is so authorized and therefore, in the light of the judgment of **Shafi Mohammad's Case (supra)**, the requirement of Section 65-B of Evidence Act is proved and the certificates are duly proved to show that these accused were guilty. It has come in the statement of PW-34 that in the disclosure of accused Awadhesh Chaturvedi, Renu @ Akhilesh Kanaujiya, Sonu Kashyap, they told about throwing the knife, wiping the blood stained knife with a handkerchief, throwing the blood stained handkerchief, removing the jewellery of the deceased at the time of her death, throwing in a hollow electrical pole was followed by a recovery of all the articles and therefore, the disclosure of the accused persons which was followed by the recovery of articles is admissible under Section 27 of the Evidence Act. As per the FSL report, the blood stains on the knives recovered matched with the blood stained of the victim which is also a corroborating evidence regarding the recovery effected in pursuance to the recovery of weapon of offence effected in pursuance to disclosure made by the accused persons.

(xxix) The articles recovered from the accused persons belonging to Jyoti were duly identified by her father- PW-6- Shankar Nagdev, as well as PW-5- Triveni Shankar Dixit, an Astrologer who

has provided a ring with a pearl to the victim. Even the recovery of blood stained clothes worn by accused Renu, Sonu Kashyap which they have washed away to remove the blood stained were recovered by PW-34 and duly proved before the court.

(xxx) It is stated by PW-34, that the confessional statement of the accused were recorded in presence of two independent witnesses and therefore, the statement was taken as per Section 27 of the Evidence Act and in pursuance thereof, PW-34 along with a Scientific Officer and independent witnesses had recovered the knives on their identification. PW-24- Dr. Praveen Kumar Srivastava, In-charge Forensic Field Unit, has also supported the statement of these witnesses and stated that on a Benzidine test, blood was found on the knife and it was sent for forensic examination. PW-13, other co-investigator, on the disclosure of accused Awadhesh and Renu @ Akhilesh Kanaujiya visited Rave Moti Mall Big Bazar from where they purchased two knives on 21.7.2014 and obtained CCTV footage, the bill of purchasing knife has proved in the evidence of procuring the knives for committing offence. Similarly, it is also proved that two knives from the same Rave Moti Mall purchased on 13.7.2014 by accused Awadhesh. PW-30- Rajeev Dwivedi has proved that on 21.7.2014, even as per the call detail records, the location of Piyush was found in Rave Moti Mall along with accused Awadhesh when two knives were purchased which shows that accused A-1 and A-3 to A-6, in conspiracy, had purchased four knives on two different dates from Rave Moti Mall wherein as per the call details, presence of accused A-1 was also found. So far the arguments raised by counsel for the appellants that the call detail records are

not proved in accordance with Section 65B (4) of the Evidence Act, has no merit as not only six Investigating Officers but all the Nodal Officers of concerned mobile companies, have duly proved the call detail records of all the mobile phones by issuing requisite certificates as per requirement of Section 65B of Evidence Act.

(xxxi) It has come in the statement of PW-18, Akhilesh Kumar Gaud that some of the phone numbers were not registered in the name of the accused persons and they were in the name of different persons as stated by this witness and he did not try to find out or record the statement of those persons in whose name the numbers were issued, can be a lapse of investigation but not a circumstance to raise a suspicion about the investigation conducted by a team of investigators.

(xxxii) As per the FSL report Exhibits- 5, 7 & 9, the blood recovered on the knives, were found to be of female origin similarly the source on Exhibit 10 & 12 was found to be similar with blood on Salwar, Kurta, Petticoat, Ex.22, blood of the deceased. Out of 22 articles sent for investigation, human blood was found on articles nos. 3, 4, 5, 6, 7, 9 and 10 including 17 on the wearing cloths of deceased, the clothes of Sonu and Renu. In DNA test blood was found on article 5, 8, 7 and 9 was of female origin and its source was found to be similar to that found on the clothes of the deceased, therefore, by scientific evidence prosecution has been able to prove that accused- A-3 to A-6 have actively participated in commission of offence of murder of Pooja @ Jyoti in conspiracy with accused A-1. The judgments relied upon by appellants are distinguishable in facts.

157. Regarding **question no.B** about the role of accused A-2 being part of the

criminal conspiracy with A-1 and A-3 to A-6, we find that though there is evidence led by the prosecution that accused A-2 was well acquainted with accused A-1, however, we do not find any such clinching evidence to hold her guilty of criminal conspiracy with accused A-1 and A-3 to A-6 for the following reasons:

a) As per the statements of PW-13, PW-18 and PW-34, the three Investigating Officers, it is stated that they did not find any evidence regarding role of A-2, Manisha Makheeja in the incident except the call details showing that she was in touch with accused-A-1.

b) Even as per the call details record, accused A-1 was in touch with accused A-2 but she was not in touch with any other accused persons, therefore, even as per the extra-judicial confession made by accused A-3 to A-6, it is accused A-1 who has paid some amount to them on different occasions, to a total of Rs. 50,000/- and none of the accused, A-3 to A-6 stated that Manisha has paid any amount to them.

c) As per the witnesses of fact, PW-6, father of victim, it is stated that prior to the marriage of accused A-1 with the victim a matrimonial proposal between A-1 and A-2 was proposed, however, the same could not mature because of mismatch of horoscope, therefore, the motive and conspiracy set up by PW-6- father of the victim and PW-7- paternal aunt of the victim that 3-4 days prior to the date of incident, the victim by chance picked up the ringing phone of her husband-A-1 and heard that A-2 was saying that as per a matrimonial proposal a boy was coming to meet her on 24.7.2014, therefore, he should eliminate Jyoti, do not prove any conspiracy between accused A-1 and A-2 for the reasons that as per the prosecution

version two unsuccessful attempts were made by accused A-1 and A-3 to A-6, first on 13.7.2014 when two knives were purchased and one on 21.7.2014, when another two knives were purchased by A-3 to A-6, however, they remained unsuccessful as they could not execute their plan in furtherance to the conspiracy. From the statement of the victim, though it is hearsay as stated by PW-6 and PW-7 the victim informed them that 3-4 days prior to the incident, accused-A-2 has stated that boy coming to meet her on 24.7.2014, would show that Manisha was not a part of conspiracy on the two previous attempts made on 13.7.2014 and 21.7.2014 whereas the incident took place on 27.7.2014.

d) Therefore, the mere suspicion raised by PW-5 & PW-6 about the role of A-2 is not sufficient to uphold her conviction specially when they never rose to a situation which was very alarming because as per Jyoti, A-1 and A-2 were conspiring to eliminate her. Rather in a very casual manner, they told her that she and A-1 are coming on Rakhsa Bandhan after 12-14 days, they will talk to A-2. There is no whisper in statements of all witnesses of fact that on receiving such information from Jyoti, they either contacted their relative Balram or tried to confront A-1 or tried to bring this fact to notice of his parents. This proves that the prosecution has made up this story, later on after death of victim for the first time in statement under Section 164 of Cr.P.C. before Magistrate.

e) PW-6 has stated that prior to the marriage of A-1 and A-2 he has verified the character of the accused A-1 and found that he had no such relationship with any lady and this fact came to his knowledge only when Jyoti informed her. Another aspect which has been ignored by the Trial Court is that accused A-1 and A-2 are

living in neighbourhood and there is another person namely, Balram, first cousin (from the family of PW-3-Maya Devi, mother of the victim), living in their neighbourhood. PW-6, father of the victim has stated that when he was making inquiry about A-1 prior to the marriage of his daughter Jyoti, he has even enquired from aforesaid Balram being neighbour of accused A-1 as Balram was their relative. It is improbable that if accused A-1 and his wife-deceased Jyoti was having strained relationship, on account of extramarital affair with A-2, this fact was not within the knowledge of aforesaid Balram, though, he was involved in the inquiry conducted by PW-6 before performing marriage of his daughter deceased Jyoti with A-1. It is stated by PW-6 that after the incident they stayed at the house of Balram for 2-3 days would show that the family of PW-6 and Balram were having cordial relationship, therefore, when Jyoti made phone call to PW-6 and PW-7 that she has heard A-2 calling on the mobile phone of A-1 that he should eliminate Jyoti because some matrimonial proposal is coming, neither Jyoti nor PW-6 or PW-3 tried to inform Balram about the alarming situation to find out the truth. All Investigating Officers never recorded any statement of Balram as a witness of fact to find out about any such information given to him by Jyoti. As accused A-2 is also neighbour of Balram and all the three persons i.e. A-1, A-2 and Balram were living in same neighbourhood, the non examination of this person about the strained relationship or the conspiracy proves that A-2- Manisha Makheeja was not part of the conspiracy so much so to the extent that she knew that accused A-1- Piyush Shyamdasani in conspiracy with accused A-3- Awadhesh Chaturvedi, A-4- Renu @ Akhilesh Kanaujiya, A-5- Sonu Kashyap and A-6-

Ashish Kashyap have conspired to kill Jyoti and in furtherance thereto they committed her murder on 27.7.2014.

f) Another circumstance which has not been appreciated by the Trial Court is that PW-33 Sagar Ratnani with whom the family of Manisha had a matrimonial proposal through a mediator, namely, Suresh Nahlani would show that the family of Manisha was trying to settle her down by getting herself married. This witness has stated that this proposal could not mature because of short height of Manisha as he is a tall man. The adverse inference which has been drawn against A-2 by the Trial Court is that this witness has stated that Manisha told her to say no to the proposal because of her short height and it will not be appropriate for her to say no, do not prove that she refused for this proposal either because her relationship with A-1 or as part of conspiracy. In fact, this witness nowhere stated that Manisha told him that she is not interested in marrying him as she is having any relationship with A-1.

g) Another aspect which is ignored by the Trial Court is that this witness, PW-33 visited the house of Manisha on 24.7.2014 and has stated that he had exchanged SMS / Whatsapp messages with A-2 from 24.7.2014 till 28.7.2014 i.e. a day subsequent to the date of incident. This reflects that accused A-2 and PW-33 were was still interested in having matrimonial alliance. PW-33 who has stated that after he came to know from the newspaper that name of the Manisha is involved in the present case, he stopped chatting with her also, shows that even he was chatting with Manisha in order to find whether the matrimonial proposal can still mature.

h) In her statement under section 313 (5) Cr.P.C. Manisha has stated that she is three years older to accused A-1 and she

was never a part of any criminal conspiracy, she also stated that police also move a false application before the Trial Court for getting her pregnancy test in order to defame her.

i) Even as per PW-5, Astrologer who acted as catalyst in worsening relationship of accused A-1 and his wife-victim Jyoti, by making her believe that her marriage will not work, also did not disclose name of A-2- Manisha Makheeja. This witness stated that he used to meet Jyoti but was not aware of any such love relationship between A-1 and A-2 and even deposed that after incident, he came to know about this.

j) It has been held in **Sharad Birdhichand's Case (supra)** that mere suspicion cannot be approved of proving complete chain of circumstances. Therefore, in the light of **Sharad Birdhichand's Case (supra)** the prosecution has failed to prove the chain of circumstances which proves that the Manisha had any knowledge of intention of A-1- Piyush Shyamdasani, A-3- Awadhesh Chaturvedi, A-4- Renu @ Akhilesh Kanaujiya, A-5- Sonu Kashyap and A-6- Ashish Kashyap. The circumstances are not conclusive against the appellant- A-2 so far as to exclude every possible hypothesis to be proved. Thus, in view of finding recorded in paragraph no. 157 (a to j), the involvement of A-2-Manisha Makheeja in criminal conspiracy with A-1, A-3 to A-6 is not proved and **question no. B** is decided accordingly.

158. As observed above in paragraph no. 156 (i to xxxii), the prosecution has been able to prove the complete chain of evidence against A-1- Piyush Shyamdasani and A-3- Awadhesh Chaturvedi, A-4- Renu @ Akhilesh Kanaujiya, A-5- Sonu Kashyap and A-6- Ashish Kashyap and therefore, the finding recorded by the Trial Court holding them guilty of offences is upheld

and the judgment of conviction and order of sentence are also upheld.

159. Accordingly, the Criminal Appeal Nos. 8254 of 2022, 10177 of 2022, 10034 of 2022, 9481 of 2022 and 10182 of 2022 are liable to be dismissed and Criminal Appeal No. 9005 of 2022 is allowed and Manisha Makheeja is acquitted of the charge.

160. The appellant- Manisha Makheeja is on bail and her bail surety bonds are discharged. The bail bonds of accused-appellants Awadhesh Chaturvedi and Ashish Kashyap, who are on bail are cancelled and they be taken into custody forthwith to undergo further sentence as per the order of trial court.

161. In view of the finding recorded above, the Criminal Appeal No. 121 of 2023, filed under Section 372 of Cr.P.C. challenging acquittal of Mukesh Shyamdasani, Smt. Poonam Shyamdasani and Kamlesh Shyamdasani is dismissed.

162. Record of the trial court be transmitted back forthwith. The file of material exhibits received from the concerned police station be also remitted back in sealed cover.

(2024) 12 ILRA 932

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 03.12.2024

BEFORE

**THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.**

First Appeal No. 1017 of 2024

Smt. Anchal Goyal		...Appellant
	Versus	
Parag Goyal		...Respondent

Counsel for the Appellant:

Kiran Kumar Arora

Counsel for the Respondent:

Aditya Bhushan Singh, Shadab Husain

A. Family Law - Family Court Act, 1984 - Section 19 - Code of Civil Procedure, 1908 - Section 115 - Appeal is a creature of statute and no right of appeal inheres in any party unless specifically provided for by a statute. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. (Para 34)

B. The two-tier appeal system as also the concept of multiple appeal/revision remedy before a higher Court, in the course of the same proceeding, has been done away under the general scheme of the Act and specifically u/s 19 of the Act – w.r.t. family disputes. Once the statute has done away with the concept of appeal against "case decided" by specifically excluding that concept from the scope of orders that may be appealable or revisable, it would be erroneous on part of the Court to introduce that concept through a process of judicial reasoning. **Express language used by the legislature that is unambiguous in letter and spirit, must prevail. There is no room to adapt it or to apply judicial interpretation offered to different language used under another statute.** (Para 30, 35)

In the context of main proceeding pending, the term "interlocutory order", is the genus. Any order causing the effect of "case decided" may be a species of that genus - "interlocutory order". Such species of orders may be passed during the course of such a judicial or quasi-judicial proceeding. The legislature has used the phrase "interlocutory order" and not "case decided" while excluding appeals against a type of orders passed by Family Courts... The whole having been excluded, there is no inherent reasoning to save its part. (Para 36)

Generally in dealing with the amendment applications, the Court does not decide the correctness of the contentions at that stage. To that extent, the orders passed on the amendment applications may remain procedural orders. They do not decide any issue touching the merits of the controversy. At the same time, **if such order has the effect of taking away the defence of immunity in the matter of limitation, it may be described as a judgement.** (Para 28)

In the present case, the appellant only sought to introduce (by way of amendment), a fact pleading that the respondent had earlier agreed or offered to revive his matrimonial relationship. To that extent and for that purpose, she sought to rely on some evidence allegedly led by the respondent, in collateral proceedings. The order of rejection of this amendment application does not deal with or decide any substantive rights of the parties and does not prejudice the substantive rights of the appellant involved in that proceeding before the learned court below. It is not an order of the moment. (Para 37)

Applying the test, the order impugned in this appeal is purely an "interlocutory order"/procedural order. It may never be appealed against. (Para 38)

First appeal dismissed. (E-4)

Precedent followed:

1. Shah Babu Lal Khimji Vs Jayaben, AIR 1981 SC 1786 (Para 12)
2. Amar Nath Vs St. of Har., AIR (1977) SC 2185 (Para 13)
3. Madhu Limaye Vs St. of Mah., AIR (1978) SC 47 (Para 13)
4. Mohan Lal Magan Lal Thakkar Vs St. of Guj., AIR (1968) SC 733 (Para 13)
5. C.B.I. Vs Gokul Chand, AIR (1967) SC 799 (Para 15)
6. Major Raja P. Singh Vs Surendra Kumar, 1990 SCC OnLine Raj 411 (Para 21)

7. Smt. Kanupriya Vs Ashutosh Agrawal, 2017 AIR Uttaranchal 166 (Para 22)

8. Raj Kumar Shivhare Vs Assistant Director, Directorate of Enforcement & anr., (2010) 4 SCC 772 (Para 22)

9. Major Raja P. Singh Vs Surendra Kumari, AIR 1991 Rajasthan 133 (Para 22)

10. Thankappan Nair Vs Prasannakumari & ors., M.F.A. No. 1760/1994-B (Para 22)

11. V.C. Shukla Vs St., AIR 1980 SC 962 (Para 22)

12. Avadhesh Narain Srivastava Vs Archana Srivastava, 1990 LLJ 183 (Para 26)

13. Jyoti Vs Ankit Dubey, (2023) SCC OnLine All 4506 (Para 29)

14. Vijay Prakash D. Mehta Vs Collector of Customs, (1988) 4 SCC 402 (Para 34)

15. Hoosein Kasam Dada (India) Ltd. Vs St. of M.P., AIR 1953 SC 221 (Para 34)

Precedent distinguished:

1. Rama Shanker Tiwari Vs Mahadeo & ors., (1968) ALJ 109 (Para 5)

2. Kiran Bala Srivastava Vs Jai Prakash Srivastava, 2005 (23) LCD 1 (Para 11)

Precedent overruled:

Sudhanshu Gupta Vs Komal Gupta, Civil Revision No. 109 of 2019, decided on 25.07.2019 (Para 18)

Present appeal filed u/s 19 of the Family Court Act, 1984, arises from order dated 04.10.2024, passed by Principal Judge, Family Court, Saharanpur, whereby an amendment application filed by the present appellant has been dismissed.

(Delivered by Hon'ble Saumitra Dayal Singh, J.
&

Hon'ble Donadi Ramesh, J.)

1. Heard Sri Kiran Kumar Arora, learned counsel for the appellant and Sri Aditya Bhushan Singhal, learned counsel for the respondent.

2. Present appeal has been filed under Section 19 of the Family Court Act, 1984 (hereinafter referred to as the 'Act'), arising from order dated 4.10.2024 passed by Principal Judge, Family Court, Saharanpur on Application Paper No. 39A/1-3, filed [under Order VI Rule 17 Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC')], by the present appellant in Original Suit No. 323 of 2022 (Parag Goyal Vs. Smt. Anchal Goyal), whereby the learned court below has dismissed the amendment application filed by the present appellant, seeking to introduce the following two paragraphs as paragraph nos. 54अ and 54ब, to her written statement.

"54अ- यह कि पिटिशनर ने माननीय उच्च न्यायालय नैनीताल में रेस्पोंडेन्ट के विरुद्ध एक याचिका अन्तर्गत धारा 482 सी०आर०पी०सी० (सी-482 नम्बर 781 वर्ष 2024 पराग गोयल बनाम आंचल गोयल) योजित की हुई है। उक्त याचिका अन्तर्गत धारा 482 सी०आर०पी०सी० की कार्यवाही में पिटिशनर पराग गोयल ने अपने अधिवक्ता के मार्फत न्यायालय में यह कथन किया है कि "*Learned counsel for the applicant Mr. Karan Anand, on instruction, submits that the applicant is ready to live with the respondent wife*"

"54ब- यह कि रेस्पोंडेन्ट भी सदैव पिटिशनर के साथ रहने को इच्छुक एवं तैयार रही है व वर्तमान में भी पिटिशनर के साथ रहने को तैयार है। इसके अतिरिक्त पिटिशनर के माननीय उच्च न्यायालय नैनीताल में दिनांक 25-06-2024 को किये गये कथन से रेस्पोंडेन्ट की कथित क्रूरता (यदि कोई हो तो, हालांकि रेस्पोंडेन्ट को स्वीकार नहीं है) उपमर्षित (*Condone*) हो चुकी है, जिस कारण भी पिटिशनर का वाद खण्डित होने योग्य है।"

3. At the outset, a preliminary objection has been raised by learned counsel for the respondent that the present appeal is not maintainable under Section 19 of the Act. For ready reference, Section 19 of the Act to the extent it is relevant to the present proceeding, reads as below:

“19. Appeal – (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991 (59 of 1991)].

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement or order of a Family Court.

[(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.]

[(5)] Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

[(6)] An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.”

4. During the course of his submissions, learned counsel for the appellant has also referred to and relied on the provisions of Section 115 CPC as amended and in force in the State of U.P. Section 115 CPC (as in force in the State of U.P.) to the extent relevant to the present discussion reads as below:

“115. Revision – (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has –

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.”

5. Submission of learned counsel for the appellant is, the issue whether an order rejecting an amendment application is a "case decided" is no longer *res integra*. A five-judge Full Bench of this Court in **Rama Shanker Tiwari Vs. Mahadeo & Ors., (1968) ALJ 109**, had the occasion to consider the following question:

“Whether an order passed Under Order VI, Rule 17 of the Code of Civil Procedure, either allowing an amendment or refusing to allow an amendment is a

“case decided” within the meaning of Section 115 of the Code?”

6. The provision of Section 115 CPC as was then in force in the State of U.P. read as below:

“115. Revision. – [(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.”

7. The question referred was answered by the Full Bench by a majority 4:1. The majority opinion authored by G.C. Mathur, J., reasoned as below:

“4. To hold that an order Under Order VI, Rule 17, CPC is not a “case decided” would result, in many cases, in denying relief to parties where it is most needed and in the perpetuation of gross injustice. The party aggrieved will have to wait till the suit is decided on merits after taking evidence and then raise the question in appeal. If its contention is correct, then the appellate court will set aside the order of the trial court on the amendment application and remand the case for a fresh trial. This will result in unnecessary delay and expense to both the parties. Even though an order allowing or refusing an amendment is a “case decided” this Court will not interfere unless the conditions laid down in Clauses (a), (b) and (c) of Section

115, CPC are satisfied and the order has resulted or is likely to result in such gross injustice or irreparable injury as cannot be remedied except by interference at that stage. Most of the other High Courts have also taken the view that an order Under Order VI, Rule 17, CPC is a “case decided”--see *Sukumar Chatterjee Vs. Kiran Chandra Mitter*, AIR 1964 Cal 439, AIR 1948 258 (Nagpur), *Shah Shantilal Chunilal Vs. Shah Shantilal Fulchand and Another*, AIR 1963 Guj 195, *Damodara Sastry v. Nilgri Sanjiviah* AIR 1955 Mys. 141 and *Pathikonda Gopala Rao v. Nagiri Pedda Kitamma* AIR 1956 AP 138.”

(emphasis supplied)

8. However, A.K. Kirtly, J., in his minority opinion, reasoned as below:

21. The principal matter which now needs consideration is whether and, if so, to which extent orders allowing or refusing amendment of pleadings fulfill the aforesaid requirements so as to come under the phrase “case which has been decided” in Section 115 of the Code. Plaints and written statements which constitute pleadings are documents over which the parties themselves have complete control. They may make therein any or all averments which may appear to them to be necessary, appropriate or expedient either to support a claim or to contest a claim. Once however, these documents are filed in the Court, the parties cease to have control over them. Nothing therein can be added to, deleted or altered unless permitted by the Court. The power to grant such permission has been expressly conferred on the Court Under Order VI, Rule 17 of the Code. It is a very wide power and its exercise is dependent on the judicial discretion of the Court. It is this discretionary nature of the power that

creates the real obstacle in the way of holding that an order allowing or disallowing amendment of a pleading gives rise to a case decided so as to be revisable u/s 115 of the Code. The filing of an application for amendment of a pleading gives rise to a 'case which is decided' as soon as an order allowing or dismissing it is passed. Be it so, but one may pertinently enquire: What is the controversy involving a matter of jurisdiction decided thereby? How has it a direct bearing on the rights of the parties or affected their rights and obligations directly? The required answers are hard to find. Yet to hold that under no circumstances will an order allowing or disallowing an amendment of a pleading give rise to a case decided so as to be revisable u/s 115 of the Code might result in defeating the object and purpose of the section itself. I find it difficult to accept this extreme view although I find it also logically difficult to subscribe to the view that all orders allowing or disallowing amendment of a pleading will be cases decided and revisable u/s 115 of the Code. I may here refer to two decisions of the Supreme Court in which it has been held that even where very wide words have been used in statutes conferring rights of appeal from every order or decision made or given in proceedings arising thereunder they would exclude interlocutory orders which are merely procedural or do not affect the rights or liabilities of the parties--See *Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others*, AIR 1965 SC 507 and *The Central Bank of India Ltd. v. Gokul Chand* AIR 1967 SC 79 at 800. Thus, I do not find it possible to hold that every interlocutory order passed or every finding or decision given in a proceeding in a court subordinate to the High Court will constitute a case which has been decided so as to be revisable u/s 115 of the Code.

22. The only matter which now remains to be considered is when and under what circumstances an order either allowing or dismissing an application to amend a pleading will be a case decided and revisable. The basic ingredients and the guiding rules furnished by Khanna's (*supra*) case are not exhaustive or rigid. There is room for elaboration. By way of sequel thereto it seems permissible to propound that the order, finding or decision may also potentially have a direct bearing on the rights of the parties and further that they by their own force either create or eliminate a question of jurisdiction. Therefore, the key to the solution in determining whether an order allowing or disallowing an application for amendment of a pleading will be a case decided is to be sought in the nature of the amendment sought, its direct or likely impact on the rights and obligations of the parties concerned and its immediate or potential effect on the Court's jurisdiction. If the application for amendment of pleading answers to the description affirmatively, order granting it or dismissing it may give rise to a case which has been decided and be revisable u/s 115 of the Code. If the application does not do so, the order granting or dismissing it will not give rise to a case decided revisable u/s 115 of the Code."

(emphasis supplied)

9. Thereafter, the reference was answered in terms of the majority, on the following terms:

"24. The opinion of the majority of Judges constituting the Full Bench is that an order passed Under Order VI, Rule 17 of the Code of Civil Procedure, either allowing an amendment or refusing to allow an amendment, is a "case decided"

within the meaning of that expression in Section 115, Code of Civil Procedure."

10. Thus, it has been submitted by learned counsel for the appellant that there can be no doubt that an order deciding an amendment application remains a "case decided". To that extent, such orders would fall outside the scope of the words of limitation used in Section 19(1) of the Act - "interlocutory order".

11. Elaborating, learned counsel for the appellant has next relied on another decision of a three - judge Full Bench of this Court in **Kiran Bala Srivastava Vs. Jai Prakash Srivastava, 2005 (23) LCD 1**, wherein the following question was referred to the Full Bench:

"Whether an appeal under Section 19 of the Family Courts Act, 1984 would lie against an order passed under Section 24 of the Hindu Marriage Act, for grant of interim maintenance?"

12. At first, that Full Bench relied on the decision of the Supreme Court in **Shah Babu Lal Khimji Vs. Jayaben, AIR 1981 SC 1786**. It was thus reasoned as below:

"20. In other words, the Apex Court ruled that order or interlocutory order possessing the characteristics and trappings of finality or affecting valuable, rights of the party or deciding important aspects of the trial in main or in ancillary proceedings, will be "judgment".

21. What noticeable in sub-section (1) of Section 19 of the Act of 1984, is that deviating from Section 96 of the Code of 1908 or from sub-section (1) Section 28 of the Act of 1955, it provides for appeals against "judgment". The Code of Civil Procedure, 1908, does not provide

for appeal against judgments. It provides for appeals against decrees and orders. Likewise Section 28 of the Act of 1955 also does not provide for appeals against judgments. It provides for appeals only against decrees [see: sub-section (1)] and against certain [see: sub-section (2)]. The question arises as to why the legislature made a departure by providing appeal against judgments-also, under sub-section (1) of Section 19 of the Act of 1984. Not that the legislature was not aware of the established practice or did not know the meaning of the word judgment, given by the Apex Court in Khimji's case (supra)."

13. Thereafter, that Full Bench further considered the term "interlocutory order" in the context of an order passed under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'HMA'). It took note of three decisions of the Supreme Court in **Amar Nath Vs. State of Haryana, AIR (1977) SC 2185**, **Madhu Limaye Vs. State of Maharashtra, AIR (1978) SC 47** and **Mohan Lal Magan Lal Thakkar Vs. State of Gujarat, AIR (1968) SC 733**. In **Amar Nath (supra)**, the Supreme Court observed as below:

"The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the

term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."

(emphasis supplied)

14. Further, referring on the decision in **Madhu Limaye (supra)**, the Full Bench further observed as below:

"The said view was reiterated in Madhu Limaye's case with the observation that some kinds of order may fall in between final order" and "interlocutory order" and the bar in sub-section (2) of Section 397 was not meant to be attracted to such kind of "intermediary orders"."

15. Then, considering the meaning to be given to the words "interlocutory orders"

used in Section 19 of the Act, the Full Bench also considered the definition of that phrase in Halsbury's Law of England and **Central Bank of India Vs. Gokul Chand, AIR (1967) SC 799**. Thereupon, that Full Bench made the following pertinent observations:

"27. The argument that appeal against any such order, will delay the disposal of main petition does not appeal to us, so as to give a limited meaning to the word "judgment". In an appeal against any order under Section 24 of the Act of 1955, granting pendente lite maintenance, main proceedings need not necessarily be stayed or held up. The reason is that grant of such maintenance is not to affect the merits of the main petition.

28. The learned Counsel for the respondents has referred to the definition of "interlocutory orders" in Vol. 22 of the third edition of Halsburys Law of England and also to Central Bank of India v. Gokul Chand, AIR 1967 SC 799 and also Amar Nath's case and Madhu Limaye's case (supra), so as to say that order under Section 24 of the Act of 1955 are just steps in aid of the main proceedings and have no existence in dependent of the main proceedings, so will not fall within the definition of the judgment and will be only an interlocutory order. We are of the view that in view of the discussion made above order of pendente lite maintenance has all the characteristics and trappings of the judgment as it decides the valuable rights and liabilities of the parties to the proceedings. In so far as those rights and liabilities are concerned the order is final. The fact that the considerations that matter in granting or refusing pendente lite maintenance under Section 24, have no connection with issues in the main proceedings or the question that even after

disposal of application under Section 24, the main petition remains alive for disposal, do not prevent the order under Section 24 from falling within the definition of the "judgment". We are also of the view that the expression "interlocutory order" appearing in sub-section (1) of Section 19 of the Act, 1984 qualify the word "order" only and does not qualify the word "judgment" appearing before the word "order". In other words, if order of pendente lite maintenance is a "judgment" for all legal and practical purposes, it matters little whether the same is interlocutory or final."

(emphasis supplied)

16. Thereafter, it was held that that order passed under Section 24 of the HMA is a 'judgement' as it involves effect of finality to the pendente lite maintenance awarded, thereunder.

17. Thus, it has been submitted that at present the impugned order deciding the amendment is a 'judgement'. It decides an issue or dispute at present. Though the divorce suit may remain pending, such an order may remain appealable and it cannot be described as a simple interlocutory order.

18. Last, reliance has been placed on the learned single judge decision of this Court in **Civil Revision No. 109 of 2019 (Sudhanshu Gupta Vs. Komal Gupta)** decided on 25.07.2019. Learned single-judge of this Court reasoned that the order rejecting an amendment application is a "case decided". Therefore, it is not an interlocutory order. Hence, it is appealable under Section 19 of the Act. For ready reference, relevant extract of the said decision, reads as below:

"Section 19 on the other hand starts with a non-obstante clause, namely,

"notwithstanding anything contained in the Code of Civil Procedure." It therefore necessarily follows that an appeal lies against every order passed by the Family Court, which is not an interlocutory order, despite any provision of the CPC to the contrary.

The Full Bench decision cited by counsel for the revisionist, namely Rama Shanker Tiwari Vs. Mahadeo and Ors., 1968 (38) AWR 103, holds that an order under Order 6 Rule 17 CPC, either allowing or refusing to allow an amendment, is a "case decided".

Although, this judgment has been relied upon by counsel for the revisionist to submit that the revision is maintainable, in my considered opinion, this judgment necessarily holds against the revisionist. Once it is accepted that an order rejecting an amendment application is a case decided, it necessarily follows that it is not an interlocutory order and is therefore, appealable under Section 19 of the Family Courts Act.

The revision is not maintainable also because sub-section 3 of Section 115 CPC as applicable in U.P. provides that the Superior Court shall not, under this section, vary or reverse any order made, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Even if the order impugned is set-aside and the amendment application of the revisionist is allowed, the proceedings before the Family Court shall not stand finally disposed of.

Under the circumstances, the order impugned in this revision being a final order and not an interlocutory order, it is clearly appealable under Section 19 of the Family Courts Act and for this reason alone, the revision is necessarily not maintainable. This is so because no

revision lies against an order which is appealable.

The contention of counsel for the revisionist that a revision can be filed because the provisions of CPC are applicable to the proceedings under the Family Courts Act, cannot be accepted because even though the provisions of the CPC are applicable to the proceedings before the Family Court, they are subject to and limited by the provisions of the Family Courts Act itself, which means that the provisions contained in the Family Courts Act shall necessarily prevail over the provisions contained in the Civil Procedure Code.

Under the circumstances, this Court has no hesitation in holding that the instant revision is not maintainable.

It is accordingly dismissed."

19. Coming to the facts of the present case, it has been submitted, unless the appellant is permitted to amend her written statement, prejudice would be caused to her defence. Besides the fact that the order rejecting an amendment application is a "case decided", effect of finality would attract to the extent the appellant would have been prevented to plead necessary facts.

20. On the other hand, learned counsel for the respondent would contend, the entire scheme of the Act leaves no matter of doubt that the Family Court proceedings are different from regular civil suit proceedings. The very object of the Act amongst others is to secure speedy settlement of disputes relating to marriages and family affairs. The procedure and practices and the rights created under CPC apply only to proceedings under the Act, to the extent it permits. Specifically, with respect to the appeals filed thereunder,

Section 19(1) of the Act creates a remedy of appeal. At the same time, that provision is notwithstanding anything contained in the CPC. Therefore, the remedies provided under the general enactment, i.e. CPC have been specifically done away and replaced with the remedies of appeal created under Section 19(1) of the Act. Thus, notwithstanding anything contained in the CPC, remedy of appeal has been created against every judgment and order passed by a Family Court, except interlocutory orders. Further, the Act debars any appeal against a consented order. Consented orders apart, in his submission, once the legislature has clearly barred appeals against any judgment and/or order that may be described as an "interlocutory order", there survives no occasion to read/interpret the general law i.e. CPC into the specific provisions of the special law i.e. the Act, even if the impugned order may be described to have rendered a "case decided".

21. To bolster his submission, learned counsel for the respondent has placed reliance on a decision of the Rajasthan High Court in **Major Raja P. Singh Vs. Surendra Kumar, 1990 SCC OnLine Raj 411**, wherein it has been observed as below:

9. The object of this Special Law of the Family Court Act is to decide the matrimonial cases in a speedy manner. If, the order rejecting or allowing an amendment application will be termed as the case decided for the purpose of this Act and is appealable then, in ordinary course of law the decision of such cases would take years to come to reach the finality of the matter. In order to achieve the object of the Act i.e. speedy settlement of dispute relating to marriage, the purpose of expeditious trial is frustrated. That apart if

the legislature intended that all interlocutory order be appealable, it should not have used the word in Section 19 of the Act "not being an interlocutory order" and that is why no appeal or revision has been provided. This Court in D.B. Civil Misc. Appeal No. 107/90 Smt. Vijay Kaur v. Radhey Shyam decided on 1.8.90 has held that the order relating to adjournment cost is an interlocutory order and appeal is not maintainable u/sec. 19 of the Act, in this view of the matter, the order dated 6.4.1989 cannot be termed finally deciding the case i.e. the controversy being settled. The parties can agitate the point in appeal after final disposal of the case by the trial court. In out considered opinion, the allowing or refusing an amendment is an interlocutory order against which no appeal u/sec. 19 of the Act is provided. In conclusion the preliminary objection is sustained and it is held that the order dated 6.4.1989 is an interlocutory order and no appeal lies to this Court.

22. Further, learned counsel for the respondent placed reliance on a division bench decision of the Uttarakhand High Court in **Smt. Kanupriya Vs. Ashutosh Agrawal**, 2017 AIR Uttaranchal 166. In that case, appeal had been preferred under Section 19 of the Act against an order passed by the Family Court allowing an amendment application, to amend the plaint. The Uttarakhand High Court had the occasion to consider the five-judge Full Bench decision of this Court in **Rama Shanker Tiwari (supra)** as also other decisions of the Supreme Court in **Shah Babulal Khimji (supra)**, **Kiran Bala Srivastava (supra)**, **Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and another**, (2010) 4 SCC 772, a decision of the Rajasthan High Court in **Major Raja P. Singh Vs. Surendra**

Kumari, AIR 1991 Rajasthan 133 and another decision by the Kerala High Court in **Thankappan Nair Vs. Prasannakumari & others** in M.F.A. No. 1760/1994-B, decided on 30.06.1995 as also the decisions of the Supreme Court in **Amar Nath (supra)**, **Madhu Limaye (supra)** and **V.C. Shukla Vs. State**, AIR 1980 SC 962. Thereafter, the Uttarakhand High Court reasoned as below:

"Therefore, it can be seen that there is no uniform understanding of the word "interlocutory order". The word assumes the meaning from the context of the statute and the purpose of the statute. We have already noticed that the Apex Court in (1974) 2 SCC 387 took the view that an order of amendment can, in certain situations, be treated as a judgment. The court took the view that, if the amendment merely allows the plaintiff to state a new cause of action or ask a new relief or include a new ground of relief, all that happens is that it is possible for the plaintiff to make further contentions. The court does not decide the correctness of the contentions at that stage. It was found that such amendment merely regulates the procedure applicable. It does not decide any question touching the merit of the controversy. In a case, where, however, the defence of immunity available to the defendant is taken away in the matter of limitation, it becomes a judgment. That case, as already noticed, related to an intra-court appeal. Here, we are concerned with the Family Courts Act. Amendments of pleadings are of different kinds. If an appeal is allowed against amendments ordered, one way to look at it is that the matter would be decided at that stage and he does not have to wait for an opportunity, which he, undoubtedly, has to challenge the order of amendment in the course of the

appeal against the final order, which would be passed. It could be that, at that stage, if the appellate court finds that the amendment was wholly unjustifiably allowed, the matter may merit a remand. If the intention of the Legislature in excluding interlocutory orders is to expedite the proceedings in the matrimonial causes, will not such a view hamper the object sought to be achieved by the Legislature? Even when a court allows an application for 2017:UHC:4732 13 amendment, it is settled law that the court does not sit in judgment over the correctness or the merit of the pleadings. The amended proceedings only will provide the framework within which the trial would proceed, evidence adduced, arguments canvassed and decision rendered. Further, the party has always a right to challenge the order of amendment in the appeal from the main judgment. Also, it is not irrelevant to notice that the party can, in appropriate cases, invoke the jurisdiction under Article 226 of 227. The advantage of taking the view that an order of amendment will not be treated as a judgment and will be treated only as interlocutory order is that the purpose of the Family Courts would, in one sense, be advanced, inasmuch as, the delay which attends the challenge of proceedings and before the appellate court would stand obviated. Ordinarily, amendments are to be allowed liberally. Therefore, an order allowing an amendment is rarely interfered with."

(emphasis supplied)

23. Thus, in his submission, the decisions relied upon by learned counsel for the appellant are distinguishable. In any case, the decision of the learned single judge in **Sudhanshu Gupta (supra)** does not lay down the correct law. Therefore, the present appeal is not

maintainable and it may not be entertained.

24. Having heard learned counsel for the parties and having perused the record, in the first place, the five - judge Full Bench in **Rama Shanker Tiwari (supra)** involved a completely different issue - whether an order rejecting or allowing an amendment application is "case decided" within the meaning of that phrase used in Section 115 CPC as was then in force in the State of U.P. The Full Bench answered the question in the affirmative by 4:1 majority and held that such an order is a "case decided". Therefore, the issue decided was-though an order passed under Order VI Rule 17 CPC may not be a judgement but it would amount to a "case decided" as may make it amenable to revision jurisdiction of the High Court, under Section 115 CPC. It was not relevant to that decision and the Full Bench did not deal with the issue whether such an order may be described as an "interlocutory order". Even then, it was noted-especially in the minority opinion of A.K. Kirti, J. that an order allowing or disallowing an application for amendment of a pleading may or may not be treated to be a "case decided", after considering if that order has a direct or likely impact on the rights or obligations of the parties concerned or its immediate or potential effects on the court's jurisdiction. Only if the application of amendment of pleading answers that description affirmatively, the order granting or dismissing such amendment may be revisable.

25. The dissent appears to have arisen in **Rama Shanker Tiwari (supra)** springing from the later part of the Section 115 CPC that provided for the

circumstances in which the revisional jurisdiction could be exercised by a superior court i.e. in cases of non-existing jurisdiction or failure to exercise jurisdiction or exercising of jurisdiction illegally or with material irregularity.

26. In the three-judge Full Bench decision of this Court in **Kiran Bala Srivastava (supra)**, the issue was considered in the context of an order of completely different nature. There, the issue arose whether an order providing for pendente lite maintenance allowance in terms of Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as “HMA”) is an “interlocutory order” against which no appeal may lie under Section 19 of the Act. After recognizing the difference between a final order and an interlocutory order, the Full Bench reasoned that an order passed under Section 24 of the HMA is not an “interlocutory order”. It agreed with the earlier division bench of the Court in **Avadhesh Narain Srivastava vs Archana Srivastava, 1990 LLJ 183** wherein it had been observed as below:

"No doubt, that the impugned order has been passed by the Family Court in the proceedings for restitution of conjugal rights which are pending before it and are yet to be finally disposed of by that Court but that in it self does not mean that the impugned order or any order passed during the pendency of the proceedings will be an order of interim nature or an interlocutory order. Further Section 24, under which the impugned order has been passed, does not provide that the order passed under this section will be an interlocutory order or an interim order. All that the section goes to signify is that the order is to be for maintenance and litigation expenses during the period of

pendency of the proceedings before the Family Court. But the maintenance and litigation expenses though for the interim period stood finally deter mined by the Family Court on the application file by the respondent under Section 24 of the Act. The Family Court did not indicate that it was passing the impugned order as an interlocutory order for being confirmed or recalled under a subsequent order in the same proceedings. The order has been passed finally by the Family Court on the question of grant of pendente lite maintenance and litigation expenses. Such an order cannot be considered as an interlocutory order. Same view was taken by Rajasthan High Court in the case of Sanjeev Kumar Pareek v. Shubh Laxmi Paraak, (1989) 1 Divorce & Matrimonial Cases 450."

(emphasis supplied)

27. The reasoning that prevailed with the Full Bench in **Kiran Bala Srivastava (supra)** was-an order possessing characteristics and trapping of finality or affecting valuable rights or deciding important aspects of the trial may continue to be described as a judgement and may not be treated to be an interlocutory order, simplicitor, not involving right of appeal there against. Only orders that are steps-in-aid of the main proceedings have no existence independent of the main proceedings, may continue to be described as “interlocutory orders”, entailing no right of appeal.

28. That reasoning resonates in the decision of a division bench of the Uttarakhand High Court in **Smt. Kanupriya (supra)**. After considering the Full Bench decisions of this Court in **Rama Shanker Tiwari (supra)** as also **Kiran Bala Srivastava (supra)** and the decision

of the Rajasthan High Court in **Major Raja P. Singh (supra)**, it was observed, generally in dealing with the amendment applications, the Court does not decide the correctness of the contentions at that stage. To that extent, the orders passed on the amendment applications may remain procedural orders. They do not decide any issue touching the merits of the controversy. At the same time, it was observed, if such order has the effect of taking away the defence of immunity in the matter of limitation, it may be described as a judgement. Thereafter, it was further noted, in the context of proceedings arising under the Act, the orders passed on amendment applications only provide the framework within which the trial may proceed, evidence may be adduced, submissions may be advanced and decision may be rendered. The correctness of orders passed on amendment application may remain open to challenge by the aggrieved party-in appeal against the main judgement. In any case, such orders may remain amenable to proceedings of the Court under Article 226 read with Article 227 of the Constitution of India. It then concluded that the order passed on an amendment application in proceedings under the Act is rarely interfered.

29. The view thus taken by the Uttarakhand High Court has been considered by a learned single judge of this Court in **Jyoti Vs. Ankit Dubey**, (2023) SCC OnLine All 4506. There, the order had been passed by a Family Court allowing an amendment to the plaint. It was challenged by filing a revision. In that, learned single judge observed as below:

“19. It must be noticed that both in Major Raja P. Singh and Kanupriya, the Court had before it the issue whether

an application seeking amendment, rejected in one case by the Family Court and allowed in the other, would constitute a judgment within the meaning of Section 19 so as to be amenable to appeal under the aforesaid provision. The Rajasthan High Court and the Uttarakhand High Court both have laid down law mindful of the fact that the object of the Family Court is to provide speedy justice in causes matrimonial or those relating to the family. Their Lordships have been conscious that permitting interlocutory challenge to orders granting or refusing amendment, would work to place fetters on the fast-tracked procedure contemplated by the Statute. It has also been noticed that the person who is aggrieved by the order granting amendment can in the appeal from the final judgment, if the event goes against him/her, assail that order too. No doubt, their Lordships of the Division Bench of the Uttarakhand High Court have found a dichotomy between classes of amendments, which may or may not constitute a judgment within the meaning of Section 19. This Court need not dilate much on the subtlety of principle about orders granting or refusing amendment being amenable to an appeal under Section 19 of the Act of 1984. This is so because in the present case that is not the point. The point here is whether from an order granting or refusing an amendment application by the Family Court, a revision lies to this Court under Section 115 of the Code. In the Rajasthan decision, there is a remark that the legislature did not intend all interlocutory orders passed by the Family Court to be appealable under Section 19 and that is why no appeal or revision has been provided under the Act of 1984.

20. The moot question, therefore, is whether that kind of a power can be

*inferred to be available to this Court under Section 115 of the Code. A reading of Section 10 of the Act of 1984 shows that the provisions of the Code are generally made applicable, but subject to other provisions of the Act of 1984 and the Rules. A juxtaposition of this provision with sub-Section (5) of Section 19 shows that sub-Section (5) expressly says that except as provided under sub-Sections (1) to (4) of Section 19, no appeal or revision would lie to any Court from any judgment or decree of a Family Court. The aforesaid provision expressly bars all kinds of revisions except an appeal envisaged under Section 19(1) of the Act of 1984 or a revision from a final order passed under Chapter IX of the Code of Criminal Procedure, 1973. No other kind of revision is envisaged by the Act of 1984. Thus, upon a reading of Sections 10(1) and 19(5) of the Act of 1984 together, the position that emerges is that no revision from an order of the Family Court is competent except one that arises from a final order passed under Chapter IX of the Code of Criminal Procedure. The party, therefore, aggrieved by an interlocutory order may question it in appeal, if it has the trappings of a judgment, or so to speak is an order of moment pronouncing upon rights of parties. It is dwelling on that principle that the Full Bench of this Court in *Smt. Kiran Bala Srivastava v. Jai Prakash Srivastava*, (2005) 23 LCD 1 held that an order under Section 24 of the HMA granting maintenance pendente lite is a judgment, which is appealable under Section 19 of the Act of 1984.*

30. In our considered opinion, the rule to be applied is clear. In the first place, generally speaking the orders passed allowing or rejecting the amendment application are not orders of the moment. They do not decide any merit issue. Such

orders and their correctness remains open to question and therefore appealable at the stage of appeal against the final judgement that may be passed in any proceeding instituted under the Act. There is no underlying reasoning - in the general scheme of the Act and specifically in view of express language of Section 19 of the Act, there is no legislative intent to maintain a twin right of appeal/revision-one by way of general right of appeal/revision to a party against any order passed allowing or rejecting an amendment application and another against the final order.

31. The only exception to that general rule may arise and such an order may be appealed against if it is shown to the appeal court that the order falls in the exception to the general rule. Thus, if an order is such as may be shown to decide an issue or be an order of the moment or such as may be shown to have caused the effect of deciding or decisively affecting any substantive right or liability of a party, at that stage itself with a flavour of permanence, or as may have the effect of causing any final consequence that may be experienced or suffered by the aggrieved party, notwithstanding pendency of the main proceeding, the right of appeal may arise against such an order to the aggrieved party, in those peculiar facts - by way of an exception and not by way of a general rule.

32. To that extent, we find ourselves in agreement with the reasoning of the Uttarakhand High Court in *Smt. Kanupriya (supra)* and Rajasthan High Court in *Major Raja P. Singh (supra)*. Also, to that extent, we are unable to endorse or persuade ourselves to the view of the learned single judge in *Sudhanshu Gupta (supra)*. As discussed above, *Rama Shanker Tiwari (supra)* was a case arising

under Section 115 of the CPC as it then existed. The issue involved in that reference was - if an order deciding an amendment application may be described as a “case decided”. Clearly **Sudhanshu Gupta (supra)** does not lay down the correct law.

33. Insofar as Section 115 CPC as it then existed, clearly provided for remedy of revision against a “case decided”, it was reasoned by the five - judge Full Bench of this Court that such an order would be revisable. In the first place, the phraseology of Section 19 of the Act does not use or refer to the phrase “case decided”. That concept is alien to the Act. Here, only a remedy of appeal has been provided against a “judgment” and/or an “order”, not being an “interlocutory order”.

34. Appeal is a creature of statute and no right of appeal inheres in any party unless specifically provided for by a statute as held in **Vijay Prakash D. Mehta vs Collector of Customs, (1988) 4 SCC 402**. Therein, relying on the parent law - **Hoosein Kasam Dada (India) Ltd. v State of Madhya Pradesh, AIR 1953 SC 221**, it was observed as below:

“7. In the impugned order the Tribunal noted the several abortive and defective attempts made to get extension of time to deposit the security. Firstly, the prayer was to accept the deposit of Rs 35,000 and secondly, to accept the deposit of Rs 60,000 in two months. The Tribunal took into account the probability of the prima facie case of the appellants. The appeals were filed two years ago. After taking into consideration these factors, the Tribunal rejected the prayer for reduction. It was contended that this was wrong. Shri M.S. Ganesh, learned advocate for the

petitioner, pleaded that in a situation of this type the condition for deposit of penalty was bad as it whittled down the appellants' right of appeal. This, in our opinion, is incorrect. Shri Ganesh tried to contend that the right of appeal is being whittled down by the procedure followed in this case. He drew our attention to certain, observations of this Court in Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh [(1953) 1 SCC 299 : AIR 1953 SC 221 : 1953 SCR 987 : (1953) 4 STC 114]. There this Court held that when the right to appeal vests, change of law after initiation of proceedings in lower court would not divest the vested rights of the appellant. The right of appeal is a matter of substantive right and not merely a matter of procedure, and this right becomes vested in a party when the proceedings are first initiated in, and before a decision is given by, the inferior court and such a right cannot be taken away except by express enactment or necessary intendment.

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

13. It is not the law that adjudication by itself following the Rules of natural justice would be violative of any right — constitutional or statutory without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the right becomes vested and exercisable to the appellant. The proviso to Section 129-E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion

vested in an obligation to act judicially and properly."

35. Seen in that light, the two-tier appeal system as also the concept of multiple appeal/revision remedy before a higher Court, in the course of the same proceeding, has been done away under the general scheme of the Act and specifically under Section 19 of the Act - with respect to family disputes. Once the statute has done away with the concept of appeal against "case decided" by specifically excluding that concept from the scope of orders that may be appealable or revisable, it would be erroneous on part of the Court to introduce that concept through a process of judicial reasoning. Express language used by the legislature that is unambiguous in letter and spirit, must prevail. There is no room to adapt it or to apply judicial interpretation offered to different language used under another statute.

36. Then, we further opine, in the context of main proceeding pending, the term "interlocutory order", is the genus. Any order causing the effect of "case decided" may be a species of that genus - "interlocutory order". Such species of orders may be passed during the course of such a judicial or quasi-judicial proceeding. The fact that the legislature has used the phrase "interlocutory order" and not "case decided" while excluding appeals against a type of orders passed by Family Courts, the ratio arising on the interpretation of the phrase "case decided" remains extraneous to our discussion. The whole having been excluded, there is no inherent reasoning to save its part.

37. Coming to the facts of the present case, it is seen that the appellant only sought to introduce (by way of

amendment), a fact pleading that the respondent had earlier agreed or offered to revive his matrimonial relationship. To that extent and for that purpose, she sought to rely on some evidence allegedly led by the respondent, in collateral proceedings. The fact that the learned court below has rejected the application seeking such amendment does not decide any rights or liabilities of the parties. It is not an order of the moment. It does not deal with or decide any substantive rights of the parties and does not prejudice the substantive rights of the appellant involved in that proceeding before the learned court below.

38. Thus, applying the test laid down by us, the order impugned in this appeal is purely an "interlocutory order"/procedural order. It may never be appealed against.

39. Then, Section 23A of the HMA reads as below:

"23A. Relief for respondent in divorce and other proceedings. - *In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.]"*

40. Thus, besides the opportunity to lead evidence at appropriate stage, it may remain open to the appellant to rely on the previous statement of the respondent recorded in collateral proceeding, in

accordance with law. The appellant may have further rights in terms of Section 23A of the HMA, noted above.

41. Leaving those courses open to the appellant, the appeal is **dismissed**. No order as to costs.

(2024) 12 ILRA 949
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 19749 of 2024
 With other connected cases

Anis **...Petitioner**
Versus
Vaibhav Goyal & Ors. **...Respondents**

Counsel for the Petitioner:
 Ajay Kumar Singh, Ashish Kumar Singh

Counsel for the Respondents:
 Vinay Sharma

A. Tenancy Law – Eviction – Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 - Section 21 - It cannot be said that the issue has not been judiciously decided by the Prescribed Authority as well as by the appellate authority.

In the application for eviction it has been specifically disclosed that certain vacant land was lying behind the shops and on the eastern side of which there was a lane and the landlord wanted to convert the area into godown but the lane was not wide enough to make it possible for the heavy vehicle to move in and out which would have made the downloading/ uploading and transportation of iron bars etc. impossible. The map of the area was also placed before the Prescribed Authority to which the Prescribed Authority very much referred to in its finding part. The tenant has of course, denied the

averments but the denial is very evasive. (Para 13)

The rent authority has also discussed the map filed by the landlord and held the need of the landlord to be genuine so also to get the shops demolished to utilize the entire area as godown to open two wide gates to facilitate entry of heavy vehicles. This finding has come to be affirmed in appeal and appellate court has also discussed these aspects of the matter. (Para 14)

B. The court has to look into only this much as to whether there is a genuine need of the landlord to get the building demolished and reconstruct for his personal use and if he sets up a case then such an application would be maintainable within the meaning of Section 21(2)(m) of the Act. Clause (m) provides for landlord to get the building vacated and to use it by raising new construction after demolition. **Clause (m) does not get qualified from any such proviso as contained u/s 21(2)(e) of the Act.** (Para 12, 17)

Section 21(2)(e) of the Act, clearly provides for entertaining an application for eviction on the ground of construction/ rebuilding/ alteration/ demolition in respect of the premises or any part thereof and it would not be possible without getting the premises vacated. The first and second proviso provide for a statutory right to the tenant to re- enter the tenancy to occupy the premises and how this right is not absolute. (Para 16)

C. Merely for any procedural flaw an application has been entertained, if the proceedings did not suffer from any vice of inherent lack of jurisdiction of the court, the mere entertainability of such application and thereafter, the decision thereupon would not render the judgment bad much less a nullity. (Para 20)

Regarding noncompliance of Rule 7 of the Rules, it is said that it relates to procedural part of the Act and for any procedural infirmity, if application was not entertainable, then objection ought to have been taken at very initial stage. Petitioner having not taken any

objection at the stage of Prescribed Authority would be taken to have submitted to the proceedings and therefore, cannot be permitted to raise objection at the stage of appeal. Besides this, the purpose for certain details and documents that are required for an eviction application to bear, is only for the purposes of facilitating copies to the tenant/respondent and to provide him full knowledge for which the application has been filed. (Para 18)

Once the tenant files his written objection to the eviction application, it will be taken that he is fully aware of the facts and therefore, it was his opportunity now to allege that the facts were wrong or that the application was misconceived. (Para 19)

Writ petition dismissed .(E-4)

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

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioner and Sri A.K. Jain, learned Senior Advocate assisted by Sri Vinay Sharma, learned counsel for the respondents.

2. These four petitions are by four separate tenants of the same landlord and were proceeded with for release/ eviction in respect of the tenanted shops under Section 21(1) of the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (in short 'Act') on same grounds. The order of eviction has been passed in respect of all the tenants by separate orders passed by the rent authority that were unsuccessfully challenged in rent appeal. Hence these four petitions are filed both against the order of rent authority as well as of appellate Tribunal. Since these petitions raise common question of fact and law, therefore, they are heard and decided together.

3. There is no dispute between the petitioners and the landlord regarding rural

relationship of tenant-landlord. The landlord came to file release application under Section 21(2) of the Act basically on the plea that behind the four shops with Chabutra in question there is an open space of land belonging to landlord which he wanted to use to house the stocks of iron bars, guarders, squares etc. as godown and further to install two gates for the exit and entry of goods with office and washroom on both sides. In order to raise these constructions, he needed to demolish the standing shops and this had become necessary because a lane lying on eastern side of the plot was such narrow that heavy vehicles like Truck, Tractor and Trolley cannot be brought in to the godown. Yet another plea was that the constructions are also in dilapidated stage. Thus, a personal need for the release of the shops was set up to convert the building to be used as godown.

4. An objection was filed by the tenants opposing the release and denying the averments made in paragraph no. 2 only to the extent that whatever has been stated in paragraph no. 2 was not accepted. The landlord/ respondent filed an affidavit in evidence in support of the pleadings raised, reiterating the stand and further filed a document of spot map showing the location of shop and the surroundings. The rent authority after hearing the parties and perusing the records, returned a finding that respondent needed the shop in question to be demolished to use the area of vacant plot as godown and to install two large gates and washroom and also office on both sides. The court also recorded that the landlord had placed the map and also the income tax return in corroboration of pleadings and thus granted the application directing the petitioner to vacate the tenanted premises. The Prescribed

Authority further directed for payment of Rs. 125/- as rent to be payable from January 2019 till the tenanted premises was evicted.

5. This order was sought to be challenged in appeal on various grounds including the ground that the presentation of application under Section 21(2) of the Act was not in accordance with the procedure and the format prescribed under rule 7 of the U.P. Regulation of Urban Premises Tenancy Rules, 2021 (in short 'Rules'). The Court of appeal has affirmed the order passed by the Prescribed Authority, hence these petitions.

6. Assailing the orders passed by the Prescribed Authority as well as by the appellate authority, learned counsel for the petitioner Mr. Ashish Kumar Singh has raised following points:

(i) The Prescribed Authority as well as the appellate authority failed to record any finding as to the feasibility of the plot and the area in question to be used as a godown making it necessary to demolish the shops, inasmuch as, there was no finding, nor there is any measurement provided by the landlord/ respondent as to what exactly was the area of vacant land behind the shop which could have been used as godown;

(ii) Neither the application for eviction/ release was maintainable under clause (e) of Section 21(2), nor clause (m) of Section 21(2) of the Act and therefore, in the absence of the conditions prescribed in those clauses the release/ eviction could not have been ordered; and

(iii) Rule 7 of the Rules prescribed for mandatory format and in the absence of such an application on

prescribed format, it ought not to have been entertained as maintainable.

7. In support of his first argument, learned counsel for the petitioner has taken the court to the pleadings raised in eviction application and submitted that except making of a vacant plot behind the shops and a very small land on the eastern side, there is no area given of the vacant land which could be said to be worth converting a godown. He submitted that the averments as made in paragraph no. 2 are vague. He further submitted that the affidavit so filed does not prescribed for any area. Mr. Singh submitted that these pleadings were denied by the petitioner vide para 17 of the written statement and therefore, in these circumstances the exact location of area and the map ought to have been led in evidence so as to make out a case for eviction for the need so set up.

8. He has also taken the court to the finding part of the Prescribed Authority to allege that the Prescribed Authority has simply relied upon the statement made and the affidavit filed and the certain documents led but there is no independent finding after appreciating those documents and pleadings.

9. This according to Mr. Ashish Kumar Singh does not amount to rendering due application of mind and the findings therefore, are liable to be held bad. He submitted that the court of appeal also simply affirms the order of the Prescribed Authority and has not discussed the exact need and the feasibility of converting alleged available land into a godown.

10. Advancing the second argument, learned counsel for the petitioner has taken the court to the relevant

provisions as contained under Section 21(2) of the Act that provides ground for moving an application for eviction of the tenants under Section 21(1) of the Act. Mr. Singh has placed before the Court various grounds thereof and submitted that ground 2(e) and 2(f) and 2(m) are grounds for eviction if the matter of demolition and alteration, repair, reconstruction of building was included for release/ eviction. He argued that while ground no. (f) would not be attracted, the ground 2(e) will be attracted but then this ground of eviction is qualified by the proviso which gives a right to a tenant to re-occupy the premises with the mutual agreement of the landlord and the landlord having not offered for such mutual agreement the application under Section 21(2)(e) of the Act was not maintainable. Regarding Section 22(2)(m) of the Act, Mr. Singh argued that demolition of a building is permissible provided if the same structure is reconstructed.

11. Regarding third argument, Mr. Singh has taken the Court through relevant provisions of Rule 7 of the Rules and contended that all those documents and details that are required to be placed before the rent authority in Form-7 while moving an application for recovery of possession was not complied with, nor even the mail ID, whatsapp number and mobile number was disclosed therein. Mr. Singh submitted that these copies in duplicates were also required to be sent to the tenant which also was not done. It is submitted that in the absence of non compliance of these mandatory provisions, the application was not maintainable.

12. Meeting the submission advanced by learned counsel for the petitioner, Mr. Jain, learned Senior

Advocate appearing for the respondent submitted that the court has to look into only this much as to whether there is a genuine need of the landlord to get the building demolished and reconstruct for his personal use and if he sets up a case then such an application would be maintainable within the meaning of Section 21(2)(m) of the Act. He has argued that Section 21(2)(m) of the Act gives an absolute right to the landlord to move an application for eviction of tenant from the tenanted premises, if he wanted its demolition for reconstruction for his personal use. He submitted that his case would fall either under Section 21(2)(e) or 21(2)(f) of the Act. It is further argued by Sri Jain that since sufficient pleadings were placed, the map etc. were filed before the rent authority and there was no denial of pleadings in the written objection, nor there was any evidence led by the tenant to dispute the evidence filed by the landlord, the court was justified in decreeing the application for eviction. Regarding non compliance of Rule 7, Mr. Jain argued that such an application may not have been entertained, if any objection had been raised. Since no objection had been raised as to the jurisdiction of the court at the first available opportunity before the Prescribed Authority, this opportunity got closed and issue could not have been opened at the stage of appeal. He placed reliance upon the principle contained in Section 21 of C.P.C. where the question of jurisdiction could have been raised or the maintainability of an eviction application could have been raised at first available opportunity.

13. Having heard learned counsel for the respective parties and having perused the records, in so far as the first argument is concerned regarding non disclosure of area

etc. of the land in question and the map etc. much emphasis upon which was placed by Sri Singh, learned counsel for the petitioner, I find that in the application for eviction it has been specifically disclosed that certain vacant land was lying behind the shops and on the eastern side of which there was a lane and the landlord wanted to convert the area into godown but the lane was not wide enough to make it possible for the heavy vehicle to move in and out which would have made the downloading/ uploading and transportation of iron bars etc. impossible. The map of the area was also placed before the Prescribed Authority to which the Prescribed Authority very much referred to in its finding part. The tenant has of course, denied the averments made in para 2 of the eviction application, vide paragraph no. 17 of the written objection but the denial is very evasive. He simply denies the existence of any plot but no where in the petition, nor in the affidavit filed before the rent authority it has been pleaded that the map which had disclosed the location of the area was wrong. In the written objection it is said that the disputed shops were not on the western side of the chungli but there is no denial as to the lane on the eastern side of the vacant plot and that the lane was very narrow.

14. Besides the above, I find that the rent authority has discussed the map also filed by the landlord and held the need of the landlord to be genuine so also to get the shops demolished to utilize the entire area as godown to open two wide gates to facilitate entry of heavy vehicles. This finding has come to be affirmed in appeal and appellate court has also discussed these aspects of the matter. Thus, it cannot be said that the issue has not been judiciously decided by the Prescribed Authority as well as by the appellate authority.

15. In so far as the second argument is concerned, I find it apt here to reproduce Section 21(2)(m) and (e) of the Act which runs as under:

"(m) that the premises is required by land lord either in its existing form or after demolition and new construction thereof for the purpose of its occupation by landlord.

(e) where it is necessary for the landlord to carry out any repair or construction or rebuilding or addition or alteration or demolition in respect of the premises or any part thereof, which is not possible to be carried out without the premises being vacated:

Provided that after such repair, construction, rebuilding, addition or alteration, the tenant may be allowed to reoccupy the premises only when it has been mutually agreed to between the landlord and the tenant and a new tenancy agreement has been submitted with the Rent Authority:

Provided further that the tenant shall not be allowed to reoccupy the premises—

(i) in the absence of submission of such mutual tenancy agreement with the Rent Authority; and

(ii) in cases where the tenant has been evicted under the orders of a Rent Authority;"

16. From a bare reading of Section 21(2) (e) of the Act, I find it to be clearly providing for entertaining an application for eviction on the ground of construction/ rebuilding/ alteration/ demolition in respect of the premises or any part thereof and it would not be possible without getting the premises vacated. Thus, the Act provides for eviction of the tenant on the ground that landlord wants reconstruction or rebuilding

or demolition of the premises and for which naturally the tenant will have to vacate because no reconstruction, no rebuilding or alteration or demolition can be carried out with the tenant sitting inside. In so far as the first proviso is concerned, it gives a statutory right to the tenant to re-enter the tenancy to occupy the premises provided the landlord and tenant have mutually agreed for the same. This mutual agreement is also at the discretion of the landlord because if the landlord does not want any mutual agreement and wants not to let out the building after reconstruction or remodeling or alteration, then tenant cannot compel him. This further comes to be affirmed from the second proviso which says that in the absence of submission of such mutual tenancy agreement with the rent authority, tenant cannot reoccupy the premises. Further, clause (i) and (ii) of the second proviso make it absolutely clear that this statutory right of the tenant is not absolute.

17. Moving to clause (m), I find that this clause is more applicable to the facts of the case because it provides for landlord to get the building vacated and to use it by raising new construction after demolition. Looking to the averments made in eviction application, in my considered view the application falls within clause 21(2)(m) and therefore, the argument advanced by Mr.Jain holds merit. The clause (m) does not get qualified from any such proviso as contained under Section 21(2)(e) of the Act.

18. Coming to the last argument regarding non compliance of Rule 7 of the Rules suffice it to say that it relate to procedural part of the Act and for any procedural infirmity, if application was not entertainable, then objection ought to have been taken at very initial stage. Petitioner having not taken any objection at the stage of Prescribed Authority would be taken to have submitted to the proceedings and therefore, cannot be permitted

to raise objection at the stage of appeal. Besides this, I also find that the purpose for certain details and documents that are required for an eviction application to bear, is only for the purposes of facilitating copies to the tenant/respondent and to provide him full knowledge for which the application has been filed.

19. Once the tenant files his written objection to the eviction application, it will be taken that he is fully aware of the facts and therefore, it was his opportunity now to allege that the facts were wrong or that the application was misconceived.

20. In my considered view, merely for any procedural flaw an application has been entertained, if the proceedings did not suffer from any vice of inherent lack of jurisdiction of the court, the mere entertainability of such application and thereafter, the decision thereupon would not render the judgment bad much less a nullity. No other points have been argued before the court on behalf of the petitioners.

21. In view of the above, all the four petitions are held to be devoid of merit and are accordingly **dismissed**.

(2024) 12 ILRA 954

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 17.12.2024

BEFORE

**THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Special Appeal No. 693 of 2024

Sudhanshu Aggarwal	...Appellant
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Appellant:

Usha Kiran

Counsel for the Respondents:

C.S.C., Gagan Mehta

A. Service/Education Law – Appointment - U.P. State Universities Act, 1973 - U.P. Higher Education Service Commission Act, 1980 - Sections 12 & 13 - Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 - Regulation 5 - Mere entry in the select list or existence of vacancies would not give a legal right to a candidate to be appointed or to seek entitlement for a mandamus in regard to the same. (Para 17, 24)

A candidate included in the merit list has no indefeasible right to be appointed even if vacancies exist. (Para 18, 24)

A selected candidate has a right to be considered for appointment but he has no such right to be allocated to a cadre/post of his choice. (Para 19, 20, 26)

In the present case, the petitioner was placed in the waiting list of the selected candidates and has been recommended for appointment on a post at Satish Chandra College, Ballia which was mentioned at serial no. 28 of the preferential list of 30 colleges submitted by the petitioner in his application. There being no dispute that two colleges namely, Hindu College, Moradabad and K.G.K.P.G. College, Moradabad where the petitioner has sought to raise a claim for being appointed were not mentioned in the preferential list submitted by him, no mistake can be said to have been committed by the concerned authority in giving him appointment to a college specified at serial no. 28 of the preferential list submitted by the petitioner. (Para 27)

The alternative relief sought by the petitioner at the stage of the present special appeal, for being granted placement at any of the colleges which had been specified at serial nos. 1 to 27 of the preferential list, cannot be granted as no vacancy exist at any of the said institutions. (Para 28)

As per the finding given by the learned Single Judge in the judgment under appeal, nothing has been placed on record to indicate that any person standing lower in the merit has been given appointment in any of the colleges mentioned in the preferential list of the petitioner above serial no. 28 where the petitioner has been offered appointment. The conclusion drawn thereafter that no illegality had been committed in offering appointment to the petitioner at a college specified at serial no. 28 of the preferential list submitted by the petitioner himself, therefore, cannot be faulted with. (Para 29)

Appellant has not been able to point out any material error or illegality in the order passed by the learned Single Judge. (Para 30)

Special appeal dismissed. (E-4)

Precedent followed:

1. St.of Har. Vs Subash Chander Marwaha, (1974) 3 SCC 220 (Para 17)
2. Shankarsan Dash Vs U.O.I., (1991) 3 SCC 47 (Para 18)
3. U.O.I. & ors. Vs Rajiv Yadav, IAS & ors., (1994) 6 SCC 38 (Para 19)
4. U.O.I. & anr. Vs A. Shainamol, IAS & anr., (2021) 20 SCC 267 (Para 20)
5. Tej Prakash Pathak & ors. Vs Raj.
6. High Court & ors., (2025) 2 SCC 1 (Para 21)

Present special appeal challenges the judgment and order dated 23.07.2024, passed by a learned Single Judge of the Court in Writ - A No. - 8718 of 2024 (Sudhanshu Aggarwal Vs. State of U.P. and 2 Others).

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

1. Heard Ms. Usha Kiran, learned counsel for the appellant-petitioner, Sri Manoj Kumar Mishra, learned Standing

Counsel appearing for the State-respondent(s) and Sri Gagan Mehta, learned counsel for the respondent No. 2, the Uttar Pradesh Higher Education Service Commission.

2. The present intra-court appeal is directed against the judgment and order dated 23.07.2024 passed by a learned Single Judge of the Court in Writ - A No. - 8718 of 2024 (Sudhanshu Aggarwal Vs. State of U.P. and 2 Others).

3. The facts of the case as emerging from the records are that the writ petition had been filed seeking a direction to the opposite parties to give him a choice for appointment as Assistant Professor, Mathematics at Hindu College Moradabad or K.G.K.P.G. College Moradabad instead of Satish Chandra College, Ballia and permit him to join on any of the aforesaid two posts.

4. The selection process, pursuant to an advertisement, bearing Advertisement No. 50 of 2021, was initiated for making selections for appointment to the posts of Assistant Professors in non-government aided colleges, which included 96 posts in the subject of Mathematics. The petitioner, upon declaration of results, was placed at Serial No. 8 of the waiting list, however various writ petitions were filed challenging the selection process. One of such writ petitions, being Writ - A No. 13104 of 2023 [Sanjay Prakash Dubey Vs. State of U.P. and 3 Others] was decided by means of a judgment and order dated 06.10.2023, remanding the matter to the Director of Higher Education and providing that the petitioner therein may prefer a comprehensive representation before him. In compliance of the order passed by this Court, the waiting list was corrected and

the petitioner was placed at Serial No.28. The petitioner was directed to submit his preference of colleges for his appointment. The petitioner submitted his preferential list of 30 colleges, in which Satish Chandra College, Ballia was mentioned at Serial No.28. The Director Education (Higher Education) wrote a letter dated 15.03.2024 to the Secretary/Manager/Authorized Controller, Satish Chandra College, Ballia, recommending the name of the petitioner, for being appointed on a post of Assistant Professor in that college.

5. Insofar as the claim of the petitioner for a choice of appointment as Assistant Professor, Mathematics at Hindu College Moradabad or K.G.K.P.G. College Moradabad instead of Satish Chandra College, Ballia is concerned, learned Single Judge has taken note of paragraphs 9 and 10 of the supplementary affidavit of the petitioner wherein a claim based on equity was raised. However, since none of the aforesaid two colleges had been mentioned in the preferential list submitted by the petitioner, it was held that no illegality had been committed by the authorities in giving appointment to the petitioner in a college specified at serial no.28 of the preferential list submitted by the petitioner.

6. Learned Single Judge has also taken note of the fact that nothing had been placed on record to indicate that any person standing lower in the merit has been given appointment in any of the colleges above serial no.28 in the preferential list of the petitioner in which, he had been offered appointment.

7. Upon the appeal being taken up, on 29.8.2024, before a coordinate Bench of this Court, it was sought to be argued by learned counsel for the appellant-petitioner

that one Km Arti, who had been placed at serial no.31 of the revised select list, had been granted placement at an institution, which had not been notified for recruitment. It was also urged that in case, there is any vacancy, at this stage, the appellant-petitioner would seek the relief for being granted placement at any of the institutions, which had been specified at serial nos.1 to 27 of the preferential list submitted by the petitioner.

8. Taking note of the aforesaid submissions, counsel for the State-respondents was directed to obtain instructions.

9. In response to the aforesaid, learned counsel for the State-respondent has placed reliance upon paragraphs 9 and 10 of the instructions dated 05.10.2024, stated to have been received from the Director of Education (Higher Education), UP, which read as follows:

"9. चयनित अभ्यर्थी आरती जो कि प्रथम चयन सूची में क्रम सं0 28 पर स्थित थी, को आनलाइन आसन व्यवस्था के तहत उदित नारायण पी०जी० कालेज पडरौना, कुशीनगर आवंटित किया गया, जो विज्ञापन 50 में विज्ञापित था। याची का यह कथन की आरती के आसन-व्यवस्था अविज्ञापित पद पर की गई है, पूर्णतः असत्य है। आयोग द्वारा प्रेषित दूसरी चयन सूची में आरती क्रम सं0 31 पर स्थित है। मा0 उच्च न्यायालय इलाहाबाद द्वारा स्पेशल अपील डिफेक्टिव संख्या-127/2023 में पारित आदेश दिनांक 12.04.2023 के अनुपालन में प्रथम चयन सूची के अभ्यर्थियों (आरती सहित) की आसन-व्यवस्था निरस्त नहीं की जा सकी जिससे उनको आवंटित महाविद्यालय पूर्ववत है।

10. इस कार्यालय में गणित विषय के परिणाम सूची के क्रम संख्या 1 से 27 तक के चयनित अभ्यर्थियों द्वारा कार्यभार ग्रहण करने के उपरान्त पद रिक्त की सूचना शून्य है।"

10. Based on the aforesaid written instructions, counsel for the State-respondents has submitted that the other candidate, namely, Arti, who was at serial number 28 of the first select list, had been granted placement at Udit Narayan PG College, Padrauna, Kushinagar through an on-line procedure which had been adopted. It is stated that the aforesaid institution was duly notified in terms of Advertisement No.50 pursuant to which, these selections had been held, and therefore, the contention that the said candidate had been granted placement at an institution which had not been advertised, is absolutely incorrect.

11. In regard to the claim, which is now being sought to be made by the petitioner for being granted placement at any of the institution specified at serial number 1 to 27 of the preferential list submitted by him, counsel for the State-respondents, by referring to the instructions, has submitted that no vacancy exists at any of the said institutions.

12. Heard learned counsel for the parties and perused the record.

13. The procedure of appointment of teachers in the colleges which are affiliated / associated to the universities governed by U.P. State Universities Act, 1973 is to be as per the terms prescribed under Section 12 of the U.P. Higher Education Service Commission Act, 1980. The recommendation of the Commission is to be made as per Section 13 of the said Act. For ease of reference, the aforesaid provisions are being extracted below:-

"12. Procedure for appointment of teachers.—(1) Every appointment as a teacher of any college shall be made by the

management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

Provided that a permanent teacher of an affiliated or associated college, who has been appointed in accordance with the provisions of this act and has completed five years service as such and who wishes to be transferred to any other college, may be transferred in the manner prescribed by rules from one college to another, only when the respective management of the colleges concerned give their consent in writing.

(1-a). Notwithstanding any decree or order of a Court, a teacher who has been appointed as such by transfer from one college to another in pursuance of the Government Orders No. 429 Siksha Mantri/Sattar-6-98-15-95, dated 17.8.1998 or No. 393/Sattar-1-199-15(6)-99, dated 28.10.1999 shall be deemed to have been validly appointed as if the provisions of the principal Act as amended by the Uttar Pradesh Higher Education Services Commission (Second Amendment) Act, 2004 were in force at all material times.

(2) The management shall intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation—The expression “academic year” means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject wise consolidated list of vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations :

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under sub-section (3) :

Provided further that the candidates shall be required to indicate their order of preference for the various colleges, vacancies wherein have been advertised.

13. Recommendation of Commission.—(1) The Commission shall, as soon as possible, after the notification of vacancies to it under sub-section (3) of Section 12, hold written examination and interview of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty-five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed

manner, to the order of preference if any indicated by the candidates under the second proviso to sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancy intimated under sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2), and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, whereto abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated, the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under sub-section (3) of Section 12 or not, in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under sub-section (3) or sub-section (4) or sub-section (5) to the candidate concerned.”

(emphasis supplied)

14. The procedure for selection of teachers is to be as per the terms of the **Uttar Pradesh Higher Education Services Commission (Procedure for**

Selection of Teachers) Regulations, 1983³. The manner of notification of vacancies, submission of applications, and indication of preference is to be as per Regulation 5 of the aforesaid Regulations, which is being reproduced below:

“5. Notification of vacancies, submission of application and indication of preference.—The Commission shall advertise the vacancies in three issues of at least three newspapers. The Commission shall send a copy of the advertisement to the Director and may, if it considers proper, also send a copy thereto to the District Inspector of Schools and to the Colleges. Such advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the names of the college(s) and where they are situate and shall require the candidates to apply in prescribed form and to give if he so desires, the choice of not more than five colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only, and for no other, he shall mention the fact in his application.

Provided that where the number of colleges is large or for any other reason the Commission considers it inexpedient, it may, instead of mentioning the names and particulars of the colleges in the advertisement, send the copy thereof to the colleges and to the District Inspector of Schools and mention in the advertisement that

particulars of the colleges may be seen in the office of the Commission, the office of District Inspector of Schools or in the Colleges:

Provided also that the Commission shall not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.”

(emphasis supplied)

15. The aforesaid statutory provisions and the Regulations framed thereunder indicate that the process for appointment of teachers to the Colleges, which are affiliated/associated to the Universities governed by the Act, 1973, is initiated by the Management intimating the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year, to the Director of Education (Higher Education) in the prescribed manner. The Director shall, then notify to the U P Higher Education Services Commission at such time and in such manner, as may be prescribed, a subject wise consolidated list of vacancies intimated to him from all colleges. The manner of notification of vacancies, submission of applications, and indication of preference is to be as per the terms of Regulation 5 of the Regulations, 1983, which provides that the Commission shall advertise the vacancies in the newspapers and shall send copies thereof to the Director and also to the District Inspector of Schools and to the Colleges, if it considers proper. The advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the

names of the colleges and where they situate and shall require the candidates to apply in prescribed form and to give, if he so desires, the choice of colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only, and for no other, he shall mention the fact in his application. However, as per the second proviso of the aforesaid Regulation 5, the Commission shall not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.

16. Section 13 of the Act, 1980 provides that the Commission shall, after notification of vacancies to it, hold written examination and interview of the candidates and send to the Director a list recommending candidates found suitable in each subject, the names being arranged in order of merit. The Director, as per sub-section (3) of Section 13 of the Act, 1980, having due regard to the order of preference, if any indicated by the candidates, intimate the Management the name of the candidate from the select list, for being appointed in the vacancy intimated by the institution.

17. The question as to whether entry of the name of a candidate in the select list or the existence of vacancies would give him a right to be appointed and whether a mandamus can be sought for issuance of such direction under Article 226 of the Constitution, was examined in the case of **State of Haryana vs. Subash Chander Marwaha**⁴, and it was held that mere entry in the select list or existence of vacancies would not give a legal right to a candidate to be appointed or to seek entitlement for a mandamus in regard to the

same. The relevant observations made in the judgment are as follows:-

“7. In the present case it appears that about 40 candidates had passed the examination with the minimum score of 45%. Their names were published in the Government Gazette as required by Rule 10(1) already referred to. It is not disputed that the mere entry in this list of the name of candidate does not give him the right to be appointed. The advertisement that there are 15 vacancies to be filled does not also give him a right to be appointed. It may happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules. The stage for selection for appointment comes thereafter, and it is not disputed that under the Constitution it is the State Government alone which can make the appointments.

... ..

10. One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a

candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect.”

18. In the Constitution Bench decision in **Shankarsan Dash Vs. Union of India**⁵, it was authoritatively laid down that a candidate included in the merit list has no indefeasible right to be appointed even if vacancies exist. It was stated as under:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the

candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana vs. Subhash Chander Marwaha and others*, [1974] 1 SCR 165; *Miss Neelima Shangla vs. State of Haryana and others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899.

19. In a somewhat similar set of facts, where candidates selected for appointment to the Indian Administrative Service, sought to assert a right to be allocated to a cadre of choice or to their home State, the Supreme Court in the case of **Union of India and others Vs. Rajiv Yadav, IAS and others**⁶, held that a selected candidate has a right to be considered for appointment but he has no such right to be allocated to a cadre of his choice. It was observed as follows:-

“6. We may examine the question from another angle. A selected candidate has a right to be considered for appointment to the IAS but he has no such right to be allocated to a cadre of his choice or to his home-State. Allotment of cadre is an incidence of service. A member of an All India Service bears liability to serve in any part of India. The principles of allocation as contained in Clause 2 of the letter dated May 31, 1985, wherein preference is given to a scheduled caste/scheduled tribe candidate for allocation to his home State, do not provide for

reservation of appointments or posts and as such the question of testing the said principles on the anvil of Article 16(4) of the Constitution of India does not arise. It is common knowledge that the scheduled caste/scheduled tribe candidates are normally much below in the merit list and as such are not in a position to compete with the general category candidates. The "Roster System" ensures equitable treatment to both the general candidates and the reserved categories. In compliance with the statutory requirement and in terms of Article 16(4) of the Constitution of India 221/2% reserved category candidates are recruited to the IAS. Having done so both the categories are to be justly distributed amongst the States, But for the "Roster System" it would be difficult rather impossible for the scheduled castes/scheduled tribes candidates to be allocated to their home States. The principles of cadre allocation, thus, ensure equitable distribution of reserved candidates amongst all the cadres.”

20. A similar view has been taken in **Union of India and another Vs. A. Shainamol, IAS and another**⁷, wherein it has been reiterated that allocation of a cadre is not a matter of right and that a selected candidate has a right to be considered for appointment but has no right to be allocated a cadre of his choice or to his home State.

21. The law laid down in the decision in **Shankarsan Dash** (supra) and also in the earlier decision in **Subash**

Chander Marwaha (supra), that mere placement in the select list gives no indefeasible right to appointment, has been affirmed in a recent Constitution Bench decision in **Tej Prakash Pathak & Others vs, Rajasthan High Court and others**⁸.

22. The Regulations, 1983 provide for the procedure for selection of teachers in question in the present case. Regulation 5 thereof, requires the candidates to give a choice of colleges which have been advertised, in order of preference, in their applications. The second proviso to the aforesaid regulation, however makes it clear that the Commission would not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.

23. The option to the candidates to indicate their order of preference in the colleges, wherein vacancies have been advertised is also specified in the second proviso to sub-section (4) of Section 12 of the Act, 1980 and as per sub-section (3) of Section 13 of the said Act, upon receiving the recommendation of the Commission, the Director shall, having due regard in the prescribed manner to the order of preference, if any indicated by the candidates, intimate to the Management the names of candidates from the select list for being appointed against the vacancies which have been intimated.

24. It is legally settled that the mere inclusion of the name of a candidate in the select list or the existence in the vacancies would not give a right to be appointed and also no mandamus can be issued in exercise of powers under Article 226 of the Constitution in regard to the same. It is also a settled position in law that

successful candidates in a recruitment process do not require a indefeasible right to appointment.

25. The statutory scheme which governs the procedure for appointment of teachers, which is in question before us, gives an option to candidates to indicate choice of colleges in order of preference in their applications; however, the Commission which is to make recommendations consequent to recruitment process is not to be bound by the choice given by candidates, and may, in its discretion make a recommendation for appointment in the college other than indicated by him. It is, therefore, clear that the option given to a candidate with regard to the colleges wherein he seeks appointment by his choice, would not in any manner be binding upon the Commission which is to make recommendation for appointment on the basis of the selection process .

26. It may therefore, be stated as a proposition of law that a candidate who has been selected in a recruitment process and whose name finds mention in the select list cannot claim any indefeasible or vested right to be allocated a post of his choice.

27. In the facts of the present case, the petitioner was placed in the waiting list of the selected candidates and has been recommended for appointment on a post at Satish Chandra College, Ballia which was mentioned at serial no. 28 of the preferential list of 30 colleges submitted by the petitioner in his application. There being no dispute that two colleges namely, Hindu College, Moradabad and K.G.K.P.G. College, Moradabad where the petitioner has sought to raise a claim for being appointed were not mentioned in the

preferential list submitted by him, no mistake can be said to have been committed by the concerned authority in giving him appointment to a college specified at serial no. 28 of the preferential list submitted by the petitioner.

28. As regards the alternative relief which was sought by the petitioner at the stage of the present special appeal, for being granted placement at any of the colleges which had been specified at serial nos. 1 to 27 of the preferential list, in view of the factual position borne out from the instructions placed by the learned counsel for the State-respondents that no vacancy exist at any of the said institutions, no direction can be issued in favour of the petitioner in this respect also.

29. We may also take note of the finding given by the learned Single Judge in the judgment under appeal that nothing has been placed on record to indicate that any person standing lower in the merit has been given appointment in any of the colleges mentioned in the preferential list of the petitioner above serial no. 28 where the petitioner has been offered appointment. The conclusion drawn thereafter that no illegality had been committed in offering appointment to the petitioner at a college specified at serial no. 28 of the preferential list submitted by the petitioner himself, in our opinion, therefore, cannot be faulted with.

30. Learned counsel for the appellant has not been able to point out any material error or illegality in the order passed by the learned Single Judge, which may persuade us to take a different view in the matter.

31. The appeal lacks merit and is, accordingly, dismissed.

(2024) 12 ILRA 964
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Special Appeal No. 1076 of 2024

Shivansh Singh **...Appellant**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Appellant:
Amal Darsingh

Counsel for the Respondents:
A.S.G.I, Prem Narayan Rai

A. Service Law – Recruitment – Declaring medically unfit - The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, would be extremely limited. Matters relating to the medical evaluation of candidates in a recruitment process involve expert determination and the Court should exercise caution in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated further medical evaluation.

Any such exercise in acceding to requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those envisaged by the recruiting agency under the relevant rules would result in the recruitment process being derailed, which would ordinarily be not permissible. (Para 11, 12)

In the present case, where recruitment process has been carried out as per the prescribed procedure whereunder the medical fitness of candidates has been tested by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, and that too, solely on the basis of a claim sought to be set up by the appellant- petitioner on the basis of some subsequent report procured by him from another medical practitioner. It is no where the case of the petitioner that the decision taken by the Medical Board was arbitrary or not in accordance with the procedure prescribed for the recruitment in question. (Para 13, 14)

B. A claim sought to be set up on the basis of a subsequent medical report produced by the candidate would not have the effect of overriding or setting at naught the expert opinion of the Medical Board set up as per procedure in a recruitment process. (Para 15)

Special appeal dismissed. (E-4)

Precedent followed:

1. Md. Arshad Khan General (Male) Category, (Roll Bo.00186474), Registration No.10209488956 Vs St. of U.P. & ors., (2020) 8 ADJ 235 (Para 11)

2. Vivek Kumar S/o Mool Chandra Vs St. of U.P. & ors., (2020) 140 ALR 330 (Para 12)

Present special appeal challenges judgment and order dated 12.11.2024, passed in Writ-A No. 15441 of 2024, whereby the writ petition has been dismissed.

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Amal Darsingh, learned counsel for the appellant and Sri Prem Narayan Rai, learned counsel appearing for respondent nos.1 to 3.

2. The instant special appeal is directed against the judgment and order dated 12.11.2024 passed in Writ-A No.15441 of 2024, whereby the writ petition has been dismissed.

3. The writ petition had been filed by the petitioner-appellant, seeking a direction to the concerned respondent-authority to constitute a Medical Board for the medical examination of the petitioner, who has been declared unfit by the respondent-authority during the recruitment of LUC_UTT_VAR_AVGD_2024_121906.

4. The brief facts of the present case are that the petitioner-appellant had applied for the post of Agni Veer (General Duty) in the Indian Army and after being declared successful in the preliminary written examination as well as physical test, he was called for medical test at Varanasi in which, he was declared unfit, as he is suffering from disability of *Onychomycosis Specified right index finger*. Thereafter, the petitioner was referred to the Military Hospital, Prayagraj for review in which, he was also declared unfit. Then, the petitioner approached respondent no.4, who is Head of Department and Assistant Professor, PG Department of Dermatology, Venereology & Laprosy, Moti Lal Nehru Medical College, Prayagraj for his medical test. According to the petitioner, respondent no.4 issued a certificate to him, opining that Onychomycosis is a non-communicable disease and is curable.

5. The principal ground on which the petitioner-appellant had approached the writ court, seeking constitution of a medical board, was based on a medical examination report dated 10.09.2024 given by respondent no.4.

6. In order to verify the status of the report, a personal affidavit of the said respondent no.4 was called for by learned Single Judge and the said respondent also appeared personally before the Court on 12.11.2024.

7. On the same date, instructions were produced by counsel for the respondent-authorities, indicating therein that the petitioner-appellant had been medically examined by the doctors of the Army and he was found unfit for the disability of '**Onychomycosis Specified right index finger**'. Thereafter, petitioner was reviewed by Senior Medical Officer (SRMO) wherein the disability of '**Onychomycosis**' was confirmed by the SRMO. On being found 'Unfit' by two separate doctors (MO & SRMO), the petitioner was further referred to Military Hospital, Prayagraj for medical review test by a specialist doctor for the said disability. The specialist doctor at Military Hospital, Prayagraj also opined and declared the petitioner as unfit for '**Onychomycosis Specified right index finger**'.

8. The affidavit filed by respondent no.4 and the instructions produced by counsel for the respondent-authorities were examined by learned Single Judge and based on the aforesaid, following observations were made:

"4. In the affidavit, it is stated by respondent no. 4 that he has not conducted the medical examination of the petitioner regarding the recommendation of his appointment in any provision of law and only attended the petitioner in general O.P.D. and given his opinion inadvertently without any wilful intention. He has also

tendered his unconditional apology, which is accepted.

5. This writ petition has been filed for the following relief:-

" (i) Issue a writ order or direction in the nature of mandamus directing the respondent no. 2 to constitute the medical board for the medical of the petitioner, who has been declared unfit by the respondent no.3 during the recruitment of the LUC-UTT-VAR-AVGD-2024-121906."

6. The basis of filing the present petition is a report dated 10.09.2024 given by respondent no.4. Respondent no.4 has admitted this fact in his affidavit that he has not conducted the medical examination of the petitioner regarding the recommendation of his appointment in any provision of law and only attended the petitioner in general O.P.D. and given his opinion inadvertently without any wilful intention. He has also tendered his unconditional apology which is accepted by the Court.

7. As per the instruction dated 26th October, 2024, petitioner was medically examined by the doctors of the Army and he was found unfit for the disability of "Onychomycosis Specified right index finger". Thereafter, petitioner was reviewed by Senior Medical Officer (SRMO) wherein the disability of "Onychomycosis" was confirmed by the SRMO. On being found "Unfit" by two separate doctors (MO & SRMO), the petitioner was further referred to Military Hospital, Prayagraj for medical Review test by a specialist doctor for the said disability. The

specialist doctor at Military Hospital, Prayagraj also opined and declared the petitioner as unfit for "Onychomycosis Specified right index finger".

8. Once the petitioner was found medically unfit by the Medical Officer of the Army and the same was also confirmed by the Senior Medical Officer. Specialist doctor at Military Hospital, Prayagraj also opined and declared him unfit for "Onychomycosis Specified right index finger". This Court is also of the view that no interference is required to the expert opinion given by the doctors and no fresh medical board is required for medical examination of the petitioner in light of facts mentioned here."

9. It is not disputed that the petitioner-appellant had been declared medically unfit by the Medical Board constituted for the purpose of recruitment and thereafter, the petitioner has sought a direction for constitution of fresh medical board on the basis of medical examination report submitted by respondent no.4 subsequently, who is stated to have examined the petitioner.

10. Learned Single Judge has taken note of the instructions produced by counsel for the respondent-authorities, which demonstrated that the petitioner had been medically examined by the medical board and was found unfit, and thereafter, in a review, the disability was confirmed and on a further reference, the specialist doctor at the Military Hospital also opined that the petitioner was unfit.

11. The law with regard to the scope of interference in matters relating to the assessment of fitness by the medical board constituted for the purpose of recruitment under the relevant statutory rules, in exercise of powers under writ jurisdiction, is fairly well settled. In this regard, we may place reliance upon the observations made in **Md. Arshad Khan General (Male) Category, (Roll No.00186474), Registration No.10209488956 vs. State of UP and others**¹, wherein it was observed as follows:

"6. The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, in our opinion, would be extremely limited.

7. The Courts have, time and again, emphasised the need for caution when candidates seek to assail the correctness of the findings of a Medical Board constituted under a recruitment process adopted by the State authorities.

8. We may observe that although the powers of the Court under Article 226 are wide enough to issue directions in appropriate cases but such powers are required to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in a recruitment process involve expert determination and the Court should exercise caution in supplanting the process adopted by the recruiting agency and

substituting it by a Court mandated further medical evaluation.

9. Any such exercise in acceding to requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those envisaged by the recruiting agency under the relevant rules would result in the recruitment process being derailed, which would ordinarily be not permissible."

12. A similar view had also been taken in another judgment of this Court in **Vivek Kumar S/o Mool Chandra vs. State of UP & Others²**, wherein it was held that matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefor as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process.

13. In the present case, where recruitment process has been carried out as per the prescribed procedure whereunder the medical fitness of candidates has been tested by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, and that too, solely on the basis of a claim sought to be set up by the appellant-petitioner on the basis of some subsequent report procured by him from another medical practitioner.

14. It is no where the case of the petitioner that the decision taken by the Medical Board was arbitrary or not in accordance with the procedure prescribed for the recruitment in question.

15. We are of the view that a claim sought to be set up on the basis of a subsequent medical report produced by the candidate would not have the effect of overriding or setting at naught the expert opinion of the Medical Board set up as per procedure in a recruitment process.

16. The impugned judgment passed by learned Single Judge in Writ-A No.15441 of 2024 is based on appreciation of the facts and the material on record, and after recording cogent reasons. We do not see any reason to take a different view.

17. The appeal lacks merit and is, accordingly, **dismissed**.

(2024) 12 ILRA 968
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2024

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

Writ -A No. 7793 of 2024

Kajal Kumari	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
 Mr. Narendra Singh Chahar

Counsel for the Respondents:
 Standing Counsel for the State

A. Service Law – Compassionate appointment – Jurisdiction – Condonation of delay - Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 5 - As per the proviso to Rule 5 of the Rules of 1974, apart from the law about the relevant and material facts, on the basis of which, the power to condone a delay beyond five years ought be exercised,

shows that the power to condone the delay in making an application about compassionate appointment beyond five years vests in the State Government; not the Appointing Authority.

Therefore, in this case, the Commandant, 41st Battalion, PAC, Ghaziabad, the competent authority, having found that there was a delay beyond five years and the application was made in the sixth year, ought not have determined the application on merits herself. She should have referred it to the State Government for a decision in the matter of condonation of delay. This reference should have been made with notice to the petitioner about it and apprising her also of the fact that she may file such material as she thought best. The material, if any, then filed by the petitioner in support of her case for condonation of delay beyond five years, ought have been forwarded to the State Government. (Para 13, 16)

B. The guidance in the matter by the Superintendent of Police (Establishment) vide letter dated 15.04.2024, asking the Commandant to decide the matter, as she was the competent authority, would not confer jurisdiction upon the Commandant, where, it was not vested in her, in view of proviso to Rule 5.

Likewise, even our command in Writ - A No. 12241 of 2020 could not have been regarded as one conferring jurisdiction upon the Commandant, contrary to the mandate of the proviso to Rule 5 of the Rules of 1974, which are rules framed by the Governor under the proviso to Rule 309 of the Constitution. (Para 13)

C. Even if the GO and circular say that there can be no condonation of delay beyond five years, neither can override the proviso to Rule 5 of the Rules of 1974, as the Rules last mentioned are statutory in character, being ones framed under the proviso to Article 309 of the Constitution. The learned Standing Counsel submits most emphatically that beyond five years, no application for compassionate appointment can be entertained, neither under the GO dated

18.09.2015 nor the Police Headquarters' Circular dated 24.11.2015 issued in pursuance of the GO. **Rules, without doubt, prevail over any GO issued in the exercise of the executive power of the State, and a fortiori, any administrative circular by the Police Headquarters.** (Para 15)

Writ petition allowed. (E-4)

Present petition challenges order dated 16.04.2024, passed by Ms. Shalini, the Commandant, 41st Battalion, Provincial Armed Constabulary, Ghaziabad, rejecting the petitioner's application for compassionate appointment.

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

Ms. Shalini, the Commandant, 41st Battalion, Provincial Armed Constabulary, Ghaziabad, by her order impugned dated 16.04.2024, has rejected the petitioner's application for compassionate appointment without compassion; also, without jurisdiction.

2. The petitioner, Kajal Kumari, is the daughter of the late Ashok Kumar, who was serving as a Constable with the Provincial Armed Constabulary¹, Ghaziabad. He died in harness on 16.11.2013. He left behind him his widow, Smt. Guddi Devi, a son called Vishvendra Singh, besides the petitioner, Kajal Kumari, the deceased's daughter. Ashok Kumar's son, Vishvendra Singh, made an application dated 06.07.2015, seeking compassionate appointment under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974². Vishvendra Singh was referred to a medical examination of the Chief Medical Superintendent, Ghaziabad, who, vide his medical report dated 03.09.2015, intimated the respondents that Vishvendra has

complete loss of vision in the left eye. He was, therefore, denied appointment vide order dated 24.11.2015.

3. Vishvendra challenged the order dated 24.11.2015 before this Court by means of Writ - A No. 6339 of 2018, which was, later on, withdrawn on 08.02.2021. It appears that Smt. Guddi Devi, the deceased's widow, was informed that she could make an application for compassionate appointment for herself or any other family member eligible for employment under the Rules of 1974. The respondents say that Smt. Guddi Devi did not respond for a long time and then made applications dated 09.09.2019 and 11.09.2019 to the Deputy Inspector General of Police (Establishment), U.P. Police Headquarters, seeking employment this time for her daughter, the petitioner, Kajal Kumari. A letter dated 03.11.2020 was issued to Smt. Guddi Devi, asking her to ensure submission of an application form in the prescribed proforma for the employment of her daughter under the Rules of 1974.

4. As it appears, these applications dated 09.09.2019 and 11.09.2019 did not receive prompt attention, leading the petitioner to institute Writ - A No. 12241 of 2020, seeking a direction to the respondents to decide her applications dated 09.09.2019 and 11.09.2019 for compassionate appointment. In the meantime, the petitioner, when asked to apply on the prescribed proforma, did that, pursuant where to, a letter dated 17.11.2021 was addressed by the Commandant, 41st Battalion, PAC, Ghaziabad to the District Magistrate, Agra to verify the petitioner's income certificate, caste certificate and residence certificate. The Commandant also addressed a letter to the Regional Secretary,

Board of High School and Intermediate Education, Regional Office, Ajmer, Rajasthan, seeking verification of the petitioner's intermediate education certificate etc. issued by that Board.

5. While all of this was happening, the petitioner's writ petition - Writ - A No. 12241 of 2020, came up before this Court on 21.02.2024, where, the following order was passed (material part) :

4. In this view of the matter and also in the interest of justice, the present writ petition is disposed of finally directing the respondent no.3 namely Commandant 41st P.A.C. Vahini, Ghaziabad to take a decision in the matter most expeditiously and preferably within a period of **six weeks** from the date of presentation of certified copy of this order.

5. It is made clear that this Court has not passed order on the merits of the case and the authority concerned will pass appropriate orders in accordance with law without influence of any of the observations made by this Court.

6. As it appears, the Commandant, 41st Battalion, PAC, Ghaziabad sought guidance in the matter after this Court's order dated 21.02.2024 from the Additional Director General of Police (Establishment), Headquarters, U.P., Lucknow. The Superintendent of Police (Establishment), Uttar Pradesh by some letter dated 15.04.2024 seems to have issued guidelines to the Commandant to pass necessary orders on the petitioner's claim for compassionate appointment as the officer competent to decide it. The Commandant, by her order impugned dated April the

16th, 2024, rejected the petitioner's claim on ground that it was made beyond the prescribed period of limitation of five years under the Rules of 1974; it was found to have been made beyond five years. It is remarked to have been made in the sixth year.

7. Aggrieved by the impugned order, this writ petition has been instituted under Article 226 of the Constitution.

8. On 02.07.2024, we issued a notice of motion in the following terms :

The Commandant 41st PAC Vahini, Ghaziabad shall show cause, on his own affidavit to be filed within a week, how he has rejected the petitioner's application for compassionate appointment on the ground of delay, that is to say, the application being one made beyond a period of five years, when the power to consider such belated matters condoning delay is vested in the State Government. Prima facie, the Commandant should have referred the matter to the State Government, directing the petitioner to explain the delay before the Government referring the claim (sic). The personal affidavit of the Commandant shall be filed on or before 10.07.2024. The affidavit shall be in the nature of a counter affidavit.

Adjourned to 10.07.2024.
To be taken up as fresh.

The Registrar (Compliance) is directed to communicate this order to the Commandant 41st PAC Vahini, Ghaziabad through the learned

Chief Judicial Magistrate, Ghaziabad **within 24 hours next.**

9. In compliance with the order dated 02.07.2024, a counter affidavit has been filed on behalf of respondent No. 3, the Commandant 41st Battalion, PAC, Ghaziabad which is her personal affidavit.

10. The parties having exchanged affidavits, the writ petition was admitted to hearing on 23.07.2024, which proceeded forthwith. Judgment was reserved.

11. Heard Mr. Narendra Singh Chahar, learned Counsel for the petitioner and the learned Standing Counsel appearing on behalf of the State.

12. Rule 5 of the Rules of 1974 reads :

³[5.(1) **Recruitment of a member of the family of the deceased**—In case a Government servant dies in harness after the commencement of these rules, and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purpose, be given a suitably employment in Government Service on a post except the post

which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person:-

⁴[(i) fulfils the' educational qualifications prescribed for the post:

Provided that in case appointment is to be made on a post for which typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required proficiency in typewriting, he shall be appointed subject to the condition that he would acquire the requisite speed of 25 words per minute in typewriting well within one year and if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the requisite speed in typewriting and if in the extended period also he again fails to acquire the requisite speed in typewriting, **then an order will be issued to provide him appointment on the post of class IV. The appointment so granted shall be deemed to be a fresh appointment and shall not be reversion. If he does not join the post of class IV within stipulated time his services will be terminated.**

Provided further that in case appointment is to be made on a post for which the knowledge of computer operation and typewriting has been prescribed as an essential qualification and the dependent of the deceased Government servant does not possess the required

proficiency in computer operation and typewriting, he shall be appointed subject to- the condition that he would acquire the 'CCC' certificate in computer operation awarded by the DOEACC Society or a certificate equivalent thereto from an Institution recognised by the Government together with the required speed of 25 words per minute in typewriting well within one year and, if he fails to do so, his general annual increment shall be withheld and a further period of one year shall be granted to him to acquire the required certificate in computer operation and the required speed in typewriting and if in the extended period also he again fails to acquire the required certificate in computer operation and the required speed in typewriting, **then an order will be issued to provide him appointment on the post of class IV. The appointment so granted shall be deemed to be a fresh appointment and shall not be reversion. If he does not join the post of class IV within stipulated time his services will be terminated.**

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax "the requirement as it may consider

necessary for dealing with the case in a just and equitable manner:

Provided further that for, the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay, take the appropriate decision.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time.

13. A reading of the proviso to Rule 5 of the Rules of 1974, apart from the law about the relevant and material facts, on the basis of which, the power to condone a delay beyond five years ought be exercised, shows that the power to condone the delay in making an application about compassionate appointment beyond five years vests in the State Government; not the Appointing Authority. Therefore, in this case, the Commandant, 41st Battalion, PAC, Ghaziabad, the competent authority, having found that there was a delay beyond five years and the application was made in the sixth year, ought not have determined the application on merits herself. She should have referred it to the State Government for a decision in the matter of condonation of delay. This reference should have been made with notice to the petitioner about it and apprising her also of the fact that she may file such material as she thought best. The material, if any, then filed by the petitioner in support of her case for condonation of delay beyond five years, ought have been forwarded to the State Government. By no stretch of the plain phraseology of the proviso to Rule 5 of the Rules of 1974 did the Commandant, acting as the Appointing Authority, had jurisdiction to decide the petitioner's application, seeking compassionate appointment, once it was made beyond the period of five years. The guidance in the matter by the Superintendent of Police (Establishment) vide letter dated 15.04.2024, asking the Commandant to decide the matter, as she was the competent authority, would not confer jurisdiction upon the Commandant, where, it was not vested in her, in view of proviso to Rule 5. Likewise, even our command carried in the order dated 21.02.2024 passed in Writ - A No. 12241 of 2020 is to be understood in the manner that the Commandant was

required to take a decision as much as she could, to wit, a reference to the State Government for consideration of condonation of delay beyond five years, and, if the delay were condoned by the State Government, to take a decision on the merits of the petitioner's claim. Our command in Writ - A No. 12241 of 2020 could not have been regarded as one conferring jurisdiction upon the Commandant, contrary to the mandate of the proviso to Rule 5 of the Rules of 1974, which are rules framed by the Governor under the proviso to Rule 309 of the Constitution.

14. Much reliance has been placed by the learned Standing Counsel on the circular of the Police Headquarters dated 24.11.2015 issued with reference to the Government Order dated 18.09.2015, which reads :

सेवायोजन हेतु मृतक आश्रित के सेवायोजन के पूर्व इस बात का विशेष ध्यान रखा जायेगा कि मृतक आश्रित द्वारा मृत कर्म की मृत्यु की तिथि से 05 वर्ष के अन्दर प्रार्थना-पत्र दिया गया है तथा माँगे गये पद हेतु सभी प्रकार से अहं है एवं उस पद हेतु निर्धारित न्यूनतम आयु एवं शैक्षिक अर्हता मृत कर्म की मृत्यु के 05 वर्ष के अन्दर पूर्ण किया हो। यदि मृतक आश्रित द्वारा माँगे गये पद हेतु सम्पूर्ण अर्हतायें मृत कर्म की मृत्यु के 05 वर्ष के अन्दर पूर्ण करता है तथा उस पद पर रिक्ति है, तो उसके सेवायोजन की कार्यवाही नियमानुसार की जायेगी।

15. The learned Standing Counsel submits most emphatically that beyond five years, no application for compassionate appointment can be entertained, neither under the Government Order dated 18.09.2015 nor the Police Headquarters' Circular dated 24.11.2015 issued in pursuance of the Government Order. Assuming that these say that there can be

no condonation of delay beyond five years, neither can override the proviso to Rule 5 of the Rules of 1974, as the Rules last mentioned are statutory in character, being ones framed under the proviso to Article 309 of the Constitution. These would, without doubt, prevail over any Government Order issued in the exercise of the executive power of the State, and a fortiori, any administrative circular by the Police Headquarters.

16. We are constrained to say that the Commandant, 41st Battalion, PAC, Ghaziabad, once she reached the conclusion that the application was beyond the period of five years, envisaged under Rule 5 of the Rules of 1974 made in the sixth year, as she says, should have laid her hands off the matter and referred it to the State Government, following the course that we have indicated. It was certainly not open to her to mechanically reject the application on ground that it was made beyond the prescribed period of five years.

17. In the result, this petition **succeeds** and stands **allowed**. The impugned order dated 16.04.2024 passed by the Commandant, 41st Battalion, Provincial Armed Constabulary, Ghaziabad is hereby **quashed**. A mandamus is issued to the Commandant aforesaid to forthwith forward all papers relating to the petitioner's application for compassionate appointment to the State Government in the department concerned, where it will be laid before the Secretary or other functionary empowered under the executive rules of business to take a decision on behalf of the Government. The petitioner will be given opportunity to file all necessary material by the State Government that she considers relevant in support of her case for condonation of delay. The State

Government shall decide the petitioner's claim regarding condonation of delay under the proviso to Rule 5 of the Rules of 1974 alone, taking a decision in the matter within a period of two months of receipt of records from the Commandant. If the delay is condoned by the State Government, the records would be sent back to the Commandant, 41st Battalion, P.A.C., Ghaziabad, who will then pass orders on the merits of the petitioner's claim for compassionate appointment in accordance with law, within a period of four weeks of receipt of the State Government's decision.

18. There shall be no order as to costs.

19. The Registrar (Compliance) is directed to communicate this order to the Commandant, 41st Battalion, Provincial Armed Constabulary, Ghaziabad through the learned Chief Judicial Magistrate, Ghaziabad.

(2024) 12 ILRA 975
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -A No. 9466 of 2018

With

Writ-A No. 10066 of 2018

Smt. Sushila Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Rajeev Narayan Pandey, Atul Kumar Dwivedi,
 Shivam Sharma

Counsel for the Respondents:
 C.S.C.

A. Service Law – Selection – Promotion - Uttar Pradesh Child Development and Nutrition (Subordinate) Service (Second Amendment) Rules, 1998 - Rule 5.

Test of unreasonableness - A policy can be challenged on the ground of being unreasonable. If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. ...It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. (Para 23)

B. Examining challenge to the Rule laying down the policy of fixing an upper age limit of 50 years for Anganwadi workers to apply to selection for direct recruitment to the post of Mukhya Sevika on the test of Wednesbury unreasonableness. (Para 24)

The St. Government amended the Rules of 1992 in the year 1996, whereby it was provided that 25% posts of Mukhya Sevika would be filled through interview from those Anganwadi Workers who had completed 10 years of their engagement as Anganwadi Worker and were not more than 45 years of age as on the first day of the recruitment year. The Rules were further amended in the year 1998 by increasing the aforesaid reservation from 25% to 50% and the criterion of recruitment was changed from interview to merit. (Para 25)

The upper age limit for consideration for selection to the post of Mukhya Sevika from amongst the persons working as Anganwadi Workers was previously fixed as 45 years, which was enhanced to 50 years by the Fourth Amendment Rules.

There is no unreasonableness in the explanation of the St. that the object

behind making amendment in the Rules of 1992, which is, that those Anganwadi Workers who are working on honorarium basis and who do not have any promotional avenues, be provided with the benefit of participating in selection process for recruitment to the post of Mukhya Sevika and the **object of the Fourth Amendment made in the Rules of 1992** was to provide participation of maximum number of Anganwadi Workers to be considered for selection on the post. The object of enhancing the upper age limit is that the persons appointed as Mukhya Sevika may serve for a decade before they attain the age of superannuation. The fixation of upper age limit at 50 years cannot be said to be having no reasonable nexus with the object sought to be achieved. The petitioners are challenging the fixation of the upper age limit altogether and they claim that all Anganbadi workers should be allowed to participate in the recruitment irrespective of their age. (Para 27, 29)

C. No individual candidate can claim a vested right to age relaxation, which lies in the discretion of the appointing authority. Eligibility criteria should be uniform and there cannot be any scope or arbitrary selection. A candidate cannot have a vested right to claim an exemption from a uniformly applicable criteria. A selective grant of an age relaxation will cause serious prejudice in the process of selection rendering the process arbitrary. (Para 30)

Since the Fourth Amendment Rules, 2006 have universal application, those are not discriminatory. The Second Amendment Rules, 1998 and the Fourth Amendment Rules, 2006 do not violate the letter and spirit of any superior legislation and the same are not *ultra vires* the provision of any law. (Para 31, 32)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Shanti Devi, Civil Appeal No. 5207 of 2022, decided on 08.08.2022 (Para 14)

2. Associated Provincial Picture Houses, Ltd. Vs Wednesbury Corporation, [1948] 1 K.B. 223 (Para 23)

Precedent distinguished:

1. Zee Telefilms Ltd. & anr. Vs UOI & ors., (2005) 4 SCC 649 (Para 13)

2. Arnit Das Vs St. of Bihar, (2000) 5 SCC 488 (Para 13)

3. Urmila Tripathi & anr. Vs St. of U.P., 1998 (16) LCD 1227 (Para 14)

Present petition seeks quashing of a Circular dated 09.01.2018 issued by the Director, Child Development Services and Nutrition, U.P. Lucknow to all the District Program Officers/In-charge in the St. of U.P. directing them to collect applications for selection on the post of Mukhya Sevika. The petitioners have further sought a Writ of Mandamus commanding the opposite parties to consider them for promotion to the post of Mukhya Sevika.

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

1. Heard Sri Shivam Sharma, learned counsel for the petitioners and learned Standing Counsel appearing for the State-respondents.

2. Both the aforesaid writ petitions have been filed by the persons, who were working as Anganwadi Workers under Directorate of Child Development Services and Nutrition, Uttar Pradesh challenging the vires of Rule 5 of Uttar Pradesh Child Development and Nutrition (Subordinate) Service (Second Amendment) Rules, 1998 (here-in-after referred to as 'the Second Amendment Rules, 1998) as well as Uttar Pradesh Child Development and Nutrition (Subordinate) Service (4th Amendment) Rules, 2006 (here-in-after referred to as 'the Fourth Amendment Rules, 2006) as *ultra vires* to the extent that the aforesaid

rules prescribed cut off age of 45 to 50 years respectively for Anganwadi Workers to be considered for selection for the post of Mukhya Sevika.

3. The petitioners have also sought quashing of a Circular dated 09.01.2018 issued by the Director, Child Development Services and Nutrition, U.P. Lucknow to all the District Program Officers/In-charge in the State of U.P. directing them to collect applications for selection on the post of Mukhya Sevika from such Anganwadi Workers, who have completed 10 years of service on 01.07.2017 and who are not more than 50 years of age. The petitioners have further sought a Writ of Mandamus commanding the opposite parties to consider them for promotion to the post of Mukhya Sevika.

4. Writ-A No.9466 of 2018 has been filed by three petitioners, whereas Writ-A No.10066 of 2018 has been filed by eighteen petitioners. As the questions involved in both the writ petitions are the same, the same are being decided by this common judgment.

5. All the petitioners have completed more than ten years of service as Anganwadi Workers and they are claiming promotion to the post of Mukhya Sevika and their contention is that the fixation of cut off age of 50 years is arbitrary and it disentitles more experienced Anganwadi Workers for being considered for promotion to the post of Mukhya Sevika.

6. In the counter affidavit filed on behalf of the opposite parties, it has been stated that Anganwadi Workers are engaged on payment of honorarium basis and they are not in regular service of the establishment. No gradation list of

Anganwadi Workers is prepared like regular employees and there is no provision for promotion of Anganwadi Workers.

7. On 05.04.2018, an interim order was passed by this Court by providing that the applications of the petitioners for promotion to the post of Mukhya Sevika may be accepted by the opposite parties, however, any decision taken on such consideration of their claim would not be declared.

8. On 24.04.2023 this Court had passed an order recording the submission of the learned counsel for the petitioners that there does not appear to be any nexus with the object sought to be achieved for making amendment in the Service Rules. As the counter affidavit is silent on this aspect, the State was directed to file a supplementary counter affidavit. The State Government has filed a supplementary affidavit stating that this was also a long standing demand of U.P. Rajya Anganwadi Karamchari Sangh to increase the upper age limit of 45 years to 50 years for consideration for selection to the post of Mukhya Sevika.

9. A second supplementary affidavit was also filed annexing therewith a copy of the Government Order dated 21.03.2023 which provides exhaustive mechanism for appointment of Anganwadi Workers on honorarium basis. The recruitment age of Anganwadi Workers is 18 years to 35 years, whereas the recruitment age of Mukhya Sevika is 21 years to 40 years. The object behind making amendment in the U.P. Child Development and Nutrition (Subordinate) Service Rules, 1992 (here-in-after referred to as 'the Rules of 1992') is that those Anganwadi Workers who are working on

honorarium basis and who do not have any promotional avenues, be provided with the benefit of participating in selection process for recruitment to the post of Mukhya Sevika. The object of the Fourth Amendment made in the Rules of 1992 was to provide participation of maximum number of Anganwadi Workers to be considered for selection on the post of Mukhya Sevika.

10. While challenging the vires of the Rules prescribing maximum age for selection to the post of Mukhya Sevika, Sri Shivam Sharma, the learned counsel for the petitioners, has submitted that fixation of cut off age of 50 years has no reasonable nexus with the purpose sought to be achieved, which would be selecting the most experienced Anganwadi Workers, who would be the best and most suitable candidates. Putting a cap on the age limit for selection when the criterion for selection is age based merit, is self-contradictory. By fixing cut off age of 50 years, Anganwadi Workers, who are younger to the petitioners and who have lesser experience of working as Anganwadi Workers are eligible for selection, whereas the petitioners, who are more experienced Anganwadi Workers, have been ousted from the zone of consideration. The deprivation of Anganwadi Workers, aged more than 50 years, who are more experienced, from participation in selection for the post of Mukhya Sevika is arbitrary and unreasonable. He has further submitted that earlier the criterion for selection to the post of Mukhya Sevika was interview and by the amendment made in the year 1998, it has been made merit, which is determined by experience. One mark is awarded for each year's service. Thus, longer the number of years, higher would be the merit of the

candidate. In these circumstances, fixation of upper limit of 50 years of age is unreasonable.

11. The learned counsel for the petitioners has also submitted that the fixation of upper age limit takes away the fundamental right of the petitioners to be considered for promotion and, therefore, the provision for fixation of upper age limit is ultra vires and is liable to be quashed.

12. Per contra, the learned Standing Counsel has submitted that the post of Anganwadi Worker is an honorarium based post. Neither salary is paid to Anganwadi Workers, nor is there any provision for their promotion. Appointments to the post of Mukhya Sevika are not made by way of promotion but by direct recruitment. 50% of the posts of Mukhya Sevika have been reserved for selection from amongst those Anganwadi Workers, who have not completed 50 years of age. Earlier this age limit was 45 years, which was subsequently increased to 50 years as per the long standing demand of U.P. Rajya Anganwadi Karamchari Sangh, to provide for participation of maximum number of Anganwadi Workers in selection for the post of Mukhya Sevika. The post of Mukhya Sevika in the pay scale of Rs.1350-2200 is a regular post in the establishment. Unless the upper age limit of 50 years is fixed for selection to the post of Mukhya Sevika, the persons appointed on the post of Mukhya Sevika will not get the minimum of ten years of service, in which case they will not be eligible for pensionary benefits.

13. Learned counsel for the petitioners has relied upon the judgments in

the cases of **Zee Telefilms Ltd. & another vs. UOI & Others**: (2005) 4 SCC 649 and **Arnit Das vs. State of Bihar**: (2000) 5 SCC 488.

14. The learned Standing Counsel has relied upon the judgments in the cases of **Urmila Tripathi and another vs. State of U.P.** :1998 (16) LCD 1227 and **State of U.P. and other vs. Shanti Devi**: Civil Appeal No. 5207 of 2022 decided on 08.08.2022.

15. U.P. Child Development and Nutrition (Subordinate) Service Rules, 1992 were promulgated on 16.11.1992. Part III of the aforesaid Rules deals with Recruitment. Rule 5(4) provides that recruitment of Mukhya Sevika shall be made by direct recruitment through Departmental Selection Committee on the basis of interview. Essential qualification for selection to the post of Mukhya Sevika is a Bachelor's Degree in Arts with Sociology or Social Work or Home Science as one of the subjects or Nutrition and Child Development from a University established by law in India or a degree recognized by the government as equivalent thereto. Preferential qualification is having practical experience of doing welfare work amongst children and women in rural areas. The candidate must have attained the age of 21 years and must not have attained the age of more than 35 years on the first day of the year of the recruitment in which vacancies for direct recruitment are advertised by the Commission. The upper age limit shall be greater in respect of candidates belonging to Scheduled Castes, Scheduled Tribes and such other category as may be notified by the government.

16. U.P. Child Development and Nutrition (Subordinate) Service (Second Amendment) Rules, 1998 amended the

aforesaid Rules so as to provide that 50% posts of Mukhya Sevika will be filled by direct recruitment on the basis of competitive examination and interview held by a Selection Committee and 50% posts shall be filled by direct selection from Anganwadi Workers, who have passed High School or equivalent examination, who have completed 10 years of continuous service and who have not attained 45 years of age on the initial date of the year of recruitment.

17. The U.P. Child Development and Nutrition (Subordinate) Service (4th Amendment) Rules, 2006 further amended the aforesaid Rules so as to enhance the upper age of limit from 45 years to 50 years.

18. Thus, it is clear that the post of Mukhya Sevika is filled by direct recruitment and not by promotion. The essential qualification for appointment to the post of Mukhya Sevika is a Bachelor's Degree in Arts with Sociology or Social Work or Home Science as one of the subjects or Nutrition and Child Development from a University established by law in India or a degree recognized by the government as equivalent thereto. 50% posts have been reserved for direct recruitment from amongst such Anganwadi Workers, as have passed High School examination, have completed more than ten years of service and have not attained the age of 50 years. It appears that experience of working as Anganwadi Workers for a period of ten years or more has been treated as equivalent to the qualification of possessing a Bachelor's Degree in Arts with Sociology or Social Work or Home Science as one of the subjects or Nutrition and Child Development from a University established by law in India or a degree

recognized by the government as equivalent thereto. Anganwadi Workers work on fixed honorarium basis.

19. U.P. Child Development and Nutrition (Subordinate) Service Rules, 1992 contain provisions for recruitment of Field Reporter, Nutritionist, Law Assistant, Mukhya Sevika, Social Work Instructor, Health Instructor, Pre-School Instructor, Statistical Assistant, Investigator-cum-Computer (Sic), Senior Auditor, Auditor, Assistant Accountant (Headquarters), Accounts Clerk and Junior Accounts Clerks. It does not make any mention of Anganwadi Workers. Therefore, it is clear that Anganwadi Workers are not a part of regular establishment working under the U.P. Child Development and Nutrition (Subordinate) Service Rules, 1992. There is no provision for promotion of persons working on the post of Anganwadi Workers. Mukhya Sevikas are appointed by way of direct recruitment and not by way of promotion.

20. Upper age limit of 45 years fixed by the Second Amendment Rules was challenged before this Court in the case of **Urmila Tripathi** (Supra) and while upholding the decision, it was held as under: -

“It is evident from the aforesaid Rule that upper age limit of forty five years in the year of recruitment as provided originally remained the same. The amendment was only in the procedure of appointment. The promotees originally used to be appointed on the basis of interview. The amended Rule changed the procedure and provided for appointment/promotion in

accordance with Rule 15 of the Rules. The submission made by the learned Counsel for the petitioner that the Second Amendment in the Rules provided for the upper age limit as 45 years and the same was invalid, therefore, cannot be accepted. The petitioners since the very beginning of their services knew the fact that upper age limit for promotion to the post of Mukhya Sewika was forty five years have got no right to challenge the same. Further the fixation of upper age limit as 45 years for promotion on the post of Mukhya Sevika is quite reasonable, judging the same from the angle of service which are required to be performed by Mukhya Sevikas. Mukhya Sevikas are required to do supervisory work in the villages. They are supposed to supervise the work of anganbari centres by visiting from place to place. The ladies beyond forty five years of age are, therefore, not fit to be appointed as Mukhya Sewikas. In my opinion, the said Rule is neither arbitrary nor discriminatory in any manner.”

21. Sri Shivam Sharma, the learned counsel for the petitioners has relied upon judgments rendered in the case of **Zee Telefilms Ltd.** (Supra) and **Arnit Das** (Supra), wherein it has been held that a decision is not an authority for the proposition which did not fall for its considerations. He has submitted that the Fourth Amendment Rules, 2006 were not there for consideration before this Court while deciding the case of **Urmila Tripathi** (Supra) and the question of lack of nexus between fixation of upper age limit and the object sought to be achieved was not

decided in that writ petition and therefore the decision in the case of **Urmila Tripathi** (Supra) is not binding upon this Court.

22. We agree with the aforesaid submission made by the learned counsel for the petitioners. Even otherwise, **Urmila Tripathi** (Supra) was decided by a learned Single Judge and it is not binding upon this Division Bench. We are examining the plea of fixation of upper age limit being ultra vires on the basis of merits of the submissions made in support thereof without being bound by the ratio laid down in the case of **Urmila Tripathi** (Supra).

23. A policy can be challenged on the ground of being unreasonable. The test of unreasonableness was laid down in **Associated Provincial Picture Houses, Limited V. Wednesbury Corporation**: [1948] 1 K.B. 223, in which the defendant corporation had granted a license to the plaintiff company, who was the owner and licensee of Gaumont Cinema, Wednesbury, Staffordshire, a licence to give performances on Sunday under Section 1 (1) of the Sunday Entertainments Act, 1932; but the license was granted subject to a condition that “no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not.” The plaintiffs brought an action for a declaration that the condition as ultra vires and unreasonable. While dismissing the claim, the King’s Bench laid down the following proposition of law, which came to be known as ‘the Wednesbury principle’ and which is being consistently followed by the Court’s in India: -

“It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable

authority could ever have come to it, then the courts can interfere. ...It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.”

24. We have to examine the challenge to the Rule laying down the policy of fixing an upper age limit of 50 years for Anganwadi workers to apply to selection for direct recruitment to the post of Mukhya Sevika on the test of Wednesbury unreasonableness.

25. In furtherance of Child Development and Nutrition Project launched by the Central Government, U.P. Child Development and Nutrition (Subordinate) Service Rules, 1992 were framed by the State Government under Article 309 of the Constitution of India. The post of Mukhya Sevika in the pay scale of Rs.1350-2200 was created under these rules and the post was to be filled by direct recruitment. Essential qualification for

selection to the post of Mukhya Sevika is a Bachelor's Degree in Arts with Sociology or Social Work or Home Science as one of the subjects or Nutrition and Child Development from a University established by law in India or a degree recognized by the government as equivalent thereto. Preferential qualification is having practical experience of doing welfare work amongst children and women in rural areas. The candidate must have attained the age of 21 years and must not have attained the age of more than 35 years on the first day of the year of the recruitment in which vacancies for direct recruitment are advertised by the Commission. Considering the plight of Anganwadi Workers, the Central Government wrote a letter dated 28.04.1995 to the State Government for making a provision for reservation of 25% posts of Mukhya Sevika for being filled up by Anganwadi Workers. Accordingly, the State Government amended the Rules of 1992 in the year 1996, whereby it was provided that 25% posts of Mukhya Sevika would be filled through interview from those Anganwadi Workers who had completed ten years of their engagement as Anganwadi Worker and were not more than 45 years of age as on the first day of the recruitment year. The Rules were further amended in the year 1998 by increasing the aforesaid reservation from 25% to 50% and the criterion of recruitment was changed from interview to merit.

26. Rule 4(2) of Child Development and Nutrition (Subordinate) Rules, 1992 as amended by the Second Amendment Rules notified on 19.06.1998 and by the Fourth Amendment Rules notified on 25.07.2006 provides as follows:-

“50 percent high school or equivalent examination passed

Anganbadi Karyakatris, who have completed ten years of continuous service and have not attained the age of more than 50 years from the initial date of their year of recruitment, in accordance with Rule 15-B through selection committee by direction recruitment.

(1) Selection Committee in the following manner shall prepare the eligibility list of the candidates-

(a) Each candidate will be given 10 points for 10 years of eligible service and after one point for each subsequent full year of service.

(b) Each candidate will be given three points, two points and one point for first division, second division and third division in high school and higher examinations.

(2) Under section (a) and (b) of Sub Rule (3) all the marks obtained by each candidate shall be added and on the basis of total marks obtained the final eligibility list will be prepared. In case two or more candidates obtain equal marks then the candidate senior in age shall be placed on top of the eligibility list. The name of candidates in the list shall be more than the number of vacant posts (more than 50 percent). Selection Committee shall forward the list to the Appointing Authority.”

27. The upper age limit for consideration for selection to the post of Mukhya Sevika from amongst the persons working as Anganwadi Workers was previously fixed as 45 years, which was enhanced to 50 years by the Fourth Amendment Rules on the demand of U.P. Rajya Anganwadi Karamchari Sangh so as

to provide for participation of maximum number of Anganwadi Workers for consideration for recruitment to the post of Mukhya Sevika, which cannot be said to be unreasonable and it has not been challenged by any person. The petitioners are challenging the fixation of the upper age limit altogether and they claim that all Anganbadi workers should be allowed to participate in the recruitment irrespective of their age.

28. In this regard, it should be noted that all appointments to government services are subject to a maximum age of the candidate at the cut-off date fixed by the employer. The post of Mukhya Sevika itself carries the upper age limit of 35 years for candidates who possess a Bachelor's Degree in Arts with Sociology or Social Work or Home Science as one of the subjects or Nutrition and Child Development. Fixation of upper age limit for Anganwadi workers who are not Graduate, but have merely passed the High school examination and who possess at least 10 years' work experience, cannot be said to be unreasonable and, in any case, this decision cannot be said to be so unreasonable as no reasonable person or authority could have arrived at it. Enhancement of maximum cut off age from 45 years to 50 years cannot give rise to a ground for claiming waiver of upper age limit altogether so as to make all Anganwadi Workers, irrespective of their age, eligible for consideration for recruitment to the post of Mukhya Sevika.

29. Regarding the submission of the learned Counsel for the petitioner, that the fixation of upper age limit has no reasonable nexus with the purpose sought to be achieved, we find no unreasonableness in the explanation of the

State that the object behind making amendment in the Rules of 1992 is that those Anganwadi Workers who are working on honorarium basis and who do not have any promotional avenues, be provided with the benefit of participating in selection process for recruitment to the post of Mukhya Sevika and the object of the Fourth Amendment made in the Rules of 1992 was to provide participation of maximum number of Anganwadi Workers to be considered for selection on the post of Mukhya Sevika. The object of fixing the upper age limit at 50 years is that the persons appointed as Mukhya Sevika may serve for a decade before they attain the age of superannuation. The fixation of upper age limit at 50 years cannot be said to be having no reasonable nexus with the object sought to be achieved.

30. In the case of **State of U.P. and others vs. Shanti Devi** (Supra), the issue involved was whether an applicant was entitled to claim age relaxation in making promotion to the post of Mukhya Sevika, as was ordered by a learned Single Judge of this Court, which was affirmed by a Division Bench in a Special Appeal. While allowing the appeal, Hon'ble Supreme Court has held that the respondent who was working as Anganwadi Worker since the year 1987, had crossed the upper age limit of 50 years on the relevant date. She filed a writ petition seeking age relaxation in terms of U.P. Public Services (Relaxation of the Age Limit for Recruitment) Rules, 1992, which was allowed by the High Court. Setting aside the order passed by the High Court, Hon'ble Supreme Court held that no individual candidate can claim a vested right to age relaxation, which lies in the discretion of the appointing authority. Eligibility criteria should be uniform and

earlier suspension order of the petitioner had already been quashed by this Court vide judgment and order dated 05.11.2024 and even if no formal order has been passed by the respondents reinstating the petitioner, the same would not take away the fact or the suspension order itself having been quashed and consequently the petitioner cannot be said to be a suspended employee on the date of passing of the fresh suspension order, in this case as on 09.11.2024. (Para 16, 18)

C. Non passing of a formal order of reinstatement can also be seen in context of 'Useless Formality Theory'. (Para 22)

In present case, once the petitioner had only been placed under suspension vide order dated 04.10.2024 which had been quashed by the writ court vide judgment and order dated 05.11.2024 consequently the petitioner can be deemed to have been reinstated in service. Thus **merely because a formal order of his reinstatement was not passed prior to he again being placed under suspension by means of the order impugned the same would clearly fall within the ambit of Useless Formality Theory.** (Para 23)

D. Perusal of the suspension order would indicate that the same had been passed both under the provisions of Section 16G(5)(a) and (b). And thus, once the charges are serious as such the suspension order would squarely be covered by the provisions of Section 16G(5)(a) of the Act, 1921 and thus the petitioner has correctly been placed under suspension in terms of the aforesaid provisions. (Para 15, 30)

The Court has not expressed any opinion w.r.t. provisions of Section 16G(5)(b) of the Act, 1921 that without issuance of a charge-sheet the suspension order cannot be passed and the said question is left open to be considered in an appropriate case. (Para 31)

Writ petition dismissed. (E-4)

Precedent followed:

1. The Regional Director, Employees' State Insurance Corporation vs M/S Popular Automobiles Etc., AIR 1997 SC 3956 (Para 17)

2. Public Services Tribunal Bar Association vs State Of U.P. & Another, 2003 (4) SCC 104 (Para 17)

3. Khem Chand vs Union Of India, 1963 AIR 687 SC (Para 17)

4. Canara Bank And Ors vs Debasis Das And Ors., 2003 (4) SCC 557 (Para 20)

5. M.C. Mehta vs Union Of India & Ors., 1997 (2) SCC 353 (Para 22)

6. Gadde Venkateswara Rao vs Government Of Andhra Pradesh And Others, 1966 AIR 828 SC (Para 24)

Precedent distinguished:

1. Anand Narain Shukla vs State of Madhya Pradesh, (1980) 1 SCC 252 (Para 7)

2. In Re Lal Bahadur Singh vs U.P. State Roadways Transport Corporation & Ors., Special Appeal No.305 of 2007 (Para 7)

3. Salma Bi vs Collector, Buldana & Ors., 2022 SCC OnLine Bom 273 (Para 7)

4. Managing Director of ECIL vs B. Karunakar, 1993 (4) SCC 727 (Para 31) (Para 7)

Present petition challenges the order dated 09.11.2024, by which the petitioner has been placed under suspension.

(Delivered by Hon'ble Abdul Moin, J.)

1. Affidavit of compliance filed by Shri Ashutosh Singh, learned counsel appearing on behalf of the respondent No.5 is taken on record.

2. Heard learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Shri Ashutosh Singh,

learned counsel appearing on behalf of the respondent No.5.

3. Under challenge is the order dated 09.11.2024, a copy of which is Annexure-1 to the petition, by which the petitioner has been placed under suspension.

4. Raising a challenge to the said order, the contention is that earlier the petitioner had been suspended vide order dated 04.10.2024, a copy of which is Annexure-9 to the petition.

5. A challenge had been raised to the said suspension order by filing Writ A No.9746 of 2024 In Re Dr Gyanvati Dixit vs State of U.P. & Ors. This Court vide judgment and order dated 05.11.2024, a copy of which is Annexure-2 to the petition, quashed the said suspension order. It was further directed that consequences would follow. Further, it was left open for the competent authority to pass a fresh order, if required, in accordance with law.

6. Contention of the learned counsel for the petitioner is that without reinstating the petitioner in pursuance of the order of this Court dated 05.11.2024, the petitioner again has been placed under suspension which could not have been done by the respondents inasmuch as once the petitioner had been placed under suspension vide the earlier order dated 04.11.2024, employer-employee relationship stood suspended and without the said relationship being restored by passing of a consequential order in terms of the order of this Court dated 05.11.2024, the petitioner could not again have been placed under suspension.

7. In this regard, learned counsel for the petitioner has placed reliance on the

judgment of Hon'ble Supreme Court in the case of ***Managing Director of ECIL vs B. Karunakar : 1993 (4) SCC 727*** (Para 31), a Division Bench judgment of this Court passed in ***Special Appeal No.305 of 2007 In Re Lal Bahadur Singh vs U.P. State Roadways Transport Corporation & Ors.***, judgment of Hon'ble Supreme Court in the case ***Anand Narain Shukla vs State of Madhya Pradesh : (1980) 1 SCC 252*** as well as a judgment of Bombay High Court in the case of ***Salma Bi vs Collector, Buldana & Ors : 2022 SCC OnLine Bom 273.***

8. Learned counsel for the petitioner further argues that perusal of the impugned suspension order would indicate that the petitioner has been placed under suspension in view of the provisions of Section 16G(5)(b) of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921'). However, the aforesaid provision will only be attracted and applicable in case his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him, but no enquiry was initiated at the time of passing the suspension order and thus, the suspension order reflects patent non application of mind.

9. No other ground has been urged.

10. Responding to the first submission of the learned counsel for the petitioner, learned counsel appearing for respondent No.5 argues that once this Court vide judgment and order dated 05.11.2024 had quashed the suspension order dated 04.10.2024 as such the reinstatement followed automatically and there was no requirement to pass a separate order for the same. This would be apparent from the fact that while passing the impugned suspension

order dated 09.11.2024, the petitioner has been addressed as the Principal of the Institution as specifically finds place in the order.

11. Responding to the second argument of the learned counsel for the petitioner, argument of learned counsel for respondent No.5 is that a perusal of the impugned suspension order would indicate that same has been passed under the provisions of Sections 16G(5)(a) and 16G(5)(b) and even if the argument raised by the petitioner with regard to Section 16G(5)(b) is upheld yet the suspension order can still be sustained considering that the charges levelled against the petitioner are serious enough to merit her dismissal.

12. Heard learned counsel for the parties and perused the record.

13. From the argument as raised by the learned counsel for the petitioner and from perusal of the record, it emerges that earlier the petitioner has been suspended vide order dated 04.10.2024. Upon a challenge being raised to the said suspension order this Court vide judgment and order dated 05.11.2024 had quashed the suspension order and provided that consequences would follow. However, it was left open for the competent authority to pass a fresh order, if required, in accordance with law.

14. Again the petitioner has been placed under suspension vide order dated 09.11.2024. The order has been passed under the provisions of Section 16G(5) of the Act, 1921.

15. The grounds urged by the learned counsel for the petitioner in order to challenge the said order are (a) that the

said suspension order has been passed without reinstating the petitioner after the earlier suspension order had been quashed by this Court and this Court had specifically provided that consequences are to be follow; and (b) that the suspension order has been passed under the provisions of Section 16G(5)(b) of the Act, 1921, which order could only be passed in case disciplinary proceedings are being conducted but as no disciplinary proceeding have been initiated against the petitioner, the same thus reflects patently non application of mind and consequently, suspension order merits to be quashed.

16. As regards the first ground i.e. the suspension order having been passed without reinstating the petitioner, suffice to state that during the period of suspension employer-employee relationship does not come to an end. The employee is only prohibited from actually offering his services and discharging his duties and further during the suspension pending enquiry the remuneration is payable to the employee concerned.

17. In this regard, it would be suffice to refer to the judgments of the Supreme Court in the case of *The Regional Director, Employees' State Insurance Corporation vs M/S Popular Automobiles Etc : AIR 1997 SC 3956, Public Services Tribunal Bar Association vs State Of U.P. & Another : 2003 (4) SCC 104 and Khem Chand vs Union Of India : 1963 AIR 687 SC.*

18. Once the employer-employee relationship continues thus in terms of Section 16G(5) of the Act, 1921, which pertains to the suspension of the head of institution or teacher and the provision under which the petitioner has been

suspended, the same categorically provides that it is the head of the institution or teacher who can be suspended by the management on the grounds as contemplated under the said section. As the earlier suspension order of the petitioner had already been quashed by this Court vide judgment and order dated 05.11.2024 and even if no formal order has been passed by the respondents reinstating the petitioner, the same would not take away the fact or the suspension order itself having been quashed and consequently the petitioner cannot be said to be a suspended employee on the date of passing of the fresh suspension order, in this case as on 09.11.2024 and thus in case no formal order was passed for the reinstatement of the petitioner the same would not vitiate the suspension order on the ground as urged by the petitioner.

19. Even otherwise if no formal order was passed in the case of the petitioner reinstating him, the same would have to be seen in the context of the prejudice that may have been caused to the petitioner.

20. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of *Canara Bank And Ors vs Debasis Das And Ors : 2003 (4) SCC 557* wherein the Hon'ble Supreme Court has held as under:-

"24. Additionally, there was no material placed by the employee to show as to how he has been prejudiced. Though in all cases the post-decisional hearing cannot be a substitute for pre-decisional hearing, in the case at hand the position is different. The position was illuminatingly stated

by this Court in Managing Director, ECIL v. B. Karunakar [Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] (SCC at p. 758, para 31) which reads as follows:

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the

reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the court/tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the state of furnishing him with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law.”

(Emphasis supplied)

21. On perusal of the judgment in the case of **Debasis Das (supra)**, it emerges that the Hon'ble Supreme Court has propounded on the aspect of 'prejudice' that may be caused to an employee where he/she alleges some violation. In the instant case, the violation, as alleged, is non issuance of the formal order of reinstatement. The learned counsel for the petitioner neither in his arguments nor in the petition has indicated anywhere as to the prejudice that may have been caused to him on account of non issuance of the formal order of reinstatement after his suspension order was quashed. In the absence thereto, merely because no formal order was issued prior to placing the petitioner under suspension, the same, in the opinion of the Court, will not vitiate the impugned suspension order as no prejudice has been caused to him.

22. Non passing of a formal order of reinstatement can also be seen in context of 'Useless Formality Theory' as enunciated by the Hon'ble Supreme Court in the case of **M.C. Mehta vs Union Of India & Ors : 1997 (2) SCC 353**.

23. The reason as to why the said principle may be attracted in the facts of the instant case is that once the petitioner had only been placed under suspension vide order dated 04.10.2024 which suspension order had been quashed by the writ court vide judgment and order dated 05.11.2024 consequently the petitioner can be deemed to have been reinstated in service. Thus merely because a formal order of his reinstatement was not passed prior to he again being placed under suspension by means of the order impugned the same would clearly fall within the ambit of Useless Formality Theory as per the judgment of the Hon'ble

Supreme Court in the case of *M.C. Mehta (supra)*.

24. Even otherwise considering the law laid down by the Hon'ble Supreme Court in the case of *Gadde Venkateswara Rao vs Government Of Andhra Pradesh And Others : 1966 AIR 828 SC* wherein the Hon'ble Supreme Court has held that unless there is a failure of justice, the Court may refuse to exercise the extraordinary jurisdiction with which it is vested, as such, this Court is of the view that merely because a formal order of reinstatement was not passed prior to the petitioner being placed under suspension, there has been no failure of justice and as such, this court refuses to exercise the extraordinary jurisdiction.

25. As already indicated above, once the earlier suspension order of the petitioner had been quashed consequently even if the respondents failed to pass a formal order of reinstatement, the same will not and cannot take away the power of the respondents to again place the petitioner under suspension as has clearly been done in the instant case. Thus, the aforesaid ground does not appeal to the Court and is accordingly rejected.

26. So far as judgment of the Hon'ble Supreme Court in the case of *Anand Narain Shukla (supra)* is concerned, the same has no applicability of the facts of the instant case inasmuch the Hon'ble Supreme Court has considered the reversion of the employee concerned to be one of reinstatement while in the instant case the petitioner had been placed under suspension.

27. So far as judgment of this Court in the case of *Lal Bahadur Singh*

(*supra*) is concerned, the said judgment was a case of dismissal order having been quashed leaving it open to the respondents to conduct a fresh enquiry. In those circumstances, this Court had held that a fresh enquiry could only be conducted after the employee concerned was reinstated in the services and without reinstatement the enquiry could not have been conducted. In the instant case again it is not a case of the petitioner having been dismissed or removed from the service rather he had only been placed under suspension and thus the said judgment would have no applicability to the facts of the instant case.

28. So far as the judgment of the Bombay High Court in the case of *Salma Bi (supra)* is concerned, the same would have no applicability to the facts of the instant case inasmuch as the same is a case pertaining to an election dispute while the instant case pertains to a service matter.

29. So far as the judgment of the Supreme Court in the case of *B. Karunakar (supra)* is concerned, para 31 pertains to a reinstatement of an employee, which again would have no applicability to the facts of the instant case.

30. As regards ground (b), suffice to state that perusal of the suspension order would indicate that the same had been passed both under the provisions of Section 16G(5)(a) and (b). Even if for the sake of the argument, the aforesaid ground as urged by the petitioner is considered to be valid that suspension could not have been ordered without an enquiry been initiated as provided under Section 16G(5)(b) of the Act, 1921 yet a perusal of the suspension order would indicate that the same has also been passed under the provisions of Section 16G(5)(a) of the Act, 1921 also and thus once the charges are serious as such the suspension

order would squarely be covered by the provisions of Section 16G(5)(a) of the Act, 1921 and thus the petitioner has correctly been placed under suspension in terms of the aforesaid provisions.

31. The Court would like to add that it has not expressed any opinion with regard to provisions of Section 16G(5)(b) of the Act, 1921 that without issuance of a charge-sheet the suspension order cannot be passed and the said question is left open to be considered in an appropriate case.

32. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition stands *dismissed*.

(2024) 12 ILRA 991

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 03.12.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ -A No. 11509 of 2024

With

Writ-A Nos. 11511 of 2024, 11526 of 2024 &
11538 of 2024

Mahendra Singh Kanwal ...Petitioner
Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Rajendra Singh Kushwaha

Counsel for the Respondents:

C.S.C., Rajeeva Kumar Sinha

A. Service Law – Gratuity – Alternate remedy - Payment of Gratuity Act, 1972: Section 2A.

Maintainability - The Hon'ble Supreme Court has carved out certain exceptions when a petition u/Article 226 of the

Constitution of India could be entertained in spite of availability of an alternate remedy. Some of the exceptions are:

- (i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;
- (ii) it has acted in defiance of the fundamental principles of judicial procedure;
- (iii) it has resorted to invoke the provisions which are repealed; and
- (iv) when an order has been passed in total violation of the principles of natural justice. (Para 13)

None of the aforesaid exceptions are attracted in the facts of the instant case so as to entertain the instant petition. (Para 14)

B. Perusal of Section 7 of the Act, 1972 would indicate that sub Section 4(a) of Section 7 of the Act, 1972 categorically provides that if there is any dispute as to the amount of gratuity payable to an employee under the Act, 1972 or as to the admissibility of any claim etc., then the employer or the employee or any other person raising a dispute may give an application to the controlling authority for deciding the dispute. (Para 8)

In the instant case, the dispute is that although the service rendered by the petitioner as daily wager is covered under the provisions of Section 2A of the Act, 1972 yet the respondents have not considered the said service while giving the gratuity to the petitioner by treating his service only for the period between 2014 to 2019 i.e. the period of service rendered by the petitioner after his regularization till his retirement. Thus, it is apparent that there is a dispute as to the amount of gratuity payable to the petitioner which can validly be raised before the controlling authority under the provisions of the Act, 1972. (Para 9)

Statutory remedy being available under the provisions of Act, 1972 as such the writ petition is disposed of leaving it open to the petitioner to pursue the remedy as available to him under the Act. (Para 15)

Writ petition disposed of. (E-4)

Precedent followed:

1. Netram Sahu vs State of Chhattisgarh & Anr., (2018) 3 SCR 682 (Para 6)

2. The Assistant Commissioner of State Tax & Ors vs M/S Commercial Steel Limited, (2022) 16 SCC 447 (Para 11)

3. PHR Invent Educational Society v. UCO Bank, (2024) 6 SCC 579 (Para 12)

Present petition challenges order dated 20.09.2024, whereby the claim of the petitioner for gratuity on the basis of entire length of service rendered as Daily Wager has been rejected.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioners, learned Standing Counsel for the State-respondent and Shri Rajeeva Kumar Sinha, learned counsel appearing for respondents No.2 and 3.

2. Learned counsels for the parties contend that the issue involved in all the four writ petitions are same. As such, the Court proceeds to hear all the writ petitions together and they are being decided by way of a common judgement. For convenience, facts of WRIT - A No. - 11509 of 2024 are being taken.

3. Under challenge is the order dated 20.09.2024, a copy of which is Annexure-1 to the petition, whereby the claim of the petitioner for gratuity on the basis of entire length of service rendered as Daily Wager has been rejected.

4. Contention of the learned counsel for the petitioner is that the petitioner was appointed in the year 1984 as a Daily Wager and has been regularized

vide order dated 01.02.2014 and retired on 29.09.2019. Contention is that although the respondents have paid the gratuity to the petitioner but it is only the period of his regular service which has been counted by the respondents for payment of gratuity while the period of his services rendered as daily wager which has not been counted.

5. Despite the petitioner having approached this Court earlier and the Court having required the respondents to decide a representation of the petitioner in this regard said representation has been rejected vide impugned order dated 20.09.2024 and hence the instant petition.

6. Learned counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case *Netram Sahu vs State of Chhattisgarh & Anr : (2018) 3 SCR 682* to argue that the Hon'ble Supreme Court has held that entire period of service as rendered by the petitioner would fall within the ambit of being 'continuous service' as provided under Section 2A of the Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act, 1972'), consequently the respondents have patently erred in not counting the entire period of service rendered by the petitioner right from the year 1984 till his regularization in the year 2014.

7. On the other hand, Shri Rajeeva Kumar Sinha, learned counsel appearing for respondents No.2 and 3 has taken a preliminary objection that the petitioner has statutory remedy of approaching the controlling authority under the provisions of Section 7(4)(b) of the Act, 1972 inasmuch as considering Section 7(4)(a) of the Act, 1972 as the petitioner is disputing the amount of gratuity payable to him under the Act, 1972 consequently he should

approach the controlling authority in this regard.

8. Perusal of Section 7 of the Act, 1972 would indicate that sub Section 4(a) of Section 7 of the Act, 1972 categorically provides that if there is any dispute as to the amount of gratuity payable to an employee under the Act, 1972 or as to the admissibility of any claim etc., then the employer or the employee or any other person raising a dispute may give an application to the controlling authority for deciding the dispute.

9. In the instant case, the dispute is that although the service rendered by the petitioner as daily wager is covered under the provisions of Section 2A of the Act, 1972 yet the respondents have not considered the said service while giving the gratuity to the petitioner by treating his service only for the period between 2014 to 2019 i.e. the period of service rendered by the petitioner after his regularization till his retirement. Thus, it is apparent that there is a dispute as to the amount of gratuity payable to the petitioner which can validly be raised before the controlling authority under the provisions of the Act, 1972.

10. At this stage, learned counsel for the petitioner contends that as it is clearly apparent from perusal of Section 2A of the Act, 1972 read with the judgment of the Hon'ble Supreme Court in the case of *Netram (supra)* that his entire period of service would fall within the ambit of being continuous service and consequently the period of service from 1984 till 2014 would also be counted towards is gratuity as such this Court may entertain the instant petition.

11. Entertaining of a writ petition despite availability of a statutory remedy is

no longer res integra. The Hon'ble Supreme Court in the case of *The Assistant Commissioner of State Tax & Ors vs M/S Commercial Steel Limited : (2022) 16 SCC 447* has held as under:-

"10. The respondent had a statutory remedy under Section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternative remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

(i) a breach of fundamental rights;

(ii) a violation of the principles of natural justice;

(iii) an excess of jurisdiction; or

(iv) a challenge to the vires of the statute or delegated legislation.

11. In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section

107, this Court makes no observation on the merits of the case of the respondent."

12. Likewise, recently the Hon'ble Supreme Court in the case of ***PHR Invent Educational Society v. UCO Bank, (2024) 6 SCC 579*** has held as under:-

22. The law with regard to entertaining a petition under Article 226 of the Constitution in case of availability of alternative remedy is well settled. In Satyawati Tondon [United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260 : 2010 INSC 428] , this Court observed thus : (SCC p. 123, paras 43-45)

"43. Unfortunately, the High Court [Satyawati Tondon v. State of U.P., 2009 SCC OnLine All 2608] overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues

but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a

detailed mechanism for redressal of his grievance.”

23. *It could thus be seen that, this Court has clearly held that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. It has been held that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. The Court clearly observed that, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. It has been held that, though the powers of the High Court under Article 226 of the Constitution are of widest amplitude, still the courts cannot be oblivious of the rules of self-imposed restraint evolved by this Court. The Court further held that though the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, still it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution.*

24. *The view taken by this Court has been followed in Agarwal Tracom (P) Ltd. v. Punjab National Bank [Agarwal Tracom (P) Ltd. v. Punjab National Bank, (2018) 1 SCC 626 : (2018) 1 SCC (Civ) 425 : 2017 INSC 1146] .*

25. *In State Bank of Travancore v. Mathew K.C. [State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41 : 2018 INSC 71] , this Court was considering an appeal against an interim order passed by the High Court in a writ petition under Article 226 of the Constitution staying further proceedings at the stage of Section 13(4) of the Sarfaesi Act. After considering various judgments rendered by this Court, the Court observed thus : (SCC p. 94, para 16)*

“16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.”

26. *The same position was again reiterated by this Court in Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir [Phoenix ARC (P) Ltd. v. Vishwa Bharati*

Vidya Mandir, (2022) 5 SCC 345 : (2022) 3 SCC (Civ) 153 : 2022 INSC 44].

27. Again, in *Varimadugu Obi Reddy v. B. Sreenivasulu* [*Varimadugu Obi Reddy v. B. Sreenivasulu, (2023) 2 SCC 168 : (2023) 1 SCC (Civ) 58 : 2022 INSC 1207*] , after referring to earlier judgments, this Court observed thus : (SCC pp. 181-82, para 34)

“34. The order of the Tribunal dated 1-8-2019 was an appealable order under Section 18 of the Sarfaesi Act, 2002 and in the ordinary course of business, the borrowers/person aggrieved was supposed to avail the statutory remedy of appeal which the law provides under Section 18 of the Sarfaesi Act, 2002. In the absence of efficacious alternative remedy being availed, there was no reasonable justification tendered by the respondent borrowers in approaching the High Court and filing writ application assailing order of the Tribunal dated 1-8-2019 under its jurisdiction under Article 226 of the Constitution without exhausting the statutory right of appeal available at its command.”

28. It could thus be seen that this Court has strongly deprecated the practice of entertaining writ petitions in such matters.

.....

30. It can thus be seen that it is more than a settled legal position of law that in such matters, the High Court should not entertain a petition under Article 226 of the Constitution particularly when an

alternative statutory remedy is available.

.....

37. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:

(i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

(ii) it has acted in defiance of the fundamental principles of judicial procedure;

(iii) it has resorted to invoke the provisions which are repealed; and

(iv) when an order has been passed in total violation of the principles of natural justice.

38. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance."

13. From perusal of the judgments of the Hon'ble Supreme Court in the cases of ***The Assistant Commissioner of State Tax (supra)*** and ***PHR Invent Educational Society (supra)***, it clearly emerges that the Hon'ble Supreme Court has carved out certain exceptions when a petition under Article 226 of the Constitution of India could be entertained inspite of availability of an alternate remedy. Some of the

exceptions are: (i) where the statutory authority has not acted in accordance with the provisions of the enactment in question; (ii) it has acted in defiance of the fundamental principles of judicial procedure; (iii) it has resorted to invoke the provisions which are repealed; and (iv) when an order has been passed in total violation of the principles of natural justice.

14. When the facts of the instant case along with the arguments of the learned counsel for the petitioner are seen in the context of the law laid down by the Hon'ble Supreme Court, it clearly emerges that none of the aforesaid exceptions are attracted in the facts of the instant case so as to entertain the instant petition.

15. Considering the aforesaid i.e. statutory remedy being available under the provisions of Act, 1972 as such the writ petition is *disposed of* leaving it open to the petitioner to pursue the remedy as available to him under the Act, 1972. As the petitioner is a retired employee, it is provided that in case an application is filed by the petitioner under the Act, 1972, the same would be considered and decided in accordance with law and the provisions of the Act, 1972, which the authority would make an endeavour to decide within a period of 3 months from the date the application is filed along with a certified copy of this order.

(2024) 12 ILRA 997

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 17.12.2024

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 647 of 1985

Afaq

...Appellant

Versus

State of U.P.

...Respondent

Counsel for the Appellant:

J.S. Sengae, Jai Prakash Singh, M. Islam,
Mohd. Irteqa, Sudhir Mehrotra

Counsel for the Respondent:

Dga, Pradeep Kumar, R.B. Sahai, Sanjay
Srivastava

A. Criminal Law – Unreliable witness – It is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. (Para 18)

Evidence can be divided into three categories broadly, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. If evidence, along with matters surrounding it, makes the court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, court can also take note of the contradictions available in other matters. (Para 19)

The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded. (Para 16)

In the present case, if an incident of the kind which had been reported in the FIR had taken place and six persons were just onlookers then it becomes hard to believe that the incident was actually seen by six young able bodied persons. They had for reasons only known to them refrained from intervening in the scuffle which

was happening and which resulted in the murder of Shabbir Ahmad. Therefore, it is found that P.W.-3 was not a witness who was there at the place of incident at all and so was the case with P.W.-4 and P.W.-5 who were also chance witnesses and had been planted by the prosecution in a manner which could not be believed. They were thus wholly unreliable witnesses and on the basis of the testimony of unreliable witness the accused could not be convicted. (Para 25)

The charges as were framed on the 16th of November, 1984, by the court below were not proved and, therefore, it is held that the appellants Rais and Afaq were not guilty of the charges as were levelled against them. (Para 26)

Both the appeals are allowed and the appellants Rais and Afaq are acquitted of the charges levelled against them. The appellants Rais and Afaq are on bail. The bail bonds are cancelled. Sureties are discharged. (Para 27)

Criminal appeals allowed. (E-4)

Precedent followed:

1. Manoj & ors. Vs St. of U.P., (2023) 2 SCC 352 (Para 16)
2. Manoj & ors. Vs St. of M.P., (2003) 2 SCC 353 (Para 16)
3. Vadivelu Thevar Vs The St. of Madras, AIR 1957 SC 614 (Para 17)
4. Mahendra Singh & ors. Vs St. of M.P., (2022) 7 SCC 157 (Para 18)
5. Rajesh Yadav & anr. Vs St. of U.P., (2022) 12 SCC 200 (Para 19)
6. Dalbir Singh Vs St. of U.P., 2016 (11) ADJ 815 (Para 23)

Present appeals assail judgement and order dated 31.1.1985, passed by the Sessions Judge, Fatehpur.

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

1. The above criminal appeals have been heard together as appellants Afaq and Rais @ Munna who were tried together filed criminal appeals separately against the same judgement.

2. Upon an incident having taken place on 20th June, 1984 at around 7:30 a.m., wherein one Shabbir Ahmad Khan had died, his brother Saleem Khan got lodged a first information report at 8:30 a.m. As per the first information report, the brother of the first informant while was, on 20 June, 1984, at 7:30 a.m. after having answered the call of nature, going back to his home, Afaq s/o Jamaluddin Khan and Rais @ Munna s/o Shakir Khan near the Gosai Talab accosted the deceased. Afaq was carrying a razor (ustara) while Rais was empty handed as was stated in the first information report and when Rais and Afaq met Shabbir, they entered into a verbal altercation and thereafter there was a physical fight as well. Thereafter, Rais exhorted Afaq to kill the deceased and subsequently Afaq with the help of Rais had assaulted Shabbir with the razor with an intention to kill.

3. It has been stated in the first information report that the incident was witnessed by Yakoob Khan, Nasiruddin Khan, Ali Ahmad @ Gajju Khan, Usman Khan and Abdul Hafeez. When these persons who were present at the spot asked the two assailants not to kill Shabbir then the miscreants ran towards the southern direction and ran away. The motive has also been disclosed in the first information report and it has been stated that around nine months prior to the incident, one Kuresha was married to the brother of the first informant i.e. the deceased Shabbir. However, when Kuresha had doubted that Shabbir was having an affair with the wife

of Saleem then Shabbir had got angry with this false allegation, which was alleged against him and he had divorced Kuresha. In the first information report itself, it had been stated that around one month prior to the incident, there was a Panchayat in the village and the parties had come to a settlement. It had been stated that because of this enmity, the accused-Afaq and Rais had cut the throat of the deceased with an intention to kill him. In the first information report itself there was a prayer that the investigation be done and the guilty be brought to book.

4. On 21.6.1984, it was stated that as per the information the blood-stained razor (Ex.ka5) was discovered and was taken into custody at the instance of Rais. The clothes etc. of the deceased was also taken into custody. The plain soil and the blood-stained soil were also taken into custody and were exhibited as Ex.ka11. Thereafter, upon lodging of the FIR, Panchayatnama was prepared on 20th June, 1984 itself. It commenced at 9:00 a.m. and came to an end at 10:30 a.m. This was followed by a postmortem, which was done on 20th June, 1984, itself at 5:40 p.m.

5. From the side of prosecution, as many as 7 prosecution witnesses were produced. P.W.-1, Dr.Ramji Khare, had proved the postmortem and had given the details of the ante-mortem injuries, which were found on the dead-body of the deceased. P.W.-2, Ram Adhar, Head Constable, had written the chick-FIR and he had also proved the same. P.W.-3, Saleem Khan is the real brother of the deceased and he was the person who lodged the first information report. The P.W.-3 in his examination-in-chief had stated that since Kuresha was divorced by the deceased Shabbir around a month prior

to the incident, there was enmity between him and the accused. It was stated that Rais was the brother of Kuresha and Afaq was a relative of Rais. He has categorically stated that the incident had taken place on 20th June, 1984 near the Gosai Talab and that he had himself gone to the Gosai Talab to pick some mud from there. He has stated that Shabbir had returned from the Talab and had reached the place of incident after having eased himself in the morning. He has stated in his examination-in-chief that when Shabbir had reached the place of incident, then he heard the accused saying that since Shabbir had divorced his sister, he be killed. Thereafter, it has been stated that they entered into a physical fight and that Rais sat on the chest of the deceased and Afaq with the help of the razor had cut the throat to the extent that he died.

6. In the examination-in-chief itself it has been stated that the first informant had raised a hue and cry and because of which, Yakooob, Ali Ahmad, Naseeruddin, Hafeez and Usman came towards the place of incident. When all these people reached the place of incident, the accused ran away from the southern side. They had noticed that there were injuries on the body of the deceased and blood was flowing out from it. He has stated that at the place of incident itself, on his dictation Mohd. Khan had written the report and thereafter, he had put his signature on the first information report and had lodged the same.

7. In the cross-examination, P.W.-3 has somewhat changed his stand and had stated that Kuresha herself was of bad character and, therefore, Shabbir had divorced her. He has categorically denied the fact that Shabbir was of a bad character and that he was having any affair with his (Saleem-first informant's) wife. He has, in

fact, very categorically stated that it was wrong to say that Shabbir had divorced her on account of the fact that she was having an affair with him. However, in the next paragraph, he has once again stated that Kuresha had alleged that Shabbir was having an affair with his wife and thereafter upon again a question being asked as to whether Kuresha was of a bad character, he had stated that she was not of a bad character. Then again he had stated that he had forgotten to write in the first information report, that Kuresha was of a bad character.

8. Upon a question being asked as to whether there was a latrine situate in the houses of the first informant and the deceased, he had stated that there were latrines situate in their houses, but they were used only by women. He had also stated that while returning, after having answered the call of nature, the deceased Shabbir was also carrying a Lota (mug), but the mug was not found at the place of incident. Upon being asked as to whether he was actually there at the spot, he had stated that it was wrong to say that he was not there at the spot and that he was wrongly testifying the fact that he was present there at the spot. He also denied the fact that simply because there was enmity between the accused and the first informant, therefore, the accused were being implicated.

9. Upon being specifically asked as to why he had not mentioned in the first information report that he was himself present at the place of incident, he had stated that he had, in fact, stated so while dictating the first information report, but why the scribe had missed out that statement, he did not know.

10. P.W.-4, Usman, is an eye-witness and he in his testimony has stated that on

the date of incident i.e., on 20th June 1984 at around 7:30 a.m. while he was coming from Village-Adhawal towards his village along with Yakooob (P.W.-5) they had noticed that the deceased and the accused had entered into a fight and they were also abusing each other. The accused had overpowered the deceased and Rais had climbed on the chest of Shabbir and Afaq with a razor, which he had in his hand, had cut his throat. He has also stated that apart from him, the incident was witnessed by Naseeruddin, Ali Ahmad, Hafeez, Yakooob and Salim.

11. He had stated that Afaq had run away with the razor with which he had killed Shabbir and thereafter in the same breath he had stated that the razor was, in fact, left behind by Afaq. It has also been stated by him that thereafter when the accused had run away, he had also gone near the place of incident and had seen that Shabbir had died by then and from his body blood was coming out. He has, in paragraph no. 12 of his cross-examination stated that one day prior to the date of incident i.e. in the evening/night of 19.6.1984, he had gone to village Adhawal. He had stated that Yakooob had also accompanied him. They had both gone to see some dry wood and had also gone to see the tree which Yakooob had purchased and had planned to give it to the P.W.-4 on contract for cutting the same. He had stated that he had reached the village Adhawal at around 7:00 to 8:00 PM in the evening/night and in the night after they had seen the tree which they intended to cut they had slept in the village itself. He has, however, upon being asked as to in whose house he had slept, he had said that he did not remember the same. However, on the next day he himself and Yakooob had proceeded for their village from Adhawal.

He had not cut any tree in Adhawal. He has, thereafter, stated that even after the incident he had not cut the trees which Yakooob had planned to entrust him for the cutting of the same. However, 2 -3 days later he did cut them. He has very categorically stated that the verbal altercation which took place between the accused and Shabbir was heard by him. Why the police had not recorded his statement in that manner he was not aware. He has, however, stated that he had also informed the police that apart from him, the incident was also seen by Salim i.e. the first informant. He has also stated that along with all the persons who had collected at the place of incident he had tried to restrain the accused. But when all of them had tried to go towards the accused then the accused had threatened them with dire consequences and, therefore, they did not go near the place of incident.

12. P.W.-5 is, Yakooob, who has also stated somewhat the same things as had been stated by P.W.-4 Usman Khan. However, despite the fact that all the witnesses were related to each other he was trying to give out in his cross examination that he was not closely related with the informant and the deceased. He had also stated that he had gone to Adhawal on the day prior to the date of the incident and while coming back had witnessed the incident. He has stated that the village Adhawal was around 1 mile away from his own village. He has stated that in Adhawal his cut wood was lying and that he had purchased some wood in the village itself. He had, however, quite contrary to what P.W.-3 had stated got recorded that he had not purchased any tree. He had only purchased some wood from Siya Ram, Ram Narayan etc. He has also stated that Usman had accompanied him to the village

Adhawal and that they had remained at Adhawal in the night prior to the date of incident and had slept there. He had stated that the next day they had returned to their village. He has also stated that when the verbal altercation was going on between the accused and the deceased then he was only 15 steps away from the place of incident. However, he has stated that because Afaq was having a razor, none of the persons present had tried to placate the accused persons or to save the deceased from the accused persons.

13. P.W.-6 is Mohd. Khan, the witness of the recovery of the blood stained Ustara.

14. P.W.-7 is Jagvir Kateriya was the Investigating Officer.

15. Learned counsel for the appellant Sri V.P. Srivastava, learned Senior Counsel, assisted by Sri J.P. Singh and Sri Rajeev Nayan has argued that as a matter of fact the witnesses P.W.-3, P.W.4 and P.W. 5 were not there at the place of incident at all. He submits that, in fact, P.W.-3 had got the information about the death of his brother Shabbir from someone else and he had implicated the brother of the estranged wife (Kuresa) for the murder of his own brother Shabbir. Learned counsel for the appellant has stated that in the first information report, the first informant had, because of the fact that he was not there on the spot and he was getting the first information report lodged on the basis of some information he had got from someone else, he had not stated in the first information report at all that he was present on the spot. In fact while giving out the motive, he had stated that Kuresa had doubted her own husband with regard to the fact that he was having an affair with the wife of Salim. Learned counsel for the

appellant, therefore, states that if the first informant had been on the spot and had got the first information report lodged himself then he would definitely have mentioned that Shabbir was having an affair with the informant's wife and would not have said that Shabbir was having an affair with the wife of one Salim and, therefore, learned counsel for the appellant states that it was highly improbable that the first informant was there on the spot. Learned counsel for the appellant has further stated that Usman Khan and Yakoob Khan had come up with a concocted story that they had one day prior to the date of incident gone to the neighbouring village Adhawal and that they had slept there in the night and had come to their village on the subsequent morning at around 7:30am and had witnessed the entire incident. Learned counsel for the applicant states that there are any number of contradictions in the statements of P.W.-4 and P.W.-5 and those contradictions were not minor contradictions which could be brushed aside/ignored by the Court. He has made an endeavour to take the Court through the statements of P.W.-4 which is to be found at page 39 and has stated that in paragraph no. 12 of it, he had stated that P.W.-4 Usman Khan had gone with P.W.-5 Yakoob Khan to the neighbouring village Adhawal and there Yakoob had purchased certain trees and he had planned to give the job of cutting those trees to Usman Khan. He has, thereafter, stated that he did not remember as to where exactly Usman Khan had slept in the night of 19/20.6.1984. Quite contrary to that, learned counsel for the appellant has drawn the attention of the Court to the statement of P.W.-5 wherein in paragraph no. 9 Yakoob Khan has stated that they had gone to the village Adhawal which was around 1 mile away and there Yokoob Khan's cut wood was already lying. He had very categorically again,

quite contrary to what P.W.-4 had stated, got recorded that he had not purchased any tree etc. and that the cut wood was bought from Siya Ram and Ram Narayan etc. He has also stated that he had not taken Usman to the village Adhwal for any specific purpose but he had just taken him for no reason whatsoever. Learned counsel for the appellant has further stated that though Usman Khan had stated that they had slept in the house of some villager of the village Adhawal but P.W.-5 Yakoob Khan had stated that they had slept where the wood was cut and had not slept in anybody's house.

16. Learned counsel for the appellant has stated that when Adhawal was just 1 mile away from the village of Usman and Yakoob it could have been very convenient for them to have reached back their village in the cool of the evening of June 1984 itself and there was no requirement for them to have slept there at the village Adhawal. Learned counsel for the appellant, therefore, states that the witnesses P.W.-4 and 5 were chance witnesses. They had absolutely no occasion to be present near the place of incident. Learned counsel for the appellants relied upon a decision of the Supreme Court in **(2023) 2 SCC 352 : Manoj and Ors. vs. State of U.P.** and has submitted that a chance witness cannot be taken to be a reliable witness and, therefore, the testimony of a chance witness could not be in any manner used to convict an accused. Learned counsel for the appellant states that as per the law laid down by the Supreme Court, testimony of a chance witness should be utilised by the prosecution very cautiously. He submits that the evidence of the chance witness requires a very cautious and strict scrutiny and if there was any slackness in the

explanation about the presence of the chance witness at the place of incident then his deposition ought to be rejected. Since learned counsel for the appellant relied heavily on paragraphs 102, 103 and 104 of the judgment reported in **(2003) 2 SCC 353 : Manoj & Ors. vs. State of Madhya Pradesh**, the same are being reproduced here as under :-

"102. A chance witness is one, who appears on the scene suddenly. This species of witness was described in *Puran v. State of Punjab* (AIR 1953 SC 459), in the following terms:

"Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence."

103. This court has sounded a note of caution about dealing with the testimony of chance witnesses. In *Darya Singh v. State of Punjab* (AIR 1965 SC 328), it was observed that:

"...where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.....If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him

as to the assault has to be carefully scrutinised."

104. In *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719] again, this Court held that:

"22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir v. Surat Singh* (1997) 4 SCC 192 30, *Harjinder Singh v. State of Punjab* (2004) 11 SCC 253, *Acharaparambath Pradeepan and Anr. v. State of Kerala* (2006) 13 SCC 643 and *Sarvesh Narain Shukla v. Daroga Singh* (2007) 13 SCC 360). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (*vide Shankarlal v. State of Rajasthan* (2004) 10 SCC 632)."

17. Still further, learned counsel for the appellant stated that not only were they chance witnesses. From the statements made before the Court it could clearly be gathered that they were wholly unreliable. Their statements may not be relied upon at all. To differentiate between a wholly reliable witness; partly reliable witness and a wholly unreliable witness, learned counsel for the appellants has relied upon **AIR 1957 SC 614 (Vadivelu Thevar vs. The State of Madras)**. He has for that purpose, relied upon paragraph no. 11 which is being reproduced here as under:-

"11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact".

The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single

witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable."

18. Learned counsel for the appellants still further has relied upon **(2022) 7 SCC 157 (Mahendra Singh and others vs. State of Madhya Pradesh)**. Since learned counsel for the appellants has read out paragraph no. 12 of the judgement, the same is being reproduced here as under:-

12. It will be apposite to refer to the following observations of this Court in its celebrated judgment in *Vadivelu Thevar [Vadivelu Thevar v. State of Madras, 1957 SCR 981 : AIR 1957 SC 614]* : (AIR p. 619, paras 11-12)

"11. ... Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it

may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

19. To further bolster his point and to still further elaborate on the issues as to who was a reliable witness and who was not a reliable witness, the counsel for the appellant further relied upon **(2022) 12 SCC 200 (Rajesh Yadav and another vs. State of Uttar Pradesh)**. Since the learned counsel for the appellants has read out paragraph no. 20 of the judgement the same is being reproduced here as under:-

20. We have already indicated different classification of evidence. While appreciating the evidence as aforesaid along with the matters attached to it, evidence can be divided into three categories broadly, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. If evidence, along with matters surrounding it, makes the court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, court can also take note of the contradictions available in other matters.

20. Learned counsel for the appellants has further submitted that as per the first

information report when at the time when Salim was watching the entire incident and had chosen not to help out his own brother by going near the place of incident then it becomes quite probable that he was not there at the spot at all. He has further stated equally improbable was the presence of Yakooob Khan, Naseeruddin Khan, Ali Ahmad, Usman Khan and Abdul Hafees at the place of incident. Learned counsel for the appellants states that none of those six persons present at the place of incident ever tried to go near the place of incident where just two persons were mauling the deceased by a small razor (ustara). Learned counsel for the appellants states that six able bodied young people could have easily overpowered the two of the accused who were only carrying a razor and were not armed with any firearm etc.

21. Learned counsel for the appellant, therefore, states that the entire story of the prosecution becomes unbelievable and could not be relied upon to convict the appellants.

22. Learned counsel for the appellants further states that even the recovery as was done under Section 27 of the blood stained razor was a false recovery. Learned counsel for the appellant has stated that the P.W.-4 had in his examination in chief stated that Afaq after having committed the crime ran with the razor but he thereafter himself had stated that he had left the razor there on the spot. Learned counsel for the appellants therefore states that why a recovery was required of the instrument which had been left behind was not clear and in fact remained a mystery. Learned counsel for the appellants further states that Afaq who had used the razor to kill the deceased could have definitely thrown the razor in the pond which was neighbouring the place

of incident and would not have hidden the same behind a tree.

23. Learned counsel for the first informant Sri Ram Krishna holding brief of Sri Sanjay Srivastava has argued that when there were three prosecution witnesses who claimed themselves to be eye witnesses then it mattered little that Naseeruddin, Ali Ahmad, Abdul Hafees etc. who allegedly were at the place of incident did not appear in the witness box. Learned counsel for the first informant states that even if the three eye witnesses were related to the first informant and the deceased their testimony could not be thrown out because they had definitely seen the incident and thereafter had deposed so in the court. Learned counsel for the informant further states that the incident took place at 7:30am and very promptly the first information report was got lodged and, therefore, there was not an iota of doubt that the accused Rais and Afaq had killed the deceased and, therefore, they were rightly convicted. Learned counsel for the informant, in this regard, relied upon **2016(11) ADJ 815 : Dalbir Singh vs. State of U.P.**

24. Learned AGA Sri C.B. Dhar Dubey has also adopted the argument as had been made by learned counsel for the first informant.

25. Having heard the learned counsel for the parties, we are definitely of the view that when the first informant had got the first information report lodged, he had nowhere mentioned that whether he was present on the spot. He has, in fact, while describing the motive in a strange manner described that the wife of Shabbir, Kuresa, was having an affair with Saleem. He forgot that he himself was Saleem and was lodging the first information report. This

gives a doubt in the mind of the Court that in fact someone else who had an intention to implicate Rais and Afaq got the first information report lodged. In fact, a doubt also comes to the mind of the Court that in fact Salim was not there on the spot and that he was not an eye witness at all. Further the Court finds that the P.W.-4 and P.W.-5 had stated that they had gone to the neighbouring village Adhawal which was only 1 mile away and they had slept in the village in the previous night and had only come to their village on the date of incident at 7:20am. The Court feels, therefore, that the story which the P.W.-4 and P.W.-5 had come up with, was a concocted story and could not be believed. They were, as had been submitted, chance witnesses who had no occasion to be present at the place of incident and only to make them eye witnesses they had been planted by the prosecution. Still further, if we peruse the statement of P.W.-4 and P.W. -5, we find that there were material contradictions in their statements. P.W.-4 had stated that Yakooob had taken him to the village Adhawal where he had bought a tree and he was planning to give the work of cutting the same to P.W.-5 but Yakooob in his statement had stated that he had gone to look up certain trees which he had purchased in the neighbouring village Adhawal and that he had taken Usman Khan for no reason whatsoever. All these contradictions were not minor contradictions and, therefore, they create a doubt in the mind of the Court that whether the prosecution witnesses 3, 4 and 5 were at all there at the place of incident. To top it all, the Court finds it strange that six persons who were allegedly there as per the first information report had not cared to intervene in the fight between the deceased and the accused persons. The accused persons Rais and Afaq were just two young

men and from the side of the informant, Salim, there were Yakoob, Naseeruddin, Ali Ahmad, Usman Khan and Abdul Hafees. All of them were young able bodied persons but they chose just to be on lookers and kept seeing the incident from a very short distance. In fact, if the statements of P.W.-4 and P.W.-5 are perused it becomes clear that they were standing only 10 to 15 steps away from the place of incident. This appears absolutely strange to the Court. If an incident of the kind which had been reported in the first information report had taken place and six persons were just onlookers then it becomes hard to believe that the incident was actually seen by six young able bodied persons. They had for reasons only known to them refrained from intervening in the scuffle which was happening and which resulted in the murder of Shabbir Ahmad. We, therefore, do find that P.W.-3 was a witness who was not there at the place of incident at all and so was the case with P.W.-4 and P.W.-5 who were also chance witnesses and had been planted by the prosecution in a manner which could not be believed. They were thus wholly unreliable witnesses and on the basis of the testimony of unreliable witness the accused could not be convicted.

bail. The bail bonds are cancelled. Sureties are discharged.

26. We, therefore, are of the view that the charges as were framed on the 16th of November, 1984, by the court below were not proved and, therefore, we hold that the appellants Rais and Afaq were not guilty of the charges as were levelled against them.

27. The judgement and order dated 31.1.1985 passed by the Sessions Judge, Fatehpur, is set aside. Both the appeals are **allowed** and the appellants Rais and Afaq are acquitted of the charges levelled against them. The appellants Rais and Afaq are on